THE KÚRIA

as review court

Gfv.VII.30.160/2014/5.

The Kúria, in the lawsuit between, on the one side the first applicant and the second applicant, represented by dr. Zsolt Szokolyai, attorney-at-law, and on the other side, the first defendant, represented by dr. Mária Tomcs, attorney-at-law, and the second defendant, represented by the Defence Counsel Dr. Gábor Gadó, in the present case dr. Gábor Gadó, attorney-at-law, concerning the declaration of invalidity of a contract, initiated before the Békés County Court (High Court of Gyula) under No. 5.P.20.360/2010, and terminated before the Szegedi Ítélőtábla (Szeged Regional Court of Appeal) with the final and binding judgment No. Pf.I.20.052/2010/7, delivered on 26th April 2012, on the application for review lodged by the second defendant, delivered – in a public hearing – the following
judgment:

The Kúria sets aside the part of the final judgment covered by the application for review, and in this scope alters the judgment No. 31 of the first instance: establishes that the contractual terms providing for the application of the 'buying rate for the foreign currency applied by the bank' in point I.1., and of the 'selling rate of exchange for the foreign currency applied by the bank' mentioned several times in point III.2. of the credit agreement on mortgage loan denominated in foreign currency, secured by a guarantee in rem, set out in a notarial deed under No. K52016-1/748/2008/O, concluded between the Applicants and the second Defendant on 29th May 2008, are invalid.

It orders the second defendant to pay – within 15 days – to the applicants altogether HUF 63.500 (sixty-three thousand five hundred forint) as the costs of the review procedure.

No review shall lie against this judgment.

S t a t e m e n t o f r e a s o n s :

The applicants and the second defendant concluded a credit agreement on a mortgage loan denominated in foreign currency, secured by a guarantee in rem, on 29th May 2008. The amount of the credit was set at HUF 14,000,000. Point I.1 of the agreement

contained, inter alia: 'the amount of the loan in foreign currency will be determined at the buying rate for the foreign currency applied by the bank on the date of advancing the funds'. According to point III.2 of the contract: 'the lender is to determine the amount in HUF of each of the monthly instalments due by reference to the selling rate of exchange for the foreign currency applied by the bank on the day before the due date'. Point III.2 contains other provisions as well concerning the application of the selling rate of exchange for the foreign currency.

The applicants contested – among others – in their claim against the second defendant those contractual terms, that authorize the bank to calculate the instalments due by reference to the selling rate of exchange for the foreign currency applied by the bank, instead of applying the buying rate for the foreign currency on the date of advancing the funds. In their opinion, this amounts to unfair contractual terms, conferring on the bank an unjustified, unilateral benefit, within the meaning of Section 209 of Act IV of 1959 on the Civil Code.

The second defendant contended the actions should be dismissed.

The court of first instance stated in its judgment – among others – that the terms in point III.2. of the contract are invalid, according to which the bank determines the amount in HUF of each of the monthly instalments due by reference to the selling rate of exchange for the foreign currency applied by the bank on the day before the due date; informs the debtors about the amount in foreign currency determined at the buying rate for the foreign currency applied by the bank on the date of the first instalment and, in the event of changes in the selling rate of exchange for the foreign currency applied by the bank, the bank is authorised to determine the amount of the instalments every month. It declared the contract valid retroactively, in the way that, in the contract – with regard to all three provisions – it indicated the buying rate instead of the selling rate of exchange for the foreign currency.

The court of first instance explained, inter alia, that at the time of conclusion of the contract at issue, there had been no provisions expressly prohibiting the settlement methods contested by the applicants. However, the bank benefited from the difference between the buying rate and the selling rate of exchange, without having to grant any services as compensation. The profit of a lending bank on the grounds of a credit agreement should be realised through

the established interest rate and not through the difference between the buying rate and the selling rate of exchange. Without an actual service, this profit is an unjustified advantage on the side of the lending bank, and at the same time a unilateral disadvantage for the other party to the contract containing this term, which is an unfair term under Section 209/A(2) of Civil Code.

