Reports of Cases

OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 6 December 2011 [1]

Case C-472/10

Nemzeti Fogyasztóvédelmi Hatóság
v
Invitel Távközlési Zrt.

(Reference for a preliminary ruling from the Pest Megyei Bíróság (Hungary))

(Consumer protection — Directive 93/13/EEC — Article 3(1) in combination with points 1(j) and 2(d) of the annex — Articles 6 and 7 — Unfair terms in consumer contracts — Contract term that entitles the seller or supplier to amend contractual provisions unilaterally without a valid reason and without explicitly describing the method by which prices vary — Unfair nature of the term — Legal effects of a finding that a term is unfair as a result of an action in the public interest — Actio popularis — Erga omnes effect of national findings of unfairness)

I – Introduction

1. This case stems from a reference for a preliminary ruling from the Pest Megyei Bíróság (Pest County Court, Hungary) (the 'referring court') under Article 267 TFEU, in which the latter referred a series of questions to the Court of Justice on the interpretation of Directive 93/13/EEC on unfair terms in consumer contracts. [2] It affords the Court an opportunity to clarify further legal questions in connection with this directive by exercising its powers of interpretation, for although the directive has remained largely unchanged since it was adopted, it still raises various legal issues as to both substance and procedure, as evidenced by the large number of references for a preliminary ruling. It should be noted in this connection that Directive 2011/83/EU on consumer rights, [3] which was adopted by the European Parliament and the Council on 25 October 2011 and which is based on the full harmonisation of national consumer protection provisions, made only minor amendments to Directive 93/13 that do not affect the resolution of the legal questions raised in the present case.

1 — Original language: German.
Language of the case: Hungarian.

2 — Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

3 — Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64). Since the directive was published in the *Official Journal of the European Union* on 22 November 2011, the Member States now have until 13 December 2013 to incorporate it into national law. Under Article 32 of this directive, which is inserted into Directive 93/13 as Article 8a, the Member States have an obligation to inform the Commission of the adoption of specific national provisions in certain fields, in particular as regards the extension of the scope of the unfairness assessment under Article 4(2) of Directive 93/13 and the introduction of national lists of contractual terms deemed unfair. The adoption of the directive on consumer rights coincides with the submission on 11 October 2011 of a Commission proposal for a regulation of the European Parliament and of the Council on a common European sales law (COM(2011) 635 final). This proposal provides for the European sales law to be applied optionally to cross-border sales contracts. Chapter 8 of the document (Articles 79 to 86 – 'Unfair contract terms') sets out provisions on unfair contract terms both between an entrepreneur and a consumer which broadly correspond to those of Directive 93/13, and between entrepreneurs (with regard to developments in the field of private consumer law, see Wendehorst, C., 'Auf dem Weg zu einem zeitgemäßen Verbraucherprivatrecht: Umsetzungskonzepte', *Neuordnung des Verbraucherprivatrechts in Europa? — Zum Vorschlag einer Richtlinie über Rechte der Verbraucher*, Vienna, 2009, p. 154 et seq., and in the field of international private law, see Ferrari, F., *Ein neues Internationales Vertragsrecht für Europa*, Gottmadingen, 2007, p. 57).

2. The reference for a preliminary ruling relates to a dispute between Nemzeti Fogyasztóvédelmi Hatóság (National Consumer Protection Office; 'the applicant' in the main proceedings) and the undertaking Invitel Távközlési Zrt. ('the defendant' in the main proceedings) about the effectiveness of a particular contract term that the defendant normally uses as part of the general business conditions ('GBC') in its contracts with customers and which give it the right to charge customers subsequently for certain costs and expenses for individual services, without the method of calculation being laid down in the contracts. The applicant, which concludes from this circumstance that the contract term is unfair, has applied to the referring court for a finding that the term in question is void and for refund of these costs and expenses.

3. The purpose of the first question from the referring court, which in fact is in two parts, is essentially to seek guidance from the Court on the way in which the system created by the European Union ('EU') legislature by means of Directive 93/13 to protect consumers must be organised in the Member States' legal systems in order to achieve that objective. The central question relates to the requirements that Directive 93/13 lays down for consumer protection organisations to bring legal proceedings themselves against unfair terms in the interest of consumers. Furthermore, the question is raised as to the legal effectiveness that a judgment of a national court in which a contract term is found to be unfair should have within the national legal system. The second question from the referring court differs thematically from those described above in that it relates to the possible classification of the disputed term as 'unfair' within the meaning of Directive 93/13.

