OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 14 May 2009 [1]

I — Introduction

1. In the present reference for a preliminary ruling, the Juzgado de Primera Instancia No 4 de Bilbao (Court of First Instance No 4, Bilbao) ('the referring court') has asked the Court of Justice a question on the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. [2]

2. Specifically, the question is whether, in order for the purpose of the directive, which is to protect consumers, to be attained, the national court hearing an action for enforcement must determine of its own motion whether an arbitration agreement is void and accordingly annul the award if it finds that that arbitration agreement contains an unfair term to the detriment of the consumer.

1 — Original language: German.
2 — OJ 1993 L 95, p. 29.

II — Legislative framework

A — *Community law*

3. Article 3(1) of Directive 93/13 provides as follows:

'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.'

4. Article 6(1) of that directive states as follows:

'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.'

5. Article 7(1) of the directive provides as follows:

'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.'

6. The annex to the directive contains an indicative list of the terms which may be regarded as unfair. Point 1(q) of the annex mentions terms which have the object or effect of 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract'.

B — *National law*

7. Under Spanish law, consumers were initially protected against unfair terms by Ley General 26/1984 para la Defensa de los Consumidores y Usuarios (General Law 26/1984 for the protection of consumers and users) of 19 July 1984, Boletín Oficial del Estado (Official State Gazette) (BOE) No 176 of 24 July 1984 ('Law 26/1984').

8. Law 26/1984 was amended by Ley 7/1998 sobre Condiciones Generales de la Contratación (Law 7/1998 on general contractual conditions) of 13 April 1998 (BOE No 89 of 14 April 1998) ('Law 7/1998'), which transposed the directive into national law.

9. In particular, Law 7/1998 added to Law 26/1984 an Article 10a, paragraph 1 of which provides as follows:

'All those terms not individually negotiated which, contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, shall be regarded as unfair terms. In any event, the terms listed in the first

additional provision to this Law shall be regarded as unfair.

…'

10. Article 8 of Law 7/1998 provides as follows:

'1. General conditions which infringe the provisions of this Law or any other rule ordering or prohibiting certain conduct, to the detriment of a party to the contract, shall automatically be void, save in so far as they make separate provision for cases of breach.

2. In particular, general terms which are unfair, where the contract has been concluded with a consumer as defined in any event in Article 10a and the first additional provision of Law 26/1984 … shall be void.'

11. At the time of the facts in the main proceedings, arbitration proceedings were governed by Ley 60/2003 de Arbitraje (Law 60/2003 on arbitration) of 23 December 2003 (BOE No 309 of 26 December 2003) ('Law 60/2003').

12. Article 8(4) and (5) of Law 60/2003 is worded as follows:

'4. The court of first instance of the place in which the award was made shall have jurisdiction to hear an action for enforcement of the award in accordance with Article 545(2) of the Code of Civil Procedure …

5. An action for annulment of an arbitration award shall be brought before the Audiencia Provincial [Provincial Court] of the place in which that award was made.'

13. Article 22 of Law 60/2003 provides as follows:

'1. Arbitrators shall have jurisdiction to rule in matters falling within their own competence, including pleas relating to the existence or validity of arbitration agreements or any plea which, if upheld, would preclude an examination of the substance of the dispute. For that purpose, an arbitration agreement in a contract shall be regarded as a separate agreement, distinct from the other terms and conditions of the contract. Where it is decided by the arbitrators that the contract is void, the arbitration agreement shall not automatically be void.

2. The pleas referred to in paragraph 1 must be raised no later than in the statement of defence, and the fact that a party has appointed or participated in the appointment of the arbitrators shall not preclude it from raising such pleas. A plea alleging that the arbitrators do not have competence to adjudicate on the question at issue must be raised as soon as the question which is alleged to be beyond their competence is raised in the arbitration proceedings.'

14. Article 40 of Law 60/2003 states as follows:

'A final award can be challenged in an action for annulment in accordance with the provisions laid down in this title.'

15. Article 41(1) of Law 60/2003 contains the following provisions:

'An award may be annulled only where the party seeking annulment claims and proves that:

(a) the arbitration agreement does not exist or is invalid;

(b) he was not duly notified of the appointment of an arbitrator or of the arbitration proceedings, or that, for any other reason, he has been unable to exercise his rights;

…

(f) the award is contrary to public policy.'

16. Article 43 of Law 60/2003 states as follows:

'A final award shall have the effect of *res judicata* and any appeal against that award shall lie only on a point of law, in accordance with the provisions of the Ley de Enjuiciamiento Civil (Code of Civil Procedure) applicable to final decisions.'

17. Under Article 44 of Law 60/2003, the enforcement of awards is governed by the provisions laid down in the Code of Civil Procedure and Title VIII of that law.

18. Article 517(2)(2) of Law 1/2000 of 7 January 2000 on Civil Procedure (BOE No 7 of 8 January 2000) ('Law 1/2000') provides that arbitration awards or decisions are enforceable.

19. Article 556(1) of Law 1/2000 lays down the right of the party against whom enforcement is sought to challenge enforcement within ten days following the date of notification of the enforcement order.

20. Article 559(1) of Law 1/2000 sets out a number of procedural irregularities on the basis of which the party against whom enforcement is sought may challenge enforcement.