The court of second instance, on appeal by the second defendant, upheld the part of the judgment of first instance declaring the invalidity of point III.2. of the contract. With regard to the grounds for appeal, it pointed out, among others, that: a loan agreement denominated in foreign currency had been concluded between the applicants and the second defendant, according to which the disbursement and the repayment are due in forint, but the amounts of the credit and of the monthly instalments are expressed (calculated) in a foreign currency. This construction is also characterised by the fact that the monthly instalments are calculated according to the current exchange rate of the currency to HUF, therefore a negative development of the exchange rate of the forint results in elevating the amount of the instalment (accordingly, strengthening reduces the amount). In the case of a loan agreement denominated in foreign currency the bank does not make foreign currency available to the customer. During the transaction, there is no sales - purchase and sale - of foreign currency, thus the margins resulting from the difference between the exchange rates - the buying rate of exchange applicable to the advance of the loan and the selling rate of exchange applicable to its repayment - cover virtual services, although for virtual services no consideration shall be received.

Thus the difference between the buying rate of exchange and the selling rate of exchange is not a consideration for the supply of services, therefore it does not fall under the restrictive provisions of Section 209(5) of the Civil Code. It is absolutely not clear or evident why or for what reason the methods of calculating the amount of the advance and the amount of the repayment differ.

According to the court of second instance, the term regulating the calculation of the instalments in point III.2 of the contract is not unfair in itself just because of applying the selling rate of exchange of the foreign currency, but because of applying exchange rates of a different nature. In the case of a loan agreement

denominated in foreign currency, the contractual term regulating the calculation of the exchange rate is fair if the advance and the repayment are calculated using the same rate of exchange of the currency; in other words, when the exchange rates of the currency, both at the date of the advance and at the date of the instalments, are based on the buying, the selling or the median exchange rate. Pursuant to Section 209/A(1) of Civil Code, the court is entitled to eliminate the cause of invalidity - the circumstance causing the unfairness of the term, the wording causing damage to the interests - by appropriately modifying the content of the term.

In his application for review filed against the final judgment, the second defendant sought the repeal of the final judgment, the judgment of the court of first instance to be overturned and the actions of the applicants dismissed. In his opinion, the final judgment is unlawful and infringes Section 209 of the Civil Code, for the following reasons.

The court of second instance erred in law by referring to Section 209(5) of Civil Code, with regard to the fact, that at the time of conclusion of the contract at issue, on 29th May 2008, it was Section 209(4) regulating that the provisions concerning unfair contractual terms shall not be applicable to contractual terms that define the main subject-matter of the contract or to those that determine the balance between performance and consideration. Section 209(4) and (5) of Civil Code have been amended by Section 1(2) of Act XXXI of 2009 in the form as referred to by the court of second instance. This amendment, with regard to the infringement proceedings launched by the European Commission, have been made to ensure proper implementation of Article 5 of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (hereinafter: the Directive). Taking this into consideration, the Hungarian courts shall interpret Section 209(4) of the Civil Code applicable at the time of conclusion of the contract exclusively by complying with the commitments made at the time of accession to the European Union. Thus, already before the amendment of the Civil Code through Act XXI of 2009, it had been a requirement that the contractual trems should be drafted clearly and intelligibly.

The final judgment - although referring to a provision that not even existed at the time of conclusion of the contract - is not unlawful for this reason, but because, pursuant to Section 209(4)

of the Civil Code, the unfairness of contractual terms that define the main subject-matter of the contract or those that determine the balance between performance and consideration could not been examined. This provision does not serve to keep or to restore the balance whenever there is an imbalance of the values of the services supplied to one another according to the contractual relationship between them, this function is supposed to be fulfilled by other provisions (Section 202 and Section 200(2) of the Civil Code). The court, by evaluating the lawfulness of general contractual terms falling under the scope of Section 209(1) of the Civil Code, shall first determine whether the term at issue is contrary to the law under Section 200(2) of the Civil Code. If it concludes that the contractual terms that define the main subject-matter of the contract or the balance between performance and consideration are not contrary to the law then it cannot examine, pursuant to Section 209(4) of the Civil Code applicable at the time of conclusion of the contract, whether the contractual term at issue is unfair or not, provided that it is drafted in clear and intelligible language.