II – Legislative framework

A – *EU law*

4. In accordance with Article 1(1), the purpose of Directive 93/13 is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.

5. Article 3 of the directive provides:

'1. 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.

...

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.'

6. Article 4 of the directive reads as follows:

'1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

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

7. Article 6(1) of the directive provides:

‘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.

8. Article 7 of the directive states that:

‘1. 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.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

3. With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.’

9. Article 8 of Directive 93/13 provides that:

‘Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.’

10. The annex to the directive contains the list of the terms which may be regarded as unfair in accordance with Article 3(3):

‘1. Terms which have the object or effect of:

...

(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;

...

(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

...

2. Scope of subparagraphs (g), (j) and (l)

...

(d) Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.’

B – *National law*

11. Under Article 209/A(2) of the Polgári Törvénykönyv (Hungarian Civil Code; 'the Civil Code') unfair standard contract terms which have become part of consumer contracts and standard terms laid down unilaterally by sellers or suppliers which cannot be negotiated individually are void.

12. Article 209/B(1) of the Civil Code provides that bodies designated in separate legislation may also apply to the court to have a standard contract term in consumer contracts declared invalid, pursuant to Article 209/A(2). The declaration of invalidity of the unfair term will have effects as regards all those who have concluded contracts with a person who applies such a term.

13. Article 209/B(2) of the Civil Code provides that bodies designated in separate legislation may also apply for a declaration of unfairness of a standard contract term that has been defined for consumer contracts and published, regardless of whether or not the term in question has in fact been applied. According to Article 209/B(3) the court, in its proceedings under Article 209/B(2), if it finds the contested contractual term or condition unfair, is to declare it invalid in the event of its future use in favour of all parties who conclude contracts with the person who has published the term in question. Following such judgment the user of the unfair term or condition is to satisfy any claim the consumers may have against him. The court's judgment may also contain a clause banning the party who published the term in question from the further use thereof.

14. Article 39(1) of 1997. évi CLV. törvény a fogyasztóvédelemről (Law CLV of 1997 on consumer protection; 'the Law on consumer protection') provides that the consumer protection authority, the non-governmental organisation for the protection of consumers' interests or the public prosecutor may bring proceedings against any party whose illegal activities affect a wide range of consumers or cause substantial disadvantage, in order to defend consumers or eliminate substantial disadvantage. Such an action may also be brought even if the identity of the injured consumers cannot be established.

15. Article 132(2)(c) of the 2003. évi C. törvény az elektronikus hírközlésről (Law C of 2003 on electronic communications; 'the Law on electronic communications') allows suppliers of services to amend contract conditions by unilateral decision if justified by substantial changes in circumstances. Article 132(4) of that law allows a supplier of services to determine unilaterally the cases in which it may modify the standard contract conditions after the contract is concluded. The legislature does not lay down the legal limits or the guarantee conditions of such a decision by the supplier of services.

16. Under Article 132(5) of the Law on electronic communications, subscribers are not entitled to cancel the contract if they have undertaken to use the services for a specific period of time, if they have concluded the contract in the light of the benefits stemming from such an undertaking and if the amendment does not affect the benefits received. In the view of the referring court, that legal provision governs, unilaterally and without grounds, the contractual rights and obligations of the parties to the detriment of the consumer, with almost no substantive limit, in breach of the requirements of good faith, fair practices in industry or commerce and assumption of risk.

III – Facts, main proceedings and questions referred for a preliminary ruling

17. According to the case-file, in 2008 the defendant in the main proceedings, a telecommunications undertaking providing fixed network services, inserted provisions into its GBC relating to the cost of payment by money order. These provide that if payment is made by money order the service provider is entitled to charge the associated additional costs to the subscriber. The GBC do not, however, state the way in which the costs of the money order are to be charged.