III — Facts, main proceedings and the question referred

21. María Cristina Rodríguez Nogueira ('the party against whom enforcement is sought') concluded with the operator Asturcom Telecomunicaciones SL ('Asturcom') a contract for mobile telephones for individuals on 24 May 2004. That contract contained an arbitration clause under which any dispute relating to the performance of the contract was to be referred to arbitration to the Asociación Europea de Arbitraje de Derecho y Equidad (European Association of Arbitration in Law and in Equity) ('AEADE').

22. In the contract, the party against whom enforcement is sought undertook, inter alia, to maintain her subscription for a period of 18 months from the effective date of commencement of the service and to spend a minimum of EUR 6 per line. She also undertook not to vary the terms agreed with the operator. She agreed to pay the bills and not to cancel any other lines rented from the same operator. It was also stipulated that if the customer was in breach of the contract, she would pay the operator the sum of EUR 300 per line rented. Where necessary, that sum would be claimed in relevant proceedings.

23. Since the party against whom enforcement is sought failed to pay a number of telephone bills and terminated the contract before the end of the minimum subscription period, on 16 February 200[5] Asturcom initiated arbitration proceedings before the AEADE in Bilbao, claiming that she was in breach of the contract.

24. By award of 14 April 2005, the party against whom enforcement is sought was ordered to pay a sum of EUR 669.60. Since she did not bring an action to have the award declared void, the award became final.

25. On 29 October 2007 Asturcom lodged an application for enforcement of the award against Cristina Rodríguez Nogueira, for the purpose of recovering the abovementioned sum, together with EUR 300 interest and costs.

26. In its order for reference, the referring court first sets out the grounds on which it considers the arbitration agreement in the contract to be unfair. It refers, inter alia, to the fact that the association entrusted with arbitration itself draws up the mobile telephone contracts, that the arbitration agreement does not specify in which city the seat of arbitration is located or provide for a choice between a number of cities, and that the cost of travelling to the seat of arbitration is greater than the debt at issue in the main proceedings.

27. Nevertheless, the referring court explains that the Spanish legislation governing arbitration neither requires nor permits arbitration tribunals to examine arbitration agreements of their own motion and to annul clauses which are void or unfair.

28. The referring court has doubts as to the compatibility of those procedural rules with Community law. It has therefore stayed the proceedings in order to refer the following question to the Court of Justice for a preliminary ruling:

'In order that the protection given to consumers by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts should be guaranteed, is it necessary for the court hearing an action for enforcement of a final arbitration award, made in the absence of the consumer, to determine of its own motion whether the arbitration agreement is void and, accordingly, to annul the award if it finds that the arbitration agreement contains an unfair arbitration clause that is to the detriment of the consumer?'

IV — Procedure before the Court

29. The order for reference of 29 January 2008 was lodged at the Registry of the Court of Justice on 5 February 2008.

30. Written observations were submitted by Asturcom, the Governments of the Kingdom of Spain and the Republic of Hungary and by the Commission within the period laid down

in Article 23 of the Statute of the Court of Justice.

31. As none of the parties applied for the oral procedure to be opened, it was possible to prepare the Opinion in this case after the general meeting of the Court on 10 February 2009.

V — Main arguments of the parties

32. *Asturcom* proposes that the question asked by the referring court be answered in the negative. It points out that, even though the Spanish legal order does not expressly grant the national court any such power, the national court is nevertheless entitled, in accordance with the judgment in *Mostaza Claro*, [3] to review of its own motion whether an arbitration clause is void in an action for annulment. The national legislation is therefore consistent with the requirements laid down by Community law with regard to the protection of consumers against unfair terms.

33. Asturcom also points out that the case-law of the Spanish Tribunal Constitucional (Constitutional Court) treats arbitration awards and judicial decisions in the same way, with the result that if — as in the main proceedings — an arbitration award is not challenged within two months of its notification, it acquires the force of *res judicata*, in the same way\ as an unchallengeable and enforceable court judgment. Consequently, a court hearing an action for enforcement in respect of an unchallengeable arbitration award may not assess, *ab initio* and of its own motion, whether an arbitration agreement is valid or void, and thus refuse an enforcement order, as the Audiencia Provincial de Madrid has made clear in its rulings.

34. Such an interpretation not only makes it possible to observe the principle of legal certainty, since the award has the force of *res judicata*, but is also compatible with the abovementioned judgment in *Mostaza Claro*, which recognises the national court's power to determine whether an unfair arbitration clause is void only in an action for annulment of an arbitration ruling which is not yet final.

35. The *Hungarian* and the *Spanish Governments*, on the other hand, suggest that the Court recognise that the national court hearing an action for enforcement of a final arbitration award has jurisdiction to determine whether an arbitration agreement is void. They essentially put forward the same arguments, in particular with regard to the possibility of the *mutatis mutandis* application of the principles developed in case-law.

3 — Case C-168/05 [2006] ECR I-10421.

36. The *Hungarian Government* argues, in particular, that it is clear from the Court's case-law that the reasons of public interest underlying the protective purpose of the directive, specifically require the national court to determine whether a term in a consumer contract is unfair, especially in a case such as that in the main proceedings.

