Provisional text

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 3 May 2018(1)

Case C−51/17

OTP Bank Nyrt.
OTP Faktoring Követeléskezelő Zrt.
v
Teréz Ilyés
Emil Kiss

(Request for a preliminary ruling from the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal, Hungary))

(Consumer protection — Unfair terms in consumer contracts — Credit agreements denominated in a foreign currency — Member State statutory measures passed to remedy unfair contractual terms — Article 4(2) of Directive 93/13/EEC and 'plain intelligible language' — Article 1(2) of Directive 93/13 and 'mandatory statutory or regulatory provisions' — Powers of Member State courts to assess contractual terms for unfairness of their own motion)

1. This reference for a preliminary from the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal, Hungary) concerns another dispute (2) following up from the ruling of the Court of 30 April 2014 in *Kásler and KáslernéRábai* (' *Kásler*'), (3) which addressed the compatibility with EU law of clauses of consumer credit agreements in Hungary which were denominated in foreign currency, and notably Swiss Francs.

2. There the Court ruled, inter alia, on the meaning of the term the 'main subject matter of the contract' under Article 4(2) of Council Directive 93/13/EEC on unfair terms in consumer contracts. (4) It was then for the Kúria (Supreme Court of Hungary), the national referring court in that case, to decide whether the contractual terms in issue fell, in principle, outside of the protection provided by Directive 93/13. At the same time the Court supplied criteria for the Kúria to apply to determine whether such clauses were drafted in 'plain intelligible language' which, also pursuant to Article 4(2) of Directive 93/13, provides an exception to this exclusion.

3. In essence, Téréz Ilyés and Emil Kiss, the applicants at first instance in the main proceedings ('the applicants') take issue with the remedial regime put in place by the Hungarian legislature in the light of the Court's ruling in *Kásler*, and the ensuing judgment of the Kúria, contending that this regime leaves the

exchange rate risk with consumers in circumstances that lead to violation of transparency obligations imposed by Directive 93/13.

I. Legal framework

A. EU law

4. The second paragraph of Article 1(2) of Directive 93/13 states:

‘The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.’

5. Article 3(1) of Directive 93/13 states:

‘A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.’

6. Article 4 of Directive 93/13 states:

‘1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and 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 or of another contract on which it is dependent.

2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.’

7. Article 3(3) of Directive 93/13 states that the Annex to Directive 93/13 supplies an indicative and non-exhaustive list of clauses that may be regarded as unfair. Point 1(i) of the Annex refers to:

‘Terms which have the object or effect of:

irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract’.

8. Article 6(1) of Directive 93/13 states:

‘Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.’

9. Article 7(1) of Directive 93/13 states:

‘Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.’

B. Hungarian law

1. Law a hitelintézetekről és pénzügyi vállalkozásokról szóló 1996. évi CXII törvény (Law CXII of 1996 on credit institutions and financial institutions , 'the Hpt')

10. Paragraph 203 of the Hpt states:

'1. The financial institution must inform both its current and potential clients, in a plain and intelligible manner, of the conditions for using the services they provide, and the amendments to those conditions …

6. In the case of contracts concluded with retail clients granting a foreign currency loan or containing an option to purchase real property, the financial institution must explain to the client the risk he bears in the contractual operation and the client shall append his signature to confirm that he is aware thereof.'

2. Law DH1

11. Article 1(1) of A Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvény (Law XXXVIII of 2014 governing specific matters relating to the decision of the Kúria to harmonise the case-law on loan agreements concluded between credit institutions and consumers; 'Law DH1') states:

'[This law is to apply] to consumer loan agreements concluded between 1 May 2004 and the date of entry into force of this Law. In the application of this Law the concept of "consumer loan agreement" shall cover any foreign exchange based (linked to, or denominated in, a foreign currency and repaid in forint) or forint based credit or loan agreement, or any financial leasing agreement, concluded between a financial institution and a consumer, if it incorporates standard contract terms or any contract term which has not been individually negotiated, containing a clause provided for in Article 3(1) or Article 4(1).'

12. Article 3 of Law DH1 states:

'1. In credit agreements concluded with consumers, terms — with the exception of contractual terms which have been individually negotiated — pursuant to which the credit institution stipulates that, for the purpose of paying out the amount of finance granted for purchase of the subject of the loan or financial leasing, the buying rate is to apply, and that, for the purpose of repayment of the debt, the selling rate, or a different exchange rate from that set when the loan was paid out, is to apply, shall be void.

2. Instead of the void term referred to in paragraph 1 … the official exchange rate set by the [National Bank of Hungary] for the foreign currency concerned shall apply in relation to the disbursement and repayment of the loan (including payment of the instalments and all the costs, fees and commissions expressed in foreign currency).

…

5. The financial institution must clear accounts with the consumer in accordance with the provisions of a special law.'

3. Law DH3

13. Article 3(1) of Az egyes fogyasztói kölcsönszerződések devizanemének módosulásával és a kamatszabályokkal kapcsolatos kérdések rendezéséről szóló 2014. évi LXXVII. törvény (Law LXXVII of 2014 governing various matters relating to alteration of the foreign currency in which loan agreements with consumers are denominated and the provisions relating to interest; 'Law DH3') states that:

'loan agreements concluded with consumers shall be amended by operation of this Law, in accordance with its provisions.'