18. The applicant in the main proceedings subsequently received numerous complaints from consumers, which in its opinion indicate that the abovementioned provisions are unfair. It therefore asked the defendant in writing to amend its GBC accordingly, but the defendant flatly refused to do so.

19. In the action in the public interest brought before the referring court under Article 39(1) of the Hungarian Law on consumer protection, the applicant applies first for a finding that the term in question is unfair pursuant to Article 209/B(1) of the Civil Code and secondly for the immediate and retroactive refund of the amounts that the defendant received as a result of the unlawful charging of the cost of money orders.

20. The referring court has doubts about the interpretation of some provisions of Directive 93/13. It considers that an interpretation of those provisions by the Court of Justice is necessary in order to be able to resolve the dispute in the main proceedings. On that ground, it stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) May Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as meaning that an unfair contract term is not binding on any consumer where a body appointed by law and competent for that purpose seeks a declaration of the invalidity of that unfair term which has become part of a consumer contract on behalf of consumers in an action in the public interest (*actio popularis*)?

May Article 6(1) of Directive 93/13 be interpreted, where an order which benefits consumers who are not party to the proceedings is made, or the application of an unfair standard contract term is prohibited, in an action in the public interest, as meaning that an unfair term which has become part of a consumer contract is not binding on all consumers also as regards the future, so that the court has to apply the consequences in law thereof of its own motion?

(2) May Article 3(1) of Directive 93/13, in conjunction with points 1(j) and 2(d) of the annex applicable by virtue of Article 3(3) of that directive, be interpreted as meaning that, where a seller or supplier provides for a unilateral amendment of a contract term without explicitly describing the method by which prices vary or giving valid reasons in the contract, that contract term is unfair *ipso jure*?'

IV – Proceedings before the Court of Justice

21. The order for reference dated 25 August 2010 was received at the Registry of the Court of Justice on 29 September 2010.

22. Written observations were submitted by the applicant in the main proceedings, the Hungarian and Spanish Governments and the European Commission within the period laid down in Article 23 of the Statute of the Court of Justice.

23. As neither of the parties applied for the oral procedure to be opened, the Opinion on this case could be prepared after the plenary session of the Court on 7 September 2011.

V – Main arguments of the parties

A – *The first question*

24. The *Hungarian Government*, citing the case-law of the Court, points out that the collective measures laid down in Article 7 of Directive 93/13 are preventive in nature, in that their purpose is to prevent the use of unfair terms to the detriment of consumers. It asserts that actions in the public interest, to which Directive 2009/22 is also applicable, are intended to protect the common interests of

consumers, regardless of whether they are party to the proceedings or not. Consequently, according to the Hungarian Government, Article 6(1) and Article 7(2) of Directive 93/13 must be interpreted jointly as meaning that terms classified as unfair by the referring court are not binding on consumers and cannot be used in future.

25. On the one hand, according to the Hungarian Government, under Directive 93/13 the national court must rule a contract term to be unfair, if necessary of its own motion, and where appropriate order that it not be used, unless the consumer objects. On the other hand, it is for the national court to determine the consequences in law of a finding that a contract term is unfair in the context of an action for an injunction.

26. In the opinion of the *Spanish Government*, an unfair term is not binding on any consumer, nor will it be binding in the future, if an organisation competent in this regard brings an action for a finding that a contract term is void and the court seised accedes to that request. Moreover, it maintains that the national court is obliged of its own motion to apply the consequences in law arising from such a finding of unfairness and from a prohibition on use of the term in consumer contracts.

27. The *Commission* points out that the statement in Article 6(1) of Directive 93/13 that unfair terms are not binding on the consumer places an obligation on the Member States to achieve a particular result. The method of implementation must conform with the principles of equivalence and efficiency, as defined in the case-law of the Court.

28. As Article 7(1) of Directive 93/13 lays down no precise rules on the way in which the continued use of unfair terms should be prevented, in the view of the Commission the directive does not preclude the possibility that the consequences in law of a declaration that an unfair term is invalid in the context of an action for an injunction is not restricted to the parties to the action. The Commission maintains that the Hungarian legislation, which provides that such a declaration of invalidity applies to any person concluding a contract containing the term in question, contributes towards achieving the objective of the directive. It also states that Directive 93/13 does not preclude a national provision under which the national court is obliged to apply of its own motion the consequences in law stemming from a judgment, including one in favour of consumers who are not parties to the proceedings.