37. The *Spanish Government* essentially reaches the same conclusion, while at the same time providing some clarification as to national procedural law.

38. For example, it points out that there is no incompatibility between the national legal order of the Member States and the Community legal order with regard to protection of consumers against unfair terms. Under the relevant Spanish rules, the validity of an arbitration clause can and must be examined as a matter of public policy, not only by the court hearing the main action, but also by the court responsible for enforcement, irrespective of whether the party concerned has appeared before the arbitration tribunal or the court responsible for enforcement and irrespective of whether that party has initiated proceedings.

39. According to the Spanish Government, several judicial decisions in Spain, including a judgment of the Audiencia Nacional of 9 May 2005, have recognised that the national court has jurisdiction to review an arbitration award which it is called upon to enforce, in particular for reasons of public policy, even where neither of the parties has made such a request.

40. Therefore, upon a proper implementation of the principle of consumer protection and a broad interpretation of the notion of public policy, the national court responsible for enforcement must be able to determine of its own motion whether an arbitration agreement is valid and to annul the arbitration award if it finds that the arbitration agreement contains an unfair term.

41. The *Commission* first of all highlights certain differences between the facts in the present case and the situation in *Mostaza Claro*. First, the consumer in the present case took no step to become involved in the proceedings and, secondly, the question of whether the arbitration clause is unfair has been raised not in an action for annulment of the award, but in enforcement proceedings. The Commission also acknowledges that the powers of review enjoyed by the court responsible for enforcement are more limited, in principle, than those of a court hearing an action for annulment.

42. Nevertheless, the Commission argues that the importance of the aims pursued by the directive makes it necessary, exceptionally, for the court responsible for enforcement to have the power to determine of its own motion whether an arbitration clause is unfair and, if appropriate, to annul it. In cases such as that in the main proceedings, in which the consumer has not taken legal action to challenge the arbitration award, the court responsible for enforcement is the only impartial body, since it has no personal interest at all in maintaining the arbitration clause, an attribute which qualifies it to review the validity of that clause.

43. Lastly, the Commission gives its view on the question raised by the referring court as to whether the national court has not only a power but also a duty to examine of its own motion whether an arbitration clause is unfair. Relying on paragraph 38 and the operative part of the judgment in *Mostaza Claro*, it concludes that the national court has such a duty.

VI — Legal assessment

A — *Introductory remarks*

44. According to the definition contained in Article 3 of Directive 93/13, an unfair term is a term which the economically stronger party draws up unilaterally in advance and imposes on the other party, who is not able to influence the substance of the term. What essentially distinguishes an unfair term according to Article 3(1) is that, 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. [4]

45. The problem of unfair terms in consumer contracts was familiar long before Directive 93/13 entered into force. In a growing service-oriented consumer society such as Europe, the use of standard contracts, whose individual terms are no longer individually negotiated by the parties, had inevitably become increasingly widespread. The danger of using such contractual terms which have been unilaterally drawn up in advance lies in the failure to take into account or the insufficient attention paid to the interests of the the other party to the contract. [5]

4 — Kohles, S., *Das Recht der vorformulierten Vertragsbedingungen in Spanien — Die Umsetzung der Richtlinie 93/13/EWG über missbräuchliche Klauseln in Verbraucherverträgen*, Frankfurt am Main 2004, p. 56.

5 — Baier, K., *Europäische Verbraucherverträge und missbräuchliche Klauseln — Die Umsetzung der Richtlinie 93/13/EWG über missbräuchliche Klauseln in Verbraucherverträgen in Deutschland, Italien, England und Frankreich*, Hamburg 2004, p. 2.

46. Directive 93/13 is intended to redress this situation through a partial harmonisation of Member States' national consumer protection measures. [6] Its aim is to guarantee uniform minimum protection against unfair terms in consumer contracts in the Member States of the Community. The key provisions of the directive are, first, Article 6(1), under which Member States must lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier are not to be 'binding on the consumer'. Secondly, Article 7(1) provides that Member States must 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'.

47. From the point of view of legal doctrine, Articles 6 and 7 of Directive 93/13 are binding provisions of secondary law on consumer protection, the consequence of which is that contractual freedom, the principle expression of autonomy in private law, is restricted. [7]

B — *The power of national courts and tribunals to review unfair terms according to the Court's case-law*

48. In the judgments in *Océano*, [8] *Cofidis*, [9] and *Mostaza Claro*, [10] the Court interpreted those provisions and gave them a significance which enables the national court, in the exercise of its functions, to take effective action against unfair terms. The present case must be considered against the background of those judgments. It must therefore be examined below to what extent the principles

6 — Like Directive 85/577/EEC on contracts negotiated away from business premises, Directive 97/7/EC on distance contracts and Directive 1999/44/EC on the sale of consumer goods and associated guarantees, Directive 93/13 is also based on a minimum harmonisation approach. The Commission Proposal for a Directive of the European Parliament and of the Council on consumer rights of 8 October 2008, COM(2008) 614 final, which merges those four directives into a single horizontal instrument, expressly moves away from that approach. The draft directive now embraces a full harmonisation approach, with the result that Member States cannot maintain or adopt provisions diverging from those laid down in the directive. The purpose of the proposal is to contribute to the proper functioning of the business-to-consumer internal market and achieve a high common level of consumer protection by fully harmonising the key aspects of consumer contract law which are relevant for the internal market.