The second defendant referred to the fact that, due to the specific economic construction of loan agreements denominated in foreign currency, the consideration from the part of the customer is related not only to the loan disbursed by the bank in HUF. Ultimately, the debtor shall pay all fees and costs of banking operations, and as such the exchange rate gaps, which contribute to obtaining favourable interest rates from the bank, from the point of view of the debtor. Banking services performed directly for the debtor are based on banking mechanisms that guarantee the security of bank financing. The compliance with the regulatory requirements on holding the so called closed position on currency indirectly justifies that the debtor, as part of the consideration in return for the loan, shall pay the difference between the buying rate of exchange applicable to the advance of the loan and the selling rate of exchange applicable to its repayment. This was a prerequisite for ensuring that the financial institution giving a loan denominated in a foreign currency may propose substantially lower transaction interest rates compared to those loans disbursed in HUF.

The second defendant also stressed that the applicants were informed of the terms of the contract before signing it. According to Section 8, 12 and 13(1), as well as Annex 5 of Government Decree

No. 41/1997. (III.5.) on the calculation and publication of deposit rates, of the return on securities and of the annual percentage rate, applicable at the time of conclusion of the contract, the exchange rate gap constitutes information which shall be taken into consideration by calculating the APR, therefore the debtors are duly informed of it at the time of concluding the contract. At that time there were no legal provisions according to which the only consideration in return for banking services could be transaction interest or administration fees. Regarding all the above, in the opinion of the second defendant, the general contractual terms annulled by the final judgment made it possible for the bank to obtain income from the consideration in return for the loan denominated in foreign currency taken out by the debtors. Contractual terms on the application of differing exchange rates were not contrary to the law; in general banking practice they served to cover the expenses incurred by the credit institution in purchasing foreign currency on the market; moreover, in several aspects they contained more favourable terms for consumers.

The second defendant submits that, although the correct interpretation of Section 209(4) of the Civil Code applicable at the time of conclusion of the contract would have excluded the examination of the contractual terms on the merits, the final judgment is unlawful and contrary to Section 209(1) of the Civil Code, as well. The loan agreement denominated in foreign currency concluded with the debtors indeed met the requirements of good faith and fairness, therefore it cannot be considered unfair. This latter requirement is an objective category of the law of contract, which means that the unfairness of a general contractual term shall be evaluated according to the social judgment and standard commercial practices applicable at the time of concluding the contract. The court of second instance annulled the term securing the acquisition of the difference between the buying rate of exchange and the selling rate of exchange, in spite of the fact that it obviously had not diverged from the standard conduct that was characteristic of the financial sector in May 2008 and deemed lawful. The second defendant also expressed that the circumstances of conclusion of the contract at issue, such as the fact that the applicants had earlier concluded a loan agreement denominated in foreign currency, the contested contract was set out in a notarial deed and they had been informed of the imposition of the currency risk on the consumer, exclude the unfairness of the contested terms

of the contract at issue. The contested terms of the contract were clear and intelligible to the applicants. The clause on the exchange rate gap was in accordance with the general banking practice, it was justified from a financial-professional aspect, and was considered to be a reasonable solution, was not condemned by society at that time and therefore it met the requirements of the principles of good faith and fairness.

The applicants requested in their counter-application for review to uphold the final and binding judgement. According to them, the courts interpreted the applicable provisions correctly and were entitled to examine the contested contractual term on the merits. They submitted that the second defendant cannot invoke the specific characteristics of banking, and cannot transfer the costs arising from these specificities on the side of the bank to the applicants. In their opinion, the contested contractual term in itself is not clear, since the exchange rate can vary during a single day. The ruling courts were therefore entitled and obliged to examine on the merits, on the grounds of Section 209(1) of the Civil Code, the unfairness of the contractual term, in the scope of which they concluded correctly that it is unfair, thus invalid.

The Prosecutor General, at the request of the Kúria pursuant to Section 274(6) of the Code of Civil Procedure, in his professional opinion stated that, due to the prohibition established in Section 209(4) of the Civil Code applicable at the time of conclusion of the contract, the unfairness of this term cannot be examined.

The applicants, in their observations to the opinion of the Prosecutor General, contested the correctness of his arguments.