14. Article 10 of Law DH3 states:

‘As regards foreign currency mortgage loan agreements and foreign currency based mortgage loan agreements concluded with consumers, the credit institution to which the debt is owed shall be required, within the period laid down for fulfilment of the obligation to settle accounts under [Law DH2], to convert into a loan denominated in forint the debt under a foreign currency mortgage loan agreement or a foreign currency based mortgage loan agreement concluded with a consumer, or the total debt derived from that agreement (also including interest, fees, commissions and costs charged in the foreign currency), both of which must be calculated on the basis of the settlement of accounts under [Law DH2]. For the purposes of that conversion, whichever of the following two interest rates is the most favourable to the consumer on the reference date shall apply:

(a) the average exchange rate for the foreign currency concerned officially set by the National Bank of Hungary in the period from 16 June 2014 to 7 November 2014, or

(b) the exchange rate for the foreign currency concerned officially set by the National Bank of Hungary on 7 November 2014.’

II. Facts, procedure and the questions referred.

15. On 15 February 2008 the applicants concluded a contract for a loan denominated in Swiss Francs at an interest rate of 1.9 % with ELLA Első Lakáshitel Kereskedelmi Bank Zrt. On 1 November 2016 the loan was transferred from an intermediary to OTP Bank Nyrt., who then assigned to OTP Faktoring Követléskezelő Zrt. (the defendents at first instance, ‘the defendants’).

16. Under this contract, the creditor was to disburse a maximum amount of 30 075 000 Hungarian forint (HUF), an amount which included a disbursement commission of HUF 75 000 and which at the time the contract was concluded was equivalent to 212 831 Swiss francs (CHF).

17. In accordance with the contract, the creditor converted into Swiss francs, using its own buying rate at the time of disbursement, the loan which it delivered in forint. However, it fixed according to its own selling rate the amount corresponding to the monthly repayment instalments which were to be paid in forint. The creditor could also make unilateral amendments to the ordinary interest and the management costs, but the contract included no clause allowing the applicants to amend unilaterally the recording currency.

18. A part of the contract entitled ‘Declaration of notification of risk’ stated that ‘in relation to the loan risks, the debtor declares that he is aware of and understands the detailed information relating to this matter provided to him by the creditor, and is aware of the risk of taking out a foreign-currency loan, a risk which he alone bears. With regard to the exchange rate risk, he is aware, in particular, that, if during the term of the contract there were variations in the exchange rate between the forint and the Swiss franc which were unfavourable (that is to say, in the event of depreciation of the exchange rate of the forint as opposed to the exchange rate at the time of disbursement), it might even happen that the exchange value of the repayment instalments, which are fixed in foreign currency and payable in forint, would increase significantly. By signing this contract, the debtor confirms that he is aware that the economic repercussions of this risk lie entirely with him. He also declares that he has carefully assessed the possible effects of the exchange rate risk and that he accepts them, having weighed up the risk in the light of his solvency and economic situation, and that he will not be able to make any claim on the bank as a consequence of the exchange rate risk’.

19. The applicants instituted legal proceedings against the defendants on 16 May 2013, seeking a declaration of invalidity of the contract for a loan, and a declaration that the contract be regarded as valid, but as being denominated in forint.

20. The court of first instance upheld this claim by judgment of 11 March 2016, finding, inter alia, that the contractual term which imposed the obligation to bear the exchange rate risk, while being the main

subject matter of the contract, was neither plain nor intelligible.

21. The first defendant lodged an appeal against the judgment at first instance, requesting that it be amended and the claim dismissed.

22. Laws DH1 and DH2, along with Law DH3, were passed by the Hungarian legislature after the applicants instituted proceedings on 16 May 2013, but during the passage of this litigation through the Hungarian courts. The order for reference states that Law DH1, which entered into force on 26 July 2014, is based on Decision No 2/2014 of the Kúria, (5) (which is binding on the Hungarian courts) and which was issued in the light of the judgment of the Court in *Kasler*. (6)

23. According to the national referring court, Articles 1(1) and 3 of Law DH1 are applicable to the contract at issue.

24. Pursuant to Article 3(1) of Law DH1, clauses in consumer contracts pursuant to which the buying rate of a foreign currency applies for the purposes of paying out a loan, but the selling rate for the purpose of its repayment, are to be invalid. Under Paragraph 3(2) of Law DH1, a clause declared invalid under Paragraph 3(1) is to be replaced — in principle — by a provision providing for the application, for both disbursement and repayment, of the official exchange rate for the currency set by the Magyar Nemzeti Bank (National Bank of Hungary).

25. The order for reference further states that by Law DH2 of 2014, the legislature required financial institutions to clear accounts in respect of overpayments made by consumers due to unfair contractual terms. Law DH3 of 2014 ceased to accept contracts secured by mortgage denominated in foreign currencies, converted consumer debts into forint (including the debt in the main proceedings) and made other amendments to the content of legal relationships.

26. Finally, the order for reference states that Laws DH1 and DH3 continued to place the exchange rate risk on the consumer, with both *ex tunc* and *ex nunc* effects.

27. As for the judgment in Decision No 2/2014 of the Kúria, (7) according to the order for reference, it retains the force of law notwithstanding the passage of the DH laws and declares as follows:

‘1 A term in a consumer contract for a foreign currency loan under which the exchange rate risk is borne without any limit by the consumer — in return for a more favourable interest rate — is a contractual term which refers to the main subject matter the unfairness of which, as a general rule, cannot be examined. This term may be examined and declared unfair only if, at the time the contract is concluded, and taking account of the text of the contract and the information received from the financial institution, its content was neither clear nor intelligible to an average consumer, who is reasonably well informed and reasonably observant and circumspect (“the consumer”). Contractual terms relating to the exchange rate risk shall be unfair, and consequently the contract will be wholly or partially invalid, where the consumer, owing to the inadequacy of the information received from the financial institution or the delay in receiving such information, has reason to believe that the exchange rate risk is not genuine or that he bears the risk to a limited degree.’