7 — With regard to the restriction of contractual freedom as a result of Community acts, see Basedow, J., 'Die Europäische Union zwischen Marktfreiheit und Überregulierung — Das Schicksal der Vertragsfreiheit', *Sonderdruck aus Bitburger Gespräche Jahrbuch 2008/I*, Munich 2009. In the view of the author, secondary Community law is predominantly binding in so far as it relates to private contracts. The vast majority of the rules restrict contractual freedom, and only a few expressly refer to the possibility for the parties to regulate certain matters by way of contract. According to legal commentators, contractual freedom is seen as the principle expression of autonomy in private law and thus as a guarantee of individual rights. For a comparative law perspective on autonomy in private law, see as regards German law, Larenz, K., Wolf, M., *Allgemeiner Teil des bürgerlichen Rechts*, 9th edition, Munich 2004, paragraph 2, as regards Austrian law Koziol, H., Welser, R., *Grundriss des bürgerlichen Rechts. Band I: Allgemeiner Teil — Sachenrecht — Familienrecht*, 11th edition, Vienna 2000, p. 84, as regards French law Aubert, J.-L., Savaux, É., *Les obligations. 1. Acte juridique*, 12th edition, Paris 2006, p. 72, paragraph 99, and, as regards Spanish law, Díez-Picazo, L./Gullón, A., *Sistema de derecho civil*, Vol. I, 10th edition, Madrid 2002, p. 369 et seq. Díez-Picazo and Gullón state that autonomy in private law is restricted, from a legal point of view, by mandatory rules and rules of public policy.

8 — Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941.

9 — Case C-473/00 [2002] ECR I-10875.

10 — Cited in footnote 3.

developed in those judgments may be applied to the present case in the light of the common features of the different cases.

49. Regard must be had first of all to the principles developed in case-law on the basis of which the present case must then be examined.

50. The starting point for the Court's considerations in interpreting Articles 6 and 7 of Directive 93/13 was the fact that the system of protection introduced by the directive is based on the idea that 'the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms'. [11] The Court concluded from this that 'the imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract'. [12]

51. The Court also found that the national court's power to determine of its own motion whether a term is unfair must be regarded as constituting a proper means of achieving the result sought by Article 6 of the directive, namely preventing an individual consumer from being bound by an unfair term. It also regarded this power held by the national court as a proper means of contributing to achieving the aim of Article 7, since if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers. [13] The Court also held that the power to determine of its own motion whether a term is unfair must be regarded as necessary for the purpose of achieving effective consumer protection, especially since there is a real risk that the consumer, particularly because of a lack of awareness, will not challenge the term pleaded against him on the ground that it is unfair.

52. On the basis of the above considerations, the Court ruled in *Océano* [14] that the protection provided for consumers by Directive 93/13 entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts.

11 — *Océano*, cited in footnote 8, paragraph 25, and *Mostaza Claro*, cited in footnote 3, paragraph 25.

12 — *Océano*, cited in footnote 8, paragraph 27, and *Mostaza Claro*, cited in footnote 3, paragraph 26.

13 — *Océano*, cited in footnote 8, paragraph 28; *Cofidis*, cited in footnote 9, paragraph 32; and *Mostaza Claro*, cited in footnote 3, paragraph 27.

14 — Cited in footnote 8, paragraph 29.

53. In *Cofidis*, [15] the Court further clarified its case-law to the effect that the power of a national court to find, of its own motion or following a plea raised by the consumer, that a term of the contract is void cannot be made subject to provisions requiring observance of a limitation period.

54. Lastly, in *Mostaza Claro*, [16] the Court ruled that a national court seised of an action for annulment of an arbitration award may determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment.

55. The Court based its decision on the ground that the result sought by Article 6 of the directive could not be achieved if the court seised of an action for annulment of an arbitration award was unable to determine whether that award was void solely because the consumer did not plead the invalidity of the arbitration agreement in the course of the arbitration proceedings. [17] Such an omission by the consumer could not then, under any circumstances, be compensated for by action on the part of persons not party to the contract. In the view of the Court, the regime of special protection established by the directive would be definitively undermined. [18]

C — *Analysis of the question referred*

1. The power of review of the court responsible for enforcement

56. Like the *Mostaza Claro* case, the present case concerns an arbitration clause which the referring court considers to be unfair. [19] According to the Court's case-law, it is for the national court to determine whether a contractual term satisfies the requirements for it to be regarded as unfair under Article 3(1) of Directive 93/13. [20] In the view of the referring court, the arbitration clause at issue impedes Mrs Rodríguez Nogueira from exercising her rights of defence and from taking legal action or exercising any other legal remedy, which suggests that it falls within Article 3(3) of the directive, in conjunction with paragraph 1(q) of the Annex.

15 — Cited in footnote 9, paragraph 38.
16 — Cited in footnote 3, paragraph 39.
17 — Ibid., paragraph 30.
18 — Ibid., paragraph 31.
19 — See page 9 of the order for reference.
20 — See Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, paragraph 22, and *Mostaza Claro*, cited in footnote 3, paragraph 23.