B – *The second question*

29. Both the *Hungarian Government* and the *Commission* state that Article 3 of Directive 93/13 lists in abstract terms all the characteristics that make a contract term unfair. Moreover, the annex to the directive contains a list of terms that may be deemed unfair. The mere fact that a particular term appears on that list does not necessarily mean that that term must also be classified as unfair. Rather, it is for the national court itself to make that judgment, taking into account the general criteria in that regard, which in turn are subject to the interpretative jurisdiction of the Court of Justice.

30. Citing the facts of the dispute in the main proceedings, the *Hungarian Government* points out that a unilateral amendment of the GBC, without indicating the method by which prices vary or the reason for the amendment, does not accord with Directive 93/13, as it leads to a substantial imbalance in the parties' contractual rights and obligations. Nevertheless, according to that government, the national court has a duty to assess the contract term in the light of the circumstances of the individual case, taking account of the criteria listed in Directive 93/13.

31. The *Spanish Government* states that if the seller or supplier reserves the right in a contract term to amend the GBC unilaterally without describing the method by which prices vary or giving the reason for the price change that term must be deemed unfair.

VI – Legal assessment

A – *The first question*

32. The first question, which is in two parts, is designed essentially to determine whether the Hungarian system for the collective protection of rights in the form of an action in the public interest (*actio popularis)*, available to consumer protection associations under national law, is compatible with Directive 93/13. The raising of these questions provides an opportunity to clarify the principles of the system for protecting consumers from unfair terms that was created by Directive 93/13. The information gleaned should help provide an answer to the individual questions from the referring court.

33. I shall first describe this protection system in general terms and then examine the instrument of the collective action as conceived by the authors of the directive, focusing on the central question of the legal effects that the judgment of the national court seised with an action in the public interest should have in order to comply with the objective of consumer protection of Directive 93/13.

1. Consumer protection as an objective of the directive

34. According to settled case-law of the Court of Justice, the system of protection introduced by Directive 93/13 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 their content.[4] In view of that weaker position, Article 6(1) of Directive 93/13 provides that unfair terms are not binding on the consumer. As is apparent from the case-law, this is a mandatory provision which aims to replace the formal balance between the rights and obligations of the parties with an effective balance which re-establishes equality between them.[5]

35. In order to guarantee the protection intended by Directive 93/13, the Court has stated on a number of occasions that the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract.[6] It is in the light of those principles that the Court has therefore held that the national court is required to assess of its own motion whether a contractual term is unfair.[7] The court's power to determine of its own motion whether a term is unfair constitutes, in the opinion of the Court of Justice, 'a means both of achieving the result sought by Article 6 of [Directive 93/13], namely preventing an individual consumer from being bound by an unfair term, and 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'.[8] Moreover, that power of the national court has been regarded by the Court as necessary 'for ensuring that the consumer enjoys effective protection, in view in particular of the real risk that he is unaware of his rights or encounters difficulties in enforcing them'.[9]

4 — See Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 25, and Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 25.

5 — See *Mostaza Claro*, cited in footnote 4 above, paragraph 36, and Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraph 25.

6 — See *Océano Grupo Editorial and Salvat Editores*, cited in footnote 4 above, paragraph 27; *Mostaza Claro*, cited in footnote 4 above, paragraph 26; and Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 31.

7 — Ibid., paragraph 32.

8 — Case C-473/00 *Cofidis* [2002] ECR I-10875, paragraph 32, and *Mostaza Claro*, cited in footnote 4 above, paragraph 27.

9 — *Cofidis*, cited in footnote 8 above, paragraph 33, and *Mostaza Claro*, cited in footnote 4 above, paragraph 28.

2. The collective action as an appropriate and effective instrument within the meaning of Articles 6 and 7 of Directive 93/13

36. References for preliminary rulings have hitherto related primarily to the protection of individual rights, and hence to cases in which the consumer himself has taken action against the use of unfair terms, for example by challenging the contract in question or resisting its enforced execution. It would, however, be wrong to conclude from this that the provision set out in Article 7(2) of Directive 93/13 permitting individuals and organisations to bring legal proceedings in the interest of consumers against the use of unfair terms in contracts is of limited practical importance.