28. In those circumstances, the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal) stayed the proceedings and, on 17 January 2017, referred the following questions for preliminary ruling:

‘(1) Is a contractual term which places the exchange rate risk on the consumer and which, owing to the removal of an unfair contractual term which established a bid-offer spread and the obligation to bear the corresponding exchange rate risk, has become part of the contract with *ex tunc* effects as a consequence of the intervention of the legislature following disputes concerning validity which affected a large number of contracts considered to be a clause which is not individually negotiated within the meaning of Article 3(1) of Directive 93/13 and which therefore falls within the scope of Directive 93/13?

(2) If a contractual term which places the exchange rate risk on the consumer falls within the scope of Directive 93/13, is the exclusion in Article 1(2) of Directive 93/13 to be interpreted as also referring to a contractual term which reflects mandatory statutory provisions within the meaning of paragraph 26 of the judgment of the Court of Justice in *RWE Vertrieb AG*, C−92/11, which have been adopted or have come into force after the conclusion of the contract? Does that exclusion also extend to a contractual term which has become part of the contract with *ex tunc* effects after the conclusion of the contract as a consequence of a mandatory statutory provision which remedies the invalidity caused by the unfairness of a contractual term which makes it impossible to perform the contract?

(3) If, according to the replies to the above questions, it is possible to examine the unfairness of a contractual term which places the exchange rate risk on the consumer, is it to be understood that the requirement for plain intelligible language to which Article 4(2) of Directive 93/13 refers is also met if the obligation to provide information required by law and formulated in necessarily general terms is fulfilled in the terms set out in the facts, or is it also necessary to communicate information concerning the risk to the consumer of which the financial institution is aware or to which it might have access at the time the contract is concluded?

(4) Is the fact that, at the time the contract was concluded, the contractual terms relating to the power to make unilateral amendments and to the bid-offer spread — which, years later, turned out to be unfair — appeared in the contract together with the term relating to the assumption of the exchange rate risk, so that, as a cumulative effect of those terms, the consumer had no means of foreseeing how the payment obligations or the mechanism for varying them would evolve, relevant from the point of view of the requirement for clarity and transparency and of the provisions in point 1(i) of the Annex to Directive 93/13, for the purposes of interpreting Article 4(1) of Directive 93/13?

(5) If the national court declares that the contractual term which places the exchange rate risk on the consumer is unfair, is it required, when determining the legal effects in accordance with the rules of national law, also to take into account of its own motion, while respecting the right of the parties to present argument in inter partes proceedings, the unfairness of other contractual terms which have not been relied on by the applicants in their action? Does the principle that the court should act of its own motion in accordance with the case-law of the Court of Justice also apply if the applicant is a consumer or, having regard to the position occupied by the principle of the autonomy of the parties in the whole proceedings and to the particular features of the proceedings, does the principle that the parties have the right to delimit the subject matter of an action, in that case, preclude examination by the court of its own motion?’

29. Written observations have been submitted by the applicants, the defendants, the Hungarian and Polish Governments, and by the European Commission. All except the Polish Government participated in the hearing that took place on 22 February 2018.

III. Assessment

A. Preliminary observations

1. Admissibility of the order for reference

30. The defendants in the main proceedings contest the admissibility of the order for reference, on the basis that the first four questions are hypothetical, have no link with the facts of the main proceedings, and that the fifth question is *acte claire*.

31. They question, in particular, the interpretation of the DH laws provided in the order for reference, arguing, for example, that Law DH1 has nothing to do with attribution of the exchange rate risk, and that Law DH3 is not a provision that integrates into the contract an obligation on consumers to bear that risk. (8) Rather, DH3 has suppressed the exchange rate risk for foreign currency denominated loans by

converting them into loans denominated in forint for the future (which they state to be from 1 February 2015, *ex nunc*) and not the past (*ex tunc*). They argue that since neither the DH laws or Decision No 2/2014 of the Kúria modified the clause relevant to exchange rate risk, the questions referred are hypothetical, and the interpretation requested by the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal) features no linkage with the facts arising in the main proceedings.

32. However, I cannot agree that the order for reference is inadmissible. It is, however, necessary to make some clarifying remarks with respect to Question 4.

33. Article 267 TFEU is based on a clear separation of functions between the national courts and the Court of Justice, and the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. (9) I am therefore inclined to put to one side challenges in the case file to the meaning of Member State law as it appears in the order for reference. (10)

34. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the judicial decision to be made, to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions that it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling. (11)

35. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (12)

36. With the exception of Question 4, the order for reference contains a reasoned analysis of the aspects of EU law which the national referring court views as being pertinent to the dispute, (13) so that it is possible to synthesize the legal issues requiring interpretation, the lack of consensus on the meaning and impact of Laws DH1 and DH3 notwithstanding. Moreover, the general bases of disagreement between the parties are easily discernible from the case file.

37. The national referring court would like to know how the promulgation of Laws DH1 and DH3, which, as already noted, occurred in the course of the litigation arising in the main proceedings, impact on the applicants' claim.

38. The defendants contest, inter alia, whether the exchange rate risk is in fact transferred from lender to borrower by Laws DH1 and DH3, resist any interpretation of them that would lead to retroactive effects, and contend that there have been no compliance failings with respect to the 'plain intelligible language' requirement of Article 4(2) of Directive 93/13.

39. The applicants, however, argue that the latter requirement was not fulfilled, that the remedial regime resulting from Laws DH1 and DH3 leaves them as consumers with the burden of an exchange rate risk, and that the rate that they say is imposed by legislative intervention is substantially higher than the rate that was applicable at the time the contact was concluded in 2008. In this context, they argue breach of the principle of transparency. It protects consumers, under EU law, by a combination of the last line of Article 4(2) of Directive 93/13, along with Articles 3 and 5 of Directive 93/13, and its Annex. (14) In this context, the applicants argue breach of the principles of equivalence and effectiveness, and further query whether or not there has been a failure to comply with Article 6(1) of Directive 93/13.