The Kúria - taking into consideration that it deemed necessary to interpret Article 4(2) and 6(1) of the Directive for the purposes of the application for review, with its order No. Pfv. 21.247/2012/16, referred the case to the Court for a preliminary ruling, pursuant to Article 267(3) TFEU.

The Kúria reviewed the final judgment, within the limits of the application for review, taking into consideration the findings of the Court of Justice of the European Union (hereinafter CJEU) made in its judgment C-26/13, delivered on 30th April 2014, and found it unlawful only as far as the method of eliminating the unfair term is concerned.

The second defendant argued in its application for review, among

others, that at the time of conclusion of the contract it was not contrary to the law to provide for the application of the buying rate of exchange applicable to the advance of the loan and the selling rate of exchange applicable to its repayment. According to the Kúria, in the absence of concrete provisions prohibiting this practice at the time of conclusion of the contract, the contractual terms at issue were indeed not unlawful. However, the ruling courts did not state that the contractual terms at issue in the review procedure had been unlawful, but that they had been unfair.

The Kúria primarily had to take a position on the question whether the unfairness of the contractual terms providing for the application of the buying rate of exchange applicable to the advance of the loan and the selling rate of exchange applicable to the instalments can be examined by the court.

The Kúria states that the lawsuit at issue shall be determined on the grounds of the provisions of the Civil Code applicable at the time of conclusion of the contract between the applicants and the second defendant, namely on 29th May 2008. According to Section 209(4) of the Civil Code applicable at that time: 'The provisions concerning unfair contractual terms shall not be applicable to contractual terms that define the main subject-matter of the contract or to those that determine the balance between performance and consideration. This provision of the Civil Code implements Article 4(2) of the Directive in Hungarian law. According to the provision of the Directive referred to, '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 clear intelligible language'. With regard to the argument of the second defendant, according to which in spite of the absence of legal provisions at the time of conclusion of the contract in that sense, in the light of the Directive, Section 209(4) of Civil Code shall be interpreted in such a manner that the unfairness of the contractual terms is to be examined when they are not clear or intelligible, the Kúria did not find it necessary to assess the correctness of this statement.

As pointed out by the CJEU in its judgment in case C-26/13, Article 4(2) of the Directive, laying down an exception to the general rule for reviewing the substance of unfair terms, under which every

contractual term not individually negotiated may be reviewed by the national courts in order to determine whether it is unfair (points 40 and 42). The CJEU also stated hat it is for the referring court to decide whether the given contractual term not individually negotiated falls under the exception established in Article 4(2) of the Directive (Point 59).

The concept 'main subject-matter of a contract' in the Directive is implemented in the Civil Code. under the term 'főszolgáltatás' (main service), but the content of the terms is identical. The CJEU, in its judgment in the case C-26/13, clarified the content of this concept as being those that lay down the essential obligations of the contract and define the very essence of the contractual relationship (Points 49 and 50). The CJEU also found, among other things, that this concept must be 'strictly' interpreted, meaning not broadly (Point 42). According to the CJEU, 'it has to be ascertained having regard to the nature, general scheme and stipulations of the contract and its legal and factual context', whether the contractual term not individually negotiated shall be considered as 'an essential obligation of that agreement, which, as such, characterises it' (Point 59). The Kúria determined, in Point 1 of the decision No. 6/2013. PJE, the essential obligations and characteristics of loan agreements denominated in foreign currency. According to that, the loan agreement denominated in foreign currency is a loan in a foreign currency with the essential characteristic that the debtor goes into debt in a currency at a more favourable interest rate than HUF-loans had at the time. The main subject-matter of a contract includes the amount of the loan, the given foreign currency, the interest rate established in the contract and the costs and fees. However, the contractual terms on determining the exchange rates do not fall under this concept, since they constitute an essential obligation of the contract, characterising it. These are ancillary rules of a technical nature, in spite of the fact that determining the exchange rates is necessary for the performance, either in how they are established in the contract itself, or when not, how they are governed by supplementary provisions. The ancillary nature of the rules on exchange rates is not affected by the fact that these rates generate costs for the consumer. [The Kúria remarks that if the determination of exchange rates in the contract was a main subject-matter, their unfairness could have been examined in this case as well, with regard to the guidance given by the CJEU

concerning the requirement of clear and intelligible drafting, as interpreted later (Points 74 and 75).]