57. However, the present case differs from *Mostaza Claro* in that Mrs Rodríguez Nogueira did not appear before the arbitration tribunal or bring an action for annulment of the arbitration award. Unlike in the *Mostaza Claro* case, the question therefore arises whether the national court may determine whether a term is unfair in the course of enforcement proceedings. A further difference lies in the fact that in *Mostaza Claro* the consumers relied expressly on the unfair nature of the arbitration clause at issue, whereas in the present case the referring court is asking whether the question whether such a clause is unfair must also be examined of its own motion by the court hearing an action for enforcement.

58. With the exception of Asturcom, all the parties take the view that the national court must also have the power in enforcement proceedings to determine of its own motion whether an arbitration clause is unfair and to annul that clause. That view is correct.

59. In my opinion, that interpretation takes best account of the aim of Directive 93/13, which is to protect consumers. It is also consistent with the wording of Article 7(1) of Directive 93/13, which expressly calls on the Member States to employ 'adequate and effective means' to protect consumers against the use of unfair terms. The need for national implementing measures to be effective — a point emphasised by the Community legislature — is of particular importance for the purpose of legal assessment of the question referred for a preliminary ruling. Lastly, that interpretation is in keeping with the consistent case-law of the Court, which requires the Member States, in implementing directives, effectively to guarantee the rights of individuals, if the directive grants such rights. [21]

60. This is certainly not inconsistent with the institutional and procedural autonomy enjoyed by the Member States. The Court has consistently held that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law. [22]

21 — See Case 103/88 *Fratelli Constanzo* [1989] ECR 1839, paragraph 29 et seq., and Case C-208/90 *Emmott* [1991] ECR I-4269 paragraph 20 et seq. See also Schroeder, W., *EUV/EGV — Kommentar* (ed. Rudolf Streinz), Article 249, paragraph 96, p. 2183. With regard to the Member States' duty to ensure the effectiveness (*effet utile*) of a directive when transposing it into national law, see Case 48/75 *Royer* [1976] ECR 497.

22 — See, to that effect, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraph 13; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29; Case C-13/01 *Safalero* [2003] ECR I-8679, paragraph 49; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 39; Joined Cases C-222/05 to C-225/05 *Van der Weerd and Others* [2007] ECR I-4233, paragraph 28; and Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 57.

61. This is to be seen in the light of the fact that, according to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union, [23] proclaimed on 7 December 2000 in Nice. [24] In addition, according to the settled case-law of the Court, the right to be heard must be guaranteed 'in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person', [25] and thus also in arbitration proceedings. [26]

62. In the legal systems of the Member States, the purpose of enforcement proceedings is not, generally, to carry out a substantive examination of an arbitration award, but simply to enforce it. The possibility for the party against whom enforcement is sought to rely on substantive pleas against an enforcement order is, as a rule, also limited under the Member States' laws on enforcement and is available only if specific conditions are satisfied. [27] Nevertheless, in my opinion, it is necessary to accord the national court a power of review along these lines also in enforcement proceedings, if the aim of Directive 93/13, which is to protect consumers, is not to be frustrated. [28]

63. An interpretation to the contrary would mean that the unfair nature of a contractual term would prevail definitively and irrevocably, to the detriment of the consumer. This would create a legal situation which the Community legislature sought to avoid at all costs, given the special importance attached

23 — OJ 2000 C 364, p. 1.

24 — Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 18 and 19; Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 14; Case C-424/99 *Commission* v *Austria* [2001] ECR I-9285, paragraph 45; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39; and Case C-467/01 *Eribrand* [2003] ECR I-6471, paragraph 61.

25 — See Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, paragraph 39, and Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21.

26 — See point 59 of the Opinion of Advocate General Tizzano in Case C-168/05 *Mostaza Claro* (judgment cited in footnote 3).

27 — The body responsible for enforcement will generally adhere to the instrument for enforcement and not itself examine whether the enforceable claim exists, as that decision rests with the court seised of the dispute (see Béguin, J./Ortscheidt, J./Seraglini, C. 'La convention d'arbitrage', *La Semaine juridique — Édition Générale*, June 2007, No 26, p. 17). Some legal systems may provide for exceptions, in the case of performance and deferment, if the party against whom enforcement is sought is able to furnish documentary proof. In principle, the party against whom enforcement is sought has legal remedies available by which he can challenge procedural errors on the part of the body responsible for enforcement. Depending on the legal system, he has available to him forms of action by which he can raise substantive pleas against enforcement (see Schellhammer, K., *Zivilprozess*, 10th edition, Heidelberg 2003, p. 109 et seq., paragraphs 219 and 223; Lackmann, R., *Zwangsvollstreckungsrecht mit Grundzügen des Insolvenzrechts*, 6th edition, Munich 2003, p. 80, paragraph 210).

28 — See also Jordans, R.,'Anmerkung zu EuGH Rs. C-168/05 — Elisa Maria Mostaza Claro gegen Centro Móvil Milenium SL', *Zeitschrift für Gemeinschaftsprivatrecht*, 2007, p. 50. Although complaints which may be raised in arbitration proceedings are precluded in principle in proceedings for the recognition and enforcement of the arbitration award, the author takes the view that exceptions are conceivable if there is a breach of public policy.

to the protection of the economic interests of consumers.