40. I therefore have no hesitation in concluding that the order for reference is admissible with respect to Questions 1 to 3 and 5.

41. With regard to Question 4, it refers to Article 4(1) of Directive 93/13, which encompasses matters going beyond transparency requirements, and encapsulates other forms of unfairness. However, no

arguments are made in the applicant's written submissions concerning the pertinence of Article 4(1) to the main proceedings, and nor does the order for reference, in a section entitled 'reasons for making a reference for a preliminary ruling' refer to Article 4(1) of Directive 93/13.

42. With regard to the areas of dispute between the parties in the main proceedings, the applicants actively emphasise in their written observations that, contrary to the problem recently considered by the Court in *Andriciuc*, (15) they base their case for abuse on the absence of clear and comprehensible information as required by paragraphs 6 and 7 of Article 203 of the Hpt. Further, the parts of judgments of the Court relied on by the applicants concern either transparency under Article 4(2) of Directive 93/13, (16) or Article 6 and the principles of equivalence and effectiveness, (17) or a combination of these two. (18)

43. As noted above, the defendants contest the admissibility of Question 4 on the basis that it is hypothetical. However, I rather take the view that, to the extent that Question 4 asks the Court to consider the fairness of maintaining an exchange rate risk on consumers beyond the parameters of assessment for compliance with transparency, the Court lacks the factual and legal material to answer it. (19)

44. Question 4 is therefore either inadmissible, or is to be read as inquiring about how legislation intervening many years after a contract was concluded (a development which the national referring court considers to be unforeseeable from the perspective of the consumer) impacts on transparency obligations incumbent on the defendants by reference to Article 4(2) of Directive 93/13.

2. Core issues

45. The essence of the order for reference is whether or not the remedial regime resulting from Laws DH1 and DH3, measures put in place by the Hungarian legislature following the ruling of the Court in *Kásler* and that of the Kúria in Decision No 2/2014, (20) is both reviewable under EU law and compliant with it.

46. Here it is important to recall that judgments of the Court have immediate effect, and therefore apply from the date of entry into force of the measure interpreted, (21) and must therefore be applied to legal relationships arising and established before the judgment ruling on request for interpretation, provided that, in other respects, the conditions for bringing before the courts having jurisdiction in an action relating to the application of that rule are satisfied. (22)

47. Further, only in altogether exceptional circumstances, in pursuit of the protection of legal certainty, may the Court be moved to limit the temporal effect of one of its rulings. (23) The Court made no such restriction of the temporal effect of its ruling in *Kásler* and the Member State courts are precluded from so doing. (24)

48. This means that the interpretation of Article 4(2) of Directive 93/13 made by the Court in *Kásler* on 30 April 2014, and indeed the other provisions of Directive 93/13 relevant in that case (namely Articles 3, 5, 6(1) and 7), applies to contractual terms in existence from the date of entry into force of Directive 93/13, that is 31 December 1994. (25) That said, the enforceability of Article 4(2) of Directive 93/13 at national level is subject to reasonable limitation periods set by Member State law, (26) and indeed other Member State procedural rules, provided that such laws respect the principles of effectiveness and equivalence. (27)

49. In the context of Directive 93/13, Articles 6 and 7 are also relevant to the remedial obligations imposed on Member States, with the Court holding, for example in *Kásler*, that Article 7(1) obliges Member States to provide for adequate and effective means "'to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers'", (28) and Article 7 is additionally designed to secure remedies dissuasive of breach of Directive 93/13. (29) It is also important to bear in mind Article 8 of Directive 93/13, which allows Member States to 'adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer'. (30)

50. Given that the date of entry into force of Directive 93/13 is 31 December 1994, and the contractual arrangements in issue were entered into on 15 February 2008, there can, in principle, be no objection under EU law for the decision of the Hungarian legislature to purport to regulate, in Law DH1, contractual terms entered into from 1 May 2004 to 26 July 2014, or to fix, in Law DH3, options for conversion of loans set in foreign currency to loans denominated in forint, by reference to dates in 2014, whatever the disagreement may be with respect to the temporal effects of the DH laws.

51. Question 2 of the order for reference is to be answered in the light of this fundamental tenet of EU law. I take the view that Question 2 lies at the heart of the national referring court's concerns about the permissible impact, as a matter of EU law, of Laws DH1 and DH3 on the outcome of the main proceedings. In consequence, the ensuing analysis will be substantially taken up with Question 2.

IV. Answers to the questions referred

A. Answer to Question 1

52. By the first question, the national referring court wishes to know whether a contractual term imposed by statutory law which leaves the exchange rate risk on consumers with *ex tunc* effect, is a clause which has 'not been individually negotiated' under Article 3(1) of Directive 93/13, so that, as a matter of principle, it falls within the scope of that directive.

53. As pointed out in the written observations of Poland, the notion of 'individually negotiated' should be understood as referring to a clause which the parties have agreed to by common accord after negotiations concerning the specific clause in issue, and which binds them. Once a term like the one that is alleged to be imposed in the main proceedings comes into being by legislative intervention, it cannot, by definition, be considered to be one that is 'individually negotiated'. (31)

54. Not only is this interpretation supported by the plain meaning of Article 3(1) of Directive 93/13, (32) but it is also consistent with the purpose of Directive 93/13, as reflected in one of its recitals, which refers to protection of buyers and consumers from 'one-sided *standard* contracts'. (33) Further, another recital refers to facilities under Member State law for the initiation of proceedings 'concerning terms of contract drawn up for *general use* in contracts concluded with consumers'. (34)

55. I therefore propose that the first question is answered to the effect that a contractual term imposed by legislative intervention that leaves the exchange rate risk on the consumer with *ex tunc* effect cannot be regarded as one that is 'individually negotiated' pursuant to Article 3(1) of Directive 93/13.