On the grounds of the judgment of the CJEU, the application of exchange rates, as far as 'the balance between performance and consideration' is concerned, cannot be considered as contractual terms on the 'adequacy of the remuneration' (Points 58 and 59). To be considered as such terms, it would be an indispensable condition that the financial institution provides money changing services to the consumer, applying the buying and selling exchange rates as a standard consideration.

Pursuant to the arguments above, the ruling courts took the correct position that the unfairness of the contractual term providing for the application of the buying and selling exchange rates can be examined, since it does not fall under the exception established in Article 4(2) of the Directive. The Kúria observes that, in its decision of principle No. EBH2013.G.10, it could not take a position for procedural reasons on the question whether the application of different exchange rates constitutes an unfair contractual term, therefore the finding in that decision were not and could not be taken into consideration in the present case.

Further, the Kúria hade to determine whether or not the contested contractual provisions were unfair. A contractual term is unfair according to Section 209(1) of the Civil Code if the standard contract term, or a term not individually negotiated in a consumer contract 'in breach of the obligation to act in good faith and fairly, unilaterally and unjustifiably establishes the contractual rights and obligations of the parties to the detriment of the co-contractor of the party imposing the contractual term in question'. In this scope, the finding already mentioned of Point 1 of the decision No. 6/2013. PJE is relevant, according to which, in the case of a loan agreement denominated in a foreign currency, there is no exchange of currency, neither at disbursement, nor by repayment; there is only 'conversion'. The determination of the rate of conversion is necessary for performance under the contract. The application of exchange rates different in nature does not cover services actually rendered. The application of exchange rates different in nature creates income for the financial institution and costs for the customer without a clear service in return. Due to the contractual term on the exchange rates that are different in nature, the financial institution obtains an income unilaterally

and in an unjustified way, without individually negotiating the contract term, to the detriment of the customer, causing costs to him, and without rendering a direct service for remuneration, as admitted by the second defendant, which is unfair.

According to the arguments above, the terms on the conversion rates are unfair, because they cannot be considered to be 'clear' and 'intelligible' contractual terms as determined in the judgment of the CJEU. The second defendant explained that the application of exchange rates different in nature formed part of the pricing, in compliance with the regulatory requirements on holding the so-called closed position on currency, indirectly justifying that the debtor shall pay the difference between the buying and selling exchange rate as part of the consideration in return for the loan. That made it possible to use favourable transaction interest rates. If this argument is correct, it should also be stated that the application of exchange rates different in nature means an unclear and unintelligible pricing, the economic reason for which is incomprehensible to the average consumer. The court of first instance pointed out correctly that the profit of a financial institution – by transparent, clear and intelligible pricing – is obtained through interest. The court of second instance took the position correctly that the income generated by the application of exchange rates that are different in nature does not cover actual services rendered directly to the consumer. Such a pricing hinders the consumer from understanding the economic consequences clearly and to foresee its amount. Therefore – notwithstanding the fact that an average consumer can be expected to understand that the buying rate of exchange applied by the bank is lower than the selling rate of exchange applied at the same time, and the fact that the drafting on the application of the buying and selling rates is grammatically clear and unequivocal in the contract and is not in 'the small print' – the contractual term providing for the application of exchange rates different in nature does not comply with the requirements on clear and intelligible drafting, as interpreted in the judgment of the CJEU (Point 75). The circumstances referred to by the second defendant, according to which the contested contract was set out in a notarial deed, they had been informed of the imposition of the currency risk on the consumer, and that the applicants had earlier concluded a loan agreement denominated in foreign currency, do not mean that the contractual terms providing for the application of exchange rates

different in nature were clear and intelligible.

The second defendant's argument that the contested contractual terms were identical or rather favourable to the consumer – according to him – compared to those used by other financial institutions, is not suitable to prove that these terms had not been unfair. For the assessment of unfairness. it is irrelevant how society thought about the given contractual construction at the time of concluding the contract. The social judgment may be relevant for assessing whether the contract or contractual term is obviously contrary to good morals, which would be a cause for invalidity. Relating to this question, the decision No. 6/2013. PJE of the Kúria already took a position on Point 2.