64. The circumstances of the present case provide a particularly striking demonstration of the fact that it would be incompatible with Directive 93/13 for the court responsible for enforcement to be deprived of such a power of review. In such a case, in order to be spared the negative consequences of a void contractual term, the consumer would really have to challenge the term in question before the enforcement proceedings, that is to say in the preceding proceedings. In the present case, Mrs Rodríguez Nogueira, as the party against whom enforcement is sought, would have had to take part in the arbitration proceedings, the very lawfulness of which is questioned by the referring court. In other words, national law would expect the consumer to take part in invalid proceedings in order to be able to have the contract annulled. Such an outcome would be unacceptable and shows that the court responsible for enforcement must have an appropriate power of review.

65. Furthermore, as the Court has held, in order for the objective of the directive to be attained, the imbalance between the consumer and the seller or supplier must be corrected by positive action unconnected with the actual parties to the contract. [29] According to the referring court, the Spanish legislation governing arbitration neither requires nor permits arbitration tribunals to examine arbitration clauses of their own motion and annul those which are void or unfair. [30]

66. However, even if arbitrators were required or permitted to do so, serious doubts would remain as to whether an arbitrator can always be regarded as independent and neutral, especially since an arbitrator may possibly have a personal interest in maintaining the arbitration clause on which he is required to adjudicate. The Commission correctly draws attention to that point. [31] This is true, for example, in a situation such as that in the main proceedings, where the arbitration agreement has been drafted by the same association which is entrusted with the arbitration proceedings. Consequently, the assessment of whether an unfair arbitration clause is void may not be given over to the arbitrator alone. Rather, this task must be the responsibility of a court, which fully guarantees the judicial impartiality required in a State governed by the rule of law.

67. If, however, the person concerned does not bring an action for annulment of the arbitration award, which is a plausible assumption, particularly in view of the frequent lack of business experience among consumers, [32] and if that award thus becomes final, the court hearing an action for enforcement will generally be the one and only

29 — See point 50 of this Opinion.

30 — See page 9 of the order for reference.

31 — See paragraph 37 of the Commission's pleading. Picó i Junoy, J., 'El abuso del arbitraje por parte de ciertas instituciones arbitrales', *Diario La Ley*, Year XXVI, No 6198, also refers to the risk of partiality on the part of an arbitration tribunal. The author sees this as an exceptional ground of refusal of an application for enforcement, provided there is evidence of partiality.

32 — See point 51 of this Opinion.

judicial body with the power to assess whether a contractual term is lawful. [33] It is therefore logical for the Community legal order to recognise that the court responsible for enforcement should have that power, specifically in view of its unique position. It is for the Member States to ensure that the court responsible for enforcement has the necessary procedural powers to reject an application for enforcement and to annul the arbitration award.

68. One of the grounds on which an action for enforcement may be rejected may in principle be the need to protect a Member State's public policy. Provision is made in this regard in international law in Article 5(2)(a) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards [34] and in Article 29(2) of the 1966 Council of Europe Convention providing a Uniform Law on Arbitration. [35] The legal systems of some European Union Member States have a similar provision. [36]

69. Spanish substantive law does not expressly confer jurisdiction on the court responsible for enforcement to assess of its own motion whether an arbitration clause is lawful. The referring court draws attention to that fact in its order for reference. The powers of review of a Spanish court responsible for enforcement are therefore limited, as is the case in most Community Member States, and tend to be orientated towards observance of the formalities of the enforcement proceedings. Nevertheless, it must be stated that in the last few years various Spanish courts entrusted with the enforcement of arbitration awards have rejected applications for en-

33 — See Picó i Junoy, J., loc. cit. (footnote 31).

34 — Available on the website of the United Nations Commission on International Trade Law (UNCITRAL) at http://www.uncitral.org. Article 5(2)(a) of the Convention provides as follows: 'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: … (b) The recognition or enforcement of the award would be contrary to the *public policy* of that country'. Picó i Junoy, J., loc. cit. (footnote 31), takes the view that Spanish law must be interpreted in the light of this provision of international law. The national court would therefore have to reject the application for enforcement and annul the award.

35 — Available on the Council of Europe website. Article 29 of the Convention provides as follows: '(1) An arbitral award may be enforced only when it can no longer be contested before arbitrators and when an enforcement formula has been apposed to it by the competent authority on the application of the interested party. (2) The competent authority shall refuse the application if the award or its enforcement is contrary to *ordre public* or if the dispute was not capable of settlement by arbitration'.