B. The answer to Question 2

56. By Question 2, the national referring court queries whether the remedial regime reflected in Laws DH1 and DH3, which were promulgated by the Hungarian legislature in the light of both the judgment in *Kásler*, and its application by the Kúria in Decision No 2/2014, (35) amount to 'contractual terms' reflecting 'mandatory statutory or regulatory provisions' under Article 1(2) of Directive 93/13, so that they 'shall not be subject to the provisions' of that directive.

57. I have concluded that the remedial measures in issue in the main proceedings are not precluded from the scope of Directive 93/13 by operation of Article 1(2) of that directive. I do so for the following reasons.

58. I acknowledge first of all that the Court has held that the exclusion appearing in Article 1(2) of Directive 93/13 requires that two conditions are to be met. First, the contractual term must reflect a statutory or regulatory provision and, secondly, that provision must be mandatory. (36) Thus, in order to establish whether a contractual term is excluded from the scope of Directive 93/13, it is for the national court to determine whether that term reflects provisions of national law that apply between the parties to

the contract independently of their choice or which are supplementary in nature and therefore apply by default, that is to say in the absence of other arrangements established by the parties. (37)

59. I also note, however, that the Court has held that the exception supplied by Article 1(2) of Directive 93/13 is to be strictly construed. (38) Thus, although Laws DH1 and DH3 do apply independently of the choice of the parties to the main proceedings, as mentioned in the written observations of the applicants, they were not in force at the time the contract of 15 February 2008 was negotiated. (39)

60. Further, the Court has underscored that the purpose of the exclusion of the application of the rules of Directive 93/13 is justified by the fact that it may legitimately be supposed that the national legislature struck a balance between all the rights and obligations of the parties to certain contracts. (40)

61. That assumption cannot hold with respect to statutory measures passed after the date on which the relevant contract was agreed *and* for the specific purpose of implementing a judicial finding of non-compliance with Directive 93/13, which appears from the case file to be incontrovertibly so in the main proceedings. As explained at points 45 to 50 above, judgments of the Court on the interpretation of provisions of EU law take effect from the date of entry into force of those provisions, unless the Court has limited their temporal effect, while their enforcement before Member State courts requires compliance with Member State procedural rules, subject to the principles of effectiveness and equivalence. As further noted above, in the context of Directive 93/13, Articles 6, 7, and 8 are often pertinent to this exercise, as they govern the remedies Member States are to supply to protect consumer rights under that directive.

62. Indeed, the Court has already had occasion to assess the compatibility of (statutory) Member State remedial provisions with Articles 6 and 7 of Directive 93/13, along with the principles of effectiveness and equivalence, in circumstances in which such statutory measures were promulgated in response to a ruling of the Court interpreting Directive 93/13. These cases feature no discussion as to whether or not Article 1(2) of Directive 93/13 brings the relevant statutory provisions outside the parameters of this directive, probably because on no analysis could these statutory provisions have been viewed as 'contractual terms' (41) pursuant to Article 1(2) of Directive 93/13. However, it was likely also a function of the unequivocal duty imposed on Member States in primary EU law, by virtue of Article 19 TEU, to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

63. To the extent that Laws DH1 and DH3 affect the substance of the contractual terms (such as which party should bear any exchange rate risk), as opposed to the sanctions and procedural rules to apply in the light of the Court's ruling in *Kásler*, on the facts arising in the main proceedings such a substantive factor is so closely bound up with the requirement for Laws DH1 and DH3 to comply with Articles 6 and 7 of Directive 93/13, (42) along with the principles of equivalence and effectiveness, so as to be inseparable from it. Further, an interpretation of Article 1(2) of Directive 93/13 to the effect that legislation such as Laws DH1 and DH3 fall within the exclusion set by that provision would also render immune from judicial review the legislative response of a Member State to a finding of the Court that a national law or practice is incompatible with Directive 93/13.

64. Such an interpretation would thus render Article 1(2) of Directive 93/13 inconsistent with requirement for Union policies to ensure a high level of consumer protection under Article 38 of the Charter of Fundamental Rights of the European Union, which is at minimum a guide to the interpretation of Article 1(2) of Directive 93/13. (43) It would also be in tension with the right to effective judicial protection under Article 47 of the Charter, (44) which confers rights on individuals which they may rely on before Member State courts, including the context of disputes between private parties. (45)

65. Finally, the plain meaning of Article 1(2) of Directive 93/13 is of little assistance in determining its meaning, and the purpose of Article 1(2), as reflected in the recitals, provides no discernible guidance as to whether it applies to contractual terms imposed by statute *after* the conclusion of the relevant contract, *and* for the purpose of rendering Member State law compliant with Directive 93/13. However, the genesis of the provision suggests that it was designed to ensure that Member States were permitted to maintain or

introduce rules going beyond the protective provisions of the directive, (46) but not diminish them, and one Advocate General has observed that the exception in Article 1(2) 'was to apply to standard contracts whose content the national legislature had *already* regulated by national provisions and for which it had *already* conducted a fair balancing of the justified interests of all contracting parties'. (47)

66. This is also consistent with the general rule that unfairness is to be determined as at the date a contract is concluded, (48) and I am inclined to agree with the observation that the 'contractual balance' is not to be upset 'through intervention by a State authority after the contract has been concluded', (49) unless that intervention renders Member State law compliant with Directive 93/13, or is within the parameters for maximum protection of consumers set by Article 8 of Directive 93/13. (50)

67. I therefore propose that Question 2 should be answered to the effect that, in the circumstances of the main proceedings, a term which has become part of a contract by legislative intervention, and which leaves an exchange rate risk with the consumer with *ex tunc* effect, does not reflect 'mandatory statutory or regulatory provisions' within the meaning of Article 1(2) of Directive 93/13.