The final judgment therefore found correctly that the application of exchange rates that were different in nature was unfair.

The third question in which the Kúria had to take a position was whether the ruling courts had remedied the invalidity of the unfair contractual terms in a correct manner, by ordering to apply exchange rates of an identical nature, in modifying Point III.2 of the loan agreement concluded on 29th May 2008 between the applicants and the second defendant and replacing the selling rate of exchange with the buying rate of exchange, as stated in Point I.1 of the contract. Thus, by ordering the uniform application of the buying rate of exchange, the unfair contractual terms concerning the use of exchange rates different in nature were eliminated.

As a legal consequence of a term not individually negotiated in a consumer contract being unfair, Article 6(1) of the Directive establishes that the contract, as provided for under their national law, shall 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. After delivering the final judgment, contested in the application for review, the CJEU in its judgment C-618/10 in the Banco Español case clearly stated that the national court, in the event that it establishes the unfairness of a contractual term, is not entitled to amend the contractual term and complete the contract. (This interpretation of law was confirmed by the judgment C-488/11 of the CJEU in the Brusse case, in point 60.) However, the judgment C-618/10 of the CJEU in the Banco Español case was delivered on the grounds of facts partially differing from those in the present

case. Since. in the case referred to, the remaining terms of the contract could continue to exist by eliminating the unfair contractual terms.

With regard to the arguments above, it had to be clarified whether, under these circumstances it was possible to apply the solution chosen by the ruling courts, in declaring the contract valid by amending the unfair contractual term, or whether in such a case the findings of the judgment C-618/10 in the Banco Español case should apply, meaning that it is only possible to eliminate the invalid term, which would result – as the contract may not be performed – in the invalidity of the entire contract, or if it would be possible to replace the invalid contractual term by reference to supplementary provisions, thereby eliminating the invalidity of the contractual term.

The CJEU in its judgment C-26/13 confirmed its position stated in the Banco Español case, by finding that: 'According to Article 6(1) of the Directive, a national court is not allowed, if it finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, to adjust that contract by revising the content of that term' (Point 77). The CJEU gave a clear answer to the question whether the invalidity of a contract may be remedied by replacing the invalid contractual term with a reference to supplementary provisions. According to that judgment in cases 'in which a contract concluded between a seller or supplier and a consumer cannot continue in existence after an unfair term has been deleted, that provision does not preclude a rule of national law enabling the national court to cure the invalidity of that term by substituting a supplementary provision of national law for it' (point 85).

Such a supplementary provision in Hungarian law is established in Section 231(2) of the Civil Code. Pursuant to this provision, debts determined in another currency will be converted on the basis of the rate of exchange (price) applied at the place and on the date of the payment; this rate is not the buying, selling or median rate of exchange applied by the bank, but the official exchange rate published by the Magyar Nemzeti Bank (Hungarian National Bank). At the time of establishing the relevant provisions in 1959, no other exchange rates within exchange control existed in Hungary. The 'rate of exchange ... applied at the place ... of the payment' is the exchange rate that applies for the territory of Hungary, and

this condition is only met by the official exchange rate established by the Hungarian National Bank. This interpretation of the Kúria is confirmed by Section 11(1) of Act LVIII of 2001 on the Hungarian National Bank, as well as by Section 10(1) of Act CCVIII of 2011 and Section 22(1) of Act CXXXIX of 2013. The Acts referred to contain, although with different periods of validity, the same provision, according to which the Hungarian National Bank quotes and publishes the official exchange rates to convert foreign currency to HUF and HUF to foreign currency. The Kúria refers to Section 6:45 of Act V of 2013 on the Civil Code (new Civil Code), in force from 15th March 2014, which provision, although not applicable to decide on the lawsuit at issue, may serve as guidance for the legal interpretation. According to Section 6:45(2) of the new Civil Code, 'a pecuniary debt denominated in another currency shall be converted at the exchange rate set at the time of performance by the central bank of the place of performance; in the absence of such, at the money market rate'. Section 200/A of Act CXII of 1996 on credit institutions and financial enterprises, as amended by Section 1 of Act XCVI of 2010 on the amendment of certain finance-related acts in order to support consumers in difficult situations due to taking loans for house purchase, in force since 27th November 2010, cannot be considered as a dispositive rule of Hungarian law. This is a mandatory legal provision containing an option, which is only applicable to consumer loan agreements for house purchase, and is applicable only from the date established in Section 234/A(1) of Act XCVI of 2010; furthermore, it overwrote the contractual terms on the application of exchange rates different in nature exclusively in relation to contracts falling under the scope of this Section and only from the date established in it.