36 — In Germany the relevant provisions are contained in the Zivilprozessordnung (Code of Civil procedure) (ZPO). Under Paragraph 1060(1) of the ZPO, enforcement can be effected if the arbitration award is declared enforceable. Paragraph 1060(2) of the ZPO states that an application for enforcement must be rejected and the arbitration award annulled if one of the grounds for annulment set out in Paragraph 1059(2) is satisfied. Paragraph 1059(2)(2)(b) of the ZPO provides for a special ground for annulment. Thereunder, the award may be annulled if the court finds that the outcome of recognition or enforcement of the arbitration award is contrary to public policy. The grounds for annulment laid down in Paragraph 1059(2)(2) of the ZPO must be taken into consideration in enforcement proceedings — of the court's own motion (Senat, BGHZ 142, 204, 206) — even after the expiry of the time-limits prescribed for bringing annulment proceedings (Paragraph 1059(3) of the ZPO). In Belgium Article 1710(1) of the Code Judiciaire (Judicial Code) provides that the enforcement of an arbitration award may be ordered only by the President of the court of first instance upon application by the party concerned. Article 1710(3) provides that the President must reject the application if, inter alia, the award is contrary to public policy.

forcement on the ground that the awards in question were incompatible with public policy. [37] A substantial proportion of the case-law [38] and academic legal writing [39] in Spain appears to concur with this view. A more recent line of cases essentially reaches the same conclusion, the need for consumer protection being cited as the jurisdiction for the court responsible for enforcement having such powers. [40] Nevertheless, the legal situation in Spain does not yet appear to have been fully clarified, in the absence of clear rulings from the higher courts.

70. It would seem to me appropriate for the Community legal order to embrace a principle which is recognised not only in international law, but also in the legal orders of some European Union Member States, according to which the enforcement of an arbitration award which is contrary to public policy is prohibited, in the light of the fact that in *Mostaza Claro* the Court implicitly ranked Community-law consumer protection provisions as rules capable of being governed by considerations of public policy. [41] The Court concluded that the annulment of an arbitration award which infringed such a rule is justified.

71. As the Court made clear in that judgment, the mandatory provision laid down in Article 6(1) of Directive 93/13, under which unfair terms used in a contract concluded with a consumer by a seller or supplier must 'not be binding on the consumer', requires the national court to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier. [42] In addition, in the view of the Court, as the aim of Directive 93/13 is to strengthen consumer protection, it constitutes, in accordance with Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the Community

37 — See, for example, the orders of the Audiencia Provincial de Madrid (sección 14) of 28 July 2005 (rec. num. 302/2005) and of 29 July 2005 (rec. num. 155/2005).

38 — See the judgment of the Tribunal Supremo of 6 November 2007 (Judgment No 8/2007). The Tribunal Supremo states that the powers conferred on the court responsible for enforcement enabled it to review observance of the primacy of Community law and other grounds of public policy. However, the Tribunal Supremo did not refer to any legal provision in support of its legal view.

39 — See Picó i Junoy, J., loc. cit. (footnote 31), Lorca Navarrete, A. M., 'Los motivos de la denominada acción de anulación contra el laudo arbitral en la vigente ley de arbitraje', *Diario La Ley*, No 6005.

40 — See, for example, the orders of the Audiencia Provincial de Madrid (sección 21) of 10 June 2008 (rec. num. 694/2007), of 19 June 2007 and of 24 May 2007.

41 — *Mostaza Claro*, cited in footnote 3, paragraph 38. That is also the view taken in legal literature. See Jordans, R.,'Anmerkung zu EuGH Rs. C-168/05 — Elisa Maria Mostaza Claro gegen Centro Móvil Milenium SL', *Zeitschrift für Gemeinschaftsprivatrecht*, 2007, p. 50, which interprets the judgment to the effect that the Court regarded the unfair nature of the clause in question as being so serious that it was a matter of public policy. In the view of Loos, M.,'Case: ECJ — Mostaza Claro', *European Review of Contract Law*, 2007, Vol. 4, p. 443, the Court accorded the mandatory provisions of the directive on consumer protection the status of rules of public policy, as it had done previously in connection with the rules on competition. Poissonnier, G./Tricoit, J.-P., 'The CJEC confirms its intention that the national courts should implement Community consumer law', *Petites affiches*, September 2007, No 189, p. 15, observe that, unlike the Commission, the Court has not expressly classified Community consumer protection legislation as rules of public policy. Nevertheless, they take the view that the Court's arguments in that judgment may be interpreted in such a way. In the view of Courbe, P./Brière, C./Dionisi-Peyrusse, A./Jault-Seseke, F./Legros, C., 'Clause compromissoire et réglementation des clauses abusives: CJCE, 26 octobre 2006', *Petites affiches*, 2007, No 152, p. 14, this case-law of the Court of Justice elevates the consumer protection rules in Directive 93/13 to the status of rules of public policy.

42 — *Mostaza Claro*, cited in footnote 3, paragraph 38.

and, in particular, to raising the standard of living and the quality of life in its territory. [43]

72. I am well aware that this interpretation of Articles 6 and 7 of Directive 93/13 could ultimately amount to disregarding the principle of *res judicata* under the legal orders of some Member States, which necessarily raises the question as to how such an interpretation can be reconciled with the previous case-law of the Court of Justice on the authority to be accorded to legal acts and final national judgments which are contrary to Community law.