C. The answer to Question 3

68. By Question 3 the national referring court asks whether Article 4(2) of Directive 93/13, and its requirement for contractual terms to be in 'plain intelligible language', entitles the consumer to detailed information concerning the risk to them of which the financial institution is aware, or, to which it might have access at the time the contract was concluded with respect to the bearing of exchange rate risk, or is it met by the terms that were conveyed to the consumer and set out at point 18 above? (51) The applicants emphasise in this regard macroeconomic material they say is held by the defendant and their obligation to explain its effects on exchange rate mechanisms.

69. According to the written observation of the defendants, Decision No 2/2014 of the Kúria, (52) and which is binding on the national referring court, has already elaborated criteria for determining whether contractual terms concerning the bearing of exchange rate risk are plain and intelligible.

70. It is for the national referring court to decide whether individual terms are plain and intelligible under Article 4(2) of Directive 93/13. (53) That court is to take account of, in addition to the Court's ruling in *Kásler*, and the pertinent rulings of the Kúria, the criteria for determining whether a contractual term is plain and intelligible as established in the case-law of the Court, and set out in full by the judgment of 20 September 2017 in *Andriciuc* at points 43 to 50. (54)

71. As held in *Andriciuc* 'it is for the national court to check that the seller or supplier has communicated to the consumers concerned all the relevant information enabling them to assess the economic consequences of a [relevant] term … on their financial obligations', (55) including the impact on instalments of a severe depreciation of the legal tender in the Member State in which a borrower is domiciled and of an increase in the foreign interest rate. (56) The seller or supplier is required to set out the possible variations in the exchange rate and the risks inherent in taking out the loan, (57) along with the specific functioning of the mechanism to which the relevant term relates and the relationship between that mechanism and other contractual terms. (58)

72. The applicants further argue in their written submissions that Laws DH1 and DH3 are non-compliant with the principles of effectiveness and equivalence, and Article 6 of Directive 93/13, because the legislator has imposed an exchange rate risk on consumers without considering the requirement of clarity and transparency. For the sake of completeness, I note that there is insufficient material in the case file to enable conclusions to be reached on this aspect of the applicants' case, either in the context of transparency or otherwise.

73. Thus, under Question 3, it is for the national referring court to determine, taking account of all of the circumstances surrounding the contract, and the case-law of the Court, whether, under Article 4(2) of Directive 93/13 and its requirement for contractual terms to be in 'plain intelligible language', lenders are

obliged to convey to consumers pertinent financial information in its possession at the time the contract was concluded, including relevant macroeconomic material, and explain its effects on exchange rate mechanisms.

D. The answer to Question 4

74. As explained above at points 41 to 44, Question 4 is to be read as inquiring about how legislation intervening many years after a contract was concluded (a development which the national referring court considers to be unforeseeable from the perspective of the consumer) impacts on transparency obligations incumbent on the defendant by reference to Article 4(2) of Directive 93/13.

75. Pursuant to Article 3(3) of Directive 93/13, the Annex to Directive 93/13 supplies an indicative list of clauses that may be regarded as unfair. Point 1(i) refers to terms 'irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract', but there is no explanation in the order for reference as to why this part of the Annex is more significant than others, even though Point 1(j) and (l) and Point 2(b) and (d) of the Annex have been subject to interpretation by the Court in the context of transparency. (59)

76. I therefore propose answering Question 4 to the effect that, to the extent that subsequent Member State legislative intervention has failed to cure unfairness with respect to clarity and transparency of terms, as required by Directive 93/13, compliance of such terms with this obligation is to be determined from the date of the contract.

E. The answer to Question 5

77. Question 5 concerns the authority of Member State courts to review all terms of a given contract for unfairness of their own motion.

78. This obligation is self-evident from the established case-law of the Court. I underscore, however, that the duty on Member State courts to review all contractual terms for unfairness under Directive 93/13 of their own motion is operative only if all of the relevant legal and factual material is at its disposal. (60) The obligation can additionally be affected by *res judicata*. (61)

79. Question 5 is therefore to be answered to the effect that the national court is required to assess of its own motion whether a contractual term falling within the scope of the directive is unfair, thereby compensating in this way for the imbalance which exists between consumer and lender, where it has available to it the legal and factual elements necessary for that task.

V. Conclusion

80. I therefore propose the following answer to the questions referred by the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal).

(1) A contractual term imposed by legislative intervention that leaves the exchange rate risk on the consumer with *ex tunc* effect cannot be regarded as one that is 'individually negotiated' pursuant to Article 3(1) of Council Directive 93/13/EEC on unfair terms in consumer contracts.

(2) In the circumstances of the main proceedings, a term which has become part of a contract by legislative intervention, and which leaves an exchange rate risk with the consumer with *ex tunc* effect, does not reflect 'mandatory statutory or regulatory provisions' within the meaning of Article 1(2) of Directive 93/13.

(3) It is for the national referring court to determine, taking account of all of the circumstances surrounding the contract, and the case-law of the Court, whether, under Article 4(2) of Directive 93/13 and its requirement for contractual terms to be in 'plain intelligible language',

lenders are obliged to convey to consumers pertinent financial information in its possession at the time the contract was concluded, including relevant macroeconomic material, and explain its effects on exchange rate mechanisms.

(4) To the extent that subsequent Member State legislative intervention has failed to cure unfairness with respect to clarity and transparency of terms, as required by Directive 93/13, compliance of such terms with this obligation is to be determined from the date of the contract.