The rule established in Section 231(2) of the Civil Code, providing for the conversion according to the official exchange rate of the Hungarian National Bank, is a supplementary provision, which becomes a term of the contract in the event the conversion rate is not fixed in the contract, or if the terms of the conversion rate are found invalid, pursuant to the last sentence of Section 205(2) of the Civil Code. According to this provision, the parties need not agree on issues that are regulated by statutory provisions.

On the grounds of the judgment of the CJEU – binding on the chamber of the Kúria ruling on the present case as referring court –, as well as from the foregoing analysis, the Kúria concludes that the

ruling courts erred only in one point, namely that the invalidity of the contractual terms that they had correctly found unfair had been eliminated by altering the contract. The Kúria therefore set the final judgment aside pursuant to Section 275(4) of the Code of Civil Procedure, and amended the judgment of the court of first instance in a way that the rulings of the judgment, ordering the application of exchange rates of an identical nature instead of exchange rates different in nature, is brought in accordance with the statements made by the CJEU in its judgment C-26/13. The Kúria, without altering the contractual terms - in accordance with the judgment of the CJEU - could enforce the fair contractual terms instead of the contractual terms proved to be unfair, only in that way, beyond declaring the selling exchange rate unfair, it also declared the invalidity of the contractual term on the application of the buying exchange rate. Thereby ensuring that the invalid contractual terms shall be replaced by the supplementary provisions of the Civil Code, which guarantee the application of exchange rates of an identical nature. The solution proposed by the Kúria is the only one that can ensure that the exchange rates of an identical nature, as interpreted clearly by the CJEU, shall prevail in compliance with European Union law.

According to the explanations above, the content of the contract shall read:

Second sentence of point I.1:

'The amount of the loan in foreign currency will be determined at the official rate for the foreign currency applied by the Hungarian National Bank on the date of advancing the funds, of which the Debtors shall be informed by the lender in the disbursement notification'.

The provisions of point III.2:

'The lender is to determine the amount in HUF of each of the monthly instalments due by reference to the official rate of exchange for the foreign currency applied by the Hungarian National Bank on the day before the due date.

The Lender shall inform the Debtors in the disbursement notification of the amount of the foreign currency determined at the official rate for the foreign currency applied by the Hungarian National Bank on the date of repayment of the first instalment.

The Lender may alter each month the amount of the monthly instalment to be paid by the Debtors, if the official rate for the foreign currency applied by the Hungarian National Bank changes, or if the annual percentage rate is modified due to the announcement, taking into consideration the modified percentage and the residual term'.

If the contract contains further provisions mentioning the buying or selling exchange rate applied by the bank, it shall be understood as the official rate of exchange applied by the Hungarian National Bank.

As the application for review lodged by the second defendant did not lead to the intended outcome, the decision of the Kúria does not affect the rate of success and loss. Therefore the Kúria, applying Section 78(1) of the Code of Civil Procedure, applicable pursuant to Section 270(1) of the Code of Civil Procedure, ordered the second defendant to pay the applicants costs incurred in the review process. The amount of the costs were determined pursuant to Section 3(3) and (5) of Order No. 32/2003 (VIII.22.) of the Ministry of Justice on the determination of lawyers' costs in court proceedings.

Budapest, 3rd June 2014

Dr. Ursula Vezekényi (signed), President of the Chamber, Dr. András Osztovits (signed), Judge Rapporteur, Dr. Judit Török (signed), Judge, Dr. Ágnes Pethőné Kovács (signed), Judge, Dr. Andrea Csőke (signed), Judge