73. In its judgment in *Kapferer*, [44] the Court drew attention to the importance, both for the Community legal order and national legal systems, of the principle of *res judicata* and in so doing confirmed the principle that, in order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question. The Court also ruled, by reference to the judgment in *Eco Swiss*, [45] that the principle of cooperation under Article 10 EC does not require a national court to disapply domestic rules of procedure in order to review a judicial decision that has become final and to set it aside if that decision is contrary to Community law. [46]

74. Nevertheless, the Court resolved this tension between legal certainty and consumer protection by implicitly stating that the principle of *res judicata* was subject to the observance of the principles of equivalence and of effectiveness. By laying down the procedural rules for proceedings designed to ensure protection of the rights which individuals acquire through the direct effect of Community law, Member States must ensure that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and are not framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (principle of effectiveness). [47]

75. In the light of the above considerations, and above all in view of the need for effective consumer protection [48] and having regard to the case-law of the Court of Justice [49] which expressly requires positive action unconnected with the actual parties to the contract,

43 — Ibid., paragraph 37.
44 — Case C-234/04 [2006] ECR I-2585, paragraph 20.
45 — Case C-126/97 [1999] ECR I-3055, paragraphs 46 and 47.
46 — *Kapferer*, cited in footnote 44, paragraph 24.
47 — *Kapferer*, cited in footnote 44, paragraph 22.
48 — See point 59 of this Opinion.
49 — See point 50 of this Opinion.

I am convinced that it may be necessary, in exceptional cases, to disregard the principle of *res judicata.*

76. It follows that the national court must reject an application for enforcement of a final arbitration award made in the absence of the consumer and annul that award, if it finds that the arbitration agreement contains an unfair term to the detriment of the consumer. [50]

2. Duty of examination of the court responsible for enforcement

77. Although the question referred is not entirely clear in this respect, the referring court also appears to be asking the Court to answer the question whether the court responsible for enforcement is not only entitled but also obliged to determine of its own motion whether an arbitration clause is unfair.

78. In this regard it must be stated, first of all, that in both *Océano* [51] and *Cofidis* [52] the Court referred to the 'power' of the national court to determine of its own motion whether a term is unfair. Prima facie, this might suggest that the national court may determine whether a term is unfair, but is not required to do so. However, such an interpretation of those judgments would fail to take account of the fact that the Court's arguments centred on the aim of Directive 93/13, which is to protect consumers.

79. The Court attached particular importance to the fact that such a judicial examination could act as a deterrent and thus contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers. In my opinion, however,

50 — See also, to that effect, Azparren Lucas, A., 'Intervención judicial en el arbitraje — La apreciación de oficio de cláusulas abusivas y de la nulidad del convenio arbitral', *Diario La Ley*, Year XXVIII, No 6789, who comments on the *Mostaza Claro* judgment and takes the view that the answer to the question in present case should essentially be based on the same arguments as used in *Mostaza Claro*. In his view, the Court based that judgment on the principle of effectiveness, according to which the exercise of the rights conferred by the Community legal order must not be rendered excessively difficult.

51 — Cited in footnote 8, paragraph 25

52 — Cited in footnote 9, paragraphs 32, 33 and 35.

the desired deterrent effect of such an examination would be substantially diminished if it were left to the discretion of the court responsible for enforcement. On the other hand, the protection of consumers would be ensured, in accordance with the requirements of Community law, if the national court were legally required to conduct such an examination. [53]

80. This idea also appears to underlie the judgment in *Mostaza Claro*. In that judgment, the Court found that the importance of consumer protection within the Community legal order justifies 'the national court *being required* to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier'. [54]

81. Accordingly, the Court also held in that judgment that Directive 93/13 'must be interpreted as meaning that a national court seised of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment'. As has already been stated, the Court essentially based its ruling on the ground that Community-law consumer protection rules constitute rules of public policy. [55]

82. It therefore follows from the above considerations that Community imposes a duty of examination on the national court.

53 — See also, to that effect, Van Huffel, M., 'La condition procédurale des règles de protection des consommateurs: les enseignements des arrets Océano, Heininger et Cofidis de la Cour de Justice', *Revue européenne de droit de la consommation*, 2003, p. 97, who takes the view that the aims pursued by the Court of Justice could be achieved only if the national court were required to determine of its own motion whether a contractual term is unfair.

54 — *Mostaza Claro*, cited in footnote 3, paragraphs 35 to 38. See the different language versions of the judgment, such as the Spanish ('*deba* apreciar de oficio'), German ('von Amts wegen … prüfen *muss*'), French ('*soit tenu* d'apprécier d'office'), English ('*being required* to assess of its own motion'), Italian ('*sia tenuto* a valutare d'ufficio'), Dutch ('ambtshalve *dient* te beoordelen') and Portuguese ('*deva* apreciar oficiosamente').

55 — *Mostaza Claro*, cited in footnote 3, paragraph 39. This is also the interpretation adopted in legal literature. See Jordans, R., loc. cit. (footnote 41), and Poissonnier, G./Tricoit, J.-P., loc. cit. (footnote 41).

VII — Conclusion

83. In the light of the foregoing, I propose that the Court answer the question referred by the Juzgado de Primera Instancia No 4 de Bilbao as follows:

In order that the protection given to consumers by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts should be guaranteed, the court hearing an action for enforcement of a final arbitration award, made in the absence of the consumer, is required to determine of its own motion whether the arbitration agreement is void and, accordingly, to annul the award if the arbitration agreement contains an unfair term to the detriment of the consumer.