(5) The national court is required to assess of its own motion whether a contractual term falling within the scope of the directive is unfair, thereby compensating in this way for the imbalance which exists between consumer and lender, where it has available to it the legal and factual elements necessary for that task.'

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1 Original language: English.

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2 See also, e.g. the judgment pending in *Sziber*, C−483/16. The Opinion of Advocate General Wahl was issued on 16 January 2018, EU:C:2018:9.

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3 C-26/13, EU:C:2014:282.

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4 Directive of 5 April 1993 (OJ 1993 L 95, p. 29) ('Directive 93/13').

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5 *Magyar Közlöny* 2014/91, p. 10975.

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6 Judgment of 30 April 2014 (C−26/13, EU:C:2014:282). See also law DH2, A [Kúriának a] pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvényben rögzített elszámolás szabályairól és egyes egyéb rendelkezésekről szóló 2014. évi XL. törvény (Law XL of 2014 on the provisions governing the settlement of accounts referred to in Law XXXVIII of 2014 on specific matters relating to the decision [of the Kúria] to harmonise the case-law on loan agreements concluded between credit institutions and consumers, and concerning a number of other provisions.

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7 See footnote 5 above.

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8 The Hungarian Government also contests the interpretation of the DH laws appearing in the order for reference, but falls short of arguing it is inadmissible. The Commission says that it is unclear whether the order for reference is concerned with Law DH1 or Law DH3.

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9 See, in the context of unfair terms in consumer loan contracts, judgment of 14 March 2013, *Aziz*, (C−415/11, EU:C:2013:164, paragraph 34 and the case-law cited).

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10 See also in this regard my Opinion in *Egenberger*, C−414/16, EU:C:2017:851, points 61 to 65.

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11 *Aziz* above note 9. See also judgment of 20 September 2017, *Andriciuc* (C−186/16, EU:C:2017:703, paragraphs 19 and 20).

12 Judgment of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 35 and the case-law cited).

13 C.f. the Opinion of Advocate General Jääskinen in *Banif Plus Bank* (C−312/14, EU:C:2015:621).

14 See for example judgment of 26 February 2015, *Matei* (C−143/13, EU:C:2015:127, paragraphs 73 and 74.)

15 Judgment of 20 September 2017 (C−186/16, EU:C:2017:703).

16 Namely, judgment of 23 April 2015, *Van Hove* (C−96/14, EU:C:2015:262).

17 Judgment of 14 March 2013, *Aziz* (C−415/11, EU:C:2013:164, paragraph 50). The written observations of the applicant also make reference to judgment of 14 June 2012, *Banco Español de Crédito*(C−618/10, EU:C:2012:349, at paragraphs 39 and 53). The former refers to the weakness of consumers vis-à-vis sellers or suppliers, and the latter concerns the principle of effectiveness.

18 Judgments of 30 April 2014, *Kásler* (C−26/13, EU:C:2014:282), and of 21 December 2016, *Gutiérrez Naranjo and Others* (C−154/15, C−307/15, and C−308/15, EU:C:2016:980).

19 See e.g. judgment of 14 March 2013, *Aziz* (C−415/11, EU:C:2013:164, paragraph 35 and the case-law cited).

20 See footnote 5 above.

21 See e.g. judgment of 29 October 2015, *BBVA* (C−8/14, EU:C:2015:731, paragraph 22). See also the Opinion of Advocate General Szpunar, EU:C:2015:321, point 34.

22 E.g. judgment of 21 March 2013, *RWE Vertreib* (C−92/11, EU:C:2013:180, paragraph 58 and the case-law cited).

23 Ibid., paragraph 59 and the case-law cited. Those concerned must have acted in good faith, and there is risk of serious difficulties.

24 See e.g. judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C−154/15C−307/15 and C−308/15, EU:C:2016:980, paragraphs 70 to 73).

25 Article 10 (1) of Directive 93/13.

26 See e.g. judgment of 29 October 2015, *BBVA* (C-8/14, EU:C:2015:731, paragraph 24).

27 For a recent and comprehensive analysis see the Opinion of Advocate General Wahl, *Sziber* (C-483/16, EU:C:2018:9).

28 See e.g. judgment of 30 April 2014, *Kásler* (C−26/13, EU:C:2014:282, paragraph 78 and the case-law cited).

29 Ibid., paragraph 79.

30 On the limits of Article 8 see e.g. judgment of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid* (C−484/08, EU:C:2010:309).

31 Judgment of 29 October 2015, *BBVA* (C-8/14, EU:C:2015:731, paragraph 34). There the Court observed that the statutory rule in issue in that case 'lays down a legislative framework of general scope.' Although the statutory measure in issue in that case was not a 'contractual term' within the meaning of Article 3(1) of Directive 93/13, it was considered to be a general norm.

32 For an overview of the rules relevant to the interpretation of EU measures see e.g. my Opinion in *Pinckernelle* (C−535/15, EU:C:2016:996, points 34 to 70).

33 My emphasis.

34 My emphasis.

35 See footnote 5 above.

36 Judgment of 20 September 2017, *Andriciuc* (C−186/16, EU:C:2017:703, paragraph 28 and case-law cited).

37 Ibid., paragraph 29 and the case-law cited. For a further example see judgment of 26 January 2017, *Banco Primus* (C−421/14, EU:C:2017:60, points 69 to 70).

38 Judgment of 20 September 2017, *Andriciuc* (C−186/16,EU:C:2017:703, paragraph 31 and the case-law cited).

39 In that sense, the facts that are pertinent to the main proceedings are different from those arising in other leading cases in which interpretation of Article 1(2) of Directive 93/13 was in issue. See, e.g. judgments of 21 March 2013, *RWE Vertrieb* (C−92/11, EU:C:2013:180); of 10 September 2014, *Kušionová* (C−34/13, EU:C:2014:2189); and of 20 September 2017, *Andriciuc* (C−186/16, EU:C:2017:703).

40 Judgment of 21 March 2013, *RWE Vertrieb* (C−92/11, EU:C:2013:180,paragraph 28).

41 See in particular paragraphs 21 and 23 of the judgment of 29 October 2015, *BBVA* (C−8/14, EU:C:2015:731). 'In order to take account of that case-law and more specifically in response to the judgment of 14 March 2013, *Aziz* (C−415/11, EU:C:2013:164), Law 1/2013 amended, inter alia, the articles in the Civil Procedure Code relating to the enforcement procedure of mortgaged assets. Thus, for proceedings opened after the entry into force of Law 1/2013, the defendant's objections to enforcement, based on the unfairness of a contractual term, brought within the normal 10 day period from the date of service of the document ordering enforcement, henceforth allows the suspension of the mortgage enforcement proceedings until the objection to enforcement has been adjudicated upon … It must be determined whether, and, if appropriate, to what extent, Directive 93/13, as interpreted by the case-law of the Court, expounded, in particular since its judgment in *Aziz* … precludes the transitional mechanism for limitation periods adopted by the Spanish legislature and adopted by Law 1/2013.' See also e.g. judgments of 17 July 2014, *Sánchez Morcillo and Abril García* (C−169/14, EU:C:2014:2099); of 21 January 2015, *Unicaja Banco and Caixabank* (C−482/13, C−484/13, C−485/13, and C−487/13, EU:C:2015:21; and of 26 January 2017, C−421/14 (*Banco Primus*, EU:C:2017:60).

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42 See recently judgment of 26 January 2017, *Banco Primus* (C−421/14, EU:C:2017:60, paragraphs 71 to 74 and the case-law cited).

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43 Advocate General Wahl in his Opinion in*Pohotovost'*, C−470/12, EU:C:2013:844, point 66, takes the view that Article 38 of the Charter is a principle pursuant to Article 52(5) of the Charter rather than a right.

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44 See judgment of 10 September 2014, *Kušionová* (C−34/13, EU:C:2014:2189, paragraph 47 and the case-law cited), where the Court held at that 'mandatory requirements' set by Articles 38 and 47 of the Charter, 'are applicable to the implementation of Directive 93/13'.

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45 Judgment of 17 April 2018, *Egenberger* (C−414/16, EU:C:2018:257, paragraphs 70 to 82). The Court held at paragraph 82 that 'a national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in conformity with' the directive in issue in that case 'to ensure within its jurisdiction the judicial protection deriving for individuals from Articles 21 and 47 of the Charter and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.'

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46 See the Opinion of Advocate General Trstenjak in *RWE Vertrieb*, (C−92/11, EU:C:2012:566, point 42), referring to the intervention of the Economic and Social Committee in the legislative process.

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47 Ibid., point 47 (my emphasis). The Advocate General refers to the first discussion paper of the European Commission of 14 February 1984, COM(1984) 55 final.

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48 See e.g. judgment of 21 January 2015, *Unicaja Banco and Caixabank* (C−482/13, C−484/13, C−485/13 and C−487/13, EU:C:2015:21, paragraph 37).

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49 Opinion of Advocate General Wahl in *Kasler* (C−26/13, EU:C:2014:85,point 105).

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50 See footnote 30 above.

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51 It is established in the Court's case-law that the terms referred to in Article 4(2) of Directive 93/13 only escape assessment as to whether they are unfair in so far as the national court having jurisdiction forms the view, following a case-by-case examination, that they are drafted in 'plain intelligible language' pursuant to that provision. See judgment of 20 September 2017, *Andriciuc* (C−186/16, EU:C:2017:703, paragraph 43 and the case-law cited).

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52 Above, note 5.

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53 Order of 22 February 2018, *ERSTE Bank Hungary* (C−126/17, not published, EU:C:2018:107, paragraph 27), citing judgment of 20 September 2017, *Andriciuc* (C−186/16, EU:C:2017:703, paragraph 22).

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54 Judgment of 20 September 2017, *Andriciuc* (C−186/16, EU:C:2017:703). Leading judgments on transparency that preceded *Andriciuc* included judgments of 21 March 2013, *RWE Vertieb* (C−92/11, EU:C:2013:180); of 30 April 2014, *Kásler* (C−26/13, EU:C:2014:282); of 26 February 2015, *Matei* (C−143/13, EU:C:2015:127); of 23 April 2015, *Van Hove* (C−96/14, EU:C:2015:262); and of 9 July 2015, *Bucura* (C−348/14, EU:C:2015:447). Post *Andriciuc*see notably the order of 22 February 2018, *ERSTE Bank Hungary* (C−126/17, not published, EU:C:2018:107).

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55 Judgment of 20 September 2017, *Andriciuc* (C−186/16, EU:C:2017:703, paragraph 50).

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56 Ibid., point 49. The Court makes reference to a Recommendation of the European Systematic Risk Board of 21 September 2011, OJ 2011 C 342, p. 1.

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57 Ibid., paragraph 50.

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58 Ibid., paragraph 45.

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59 Judgment of 26 February 2015, *Matei* (C−143/13, EU:C:2015:127, paragraph 74).

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60 See e.g. judgments of 14 March 2013, *Aziz* (C−415/11, EU:C:2013:164, paragraphs 46 and 47 and the case-law cited), and of 30 May 2013, *Jőrös* (C−397/11, EU:C:2013:340).

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61 See e.g. recently the judgment of 18 February 2016, *Finanmadrid EFC* (C−49/14, EU:C:2016:98). At paragraph 48 the Court notes that Member State procedural autonomy with respect to *res judicata* is subject to the principles of equivalence and effectiveness.