37. In fact, this provision, the purpose of which is to introduce mechanisms for verification *in abstracto*, complements the system of protection created by Directive 93/13 by permitting an effective defence against unfair terms even where in exceptional cases consumers do not take steps to protect their rights, for reasons of cost, for example. This also accords with the objective of Directive 93/13, which not only provides consumers with appropriate protection in their individual disputes with sellers or suppliers but also, as is clear from Article 7(1), aims in general to 'prevent the continued use' of unfair terms by sellers or suppliers.

38. In order to achieve that objective, Article 7(1) of Directive 93/13 places an obligation on the Member States to take 'adequate and effective means' to eliminate unfair terms. This obligation signifies, in particular, that there must be a means of prohibiting the use of an unfair term more widely than for an individual case. Measures under civil, administrative and criminal law can be envisaged in this respect.[10] It is ultimately left to the Member States to decide which means are most appropriate and effective in the circumstances of their respective legal systems. To that extent they are free to opt for various verification mechanisms, depending on their legal tradition. As can be seen from a systematic interpretation of Article 7(1) and (2), what is required is an adequate level of effectiveness.[11] Autonomous powers of decision on the part of the competent court or authority on the unfairness of terms and the existence of appropriate and effective means to prevent the continued use of the terms in question are contributory factors in this regard.

10 — Ebers, M., 'Unfair Contract Terms Directive (93/13)', *EC Consumer Law Compendium — Comparative Analysis* (eds Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers), p. 422 et seq., gives an overview of the various instruments at national level, which shows that all the Member States provide for court procedures to prohibit unfair terms. In a number of Member States, the emphasis is on administrative proceedings, while in all Member States it is possible to pursue collective actions.

11 — See Micklitz, H.-W., 'AGB-Gesetz und die EG-Richtlinie über missbräuchliche Vertragsklauseln in Verbraucherverträgen', *Zeitschrift für Europäisches Privatrecht*, 1993, p. 529, who points out that the EU legislature did not intend to prescribe the form that verification should take. The Member States were to be free to decide whether they entrusted verification to administrative authorities or to consumer organisations, provided only that verification was effective and appropriate. A similar view is taken by Pfeiffer, T., in *Das Recht der Europäischen Union — Kommentar* (eds Eberhard Grabitz and Meinhard Hilf), Vol. IV, A5, Art. 7, paragraph 14, p. 3, who states that the Member States were to decide whether the *in abstracto* verification procedure should be judicial or administrative. An appropriate level of effectiveness is required, however. Damm, R., 'Europäisches Verbrauchervertragsrecht und AGB-Recht', *Juristenzeitung*, 1994, p. 175, interprets Article 7(2) of Directive 93/13 as meaning that the decision whether the *in abstracto* verification of unfair terms is carried out in the context of judicial or administrative proceedings is one for national law. The author points out, however, that EU law lays down not only that there be the option of collective actions but also that such actions be efficient in that it requires adequate and effective means to be employed to prevent the use of unfair terms.

39. The collective action, which was already available in the legal systems of some Member States before Directive 93/13 came into effect, is the most important instrument of effective verification required by the directive.[12] Under Article 7(2) of the directive, the Member States must make provision whereby 'persons or organisations, having a legitimate interest under national law in protecting consumers, may take action ... before the courts or before competent administrative bodies' for a decision on the unfairness of terms and, where necessary, 'can apply appropriate and effective means to prevent the continued use of such terms'. The fact that the legislature made express provision for collective actions shows that it regards them as an essentially appropriate and effective instrument within the meaning of Article 7(1) in order permanently to prevent the use of unfair terms in contracts.

40. It is useful to point out in this connection that actions brought by persons or organisations representing consumer interests for a finding that individual contract terms are invalid or to prohibit their use in contracts are equal in value to actions brought by individual consumers. As a matter of principle, the considerations that justify strict consumer protection and on which the Court of Justice has based its case-law with respect to Article 6 of Directive 93/13 in proceedings by individuals also apply to such persons or organisations. It is a question of intervening to protect the consumer, who as a rule is in a weaker position, and in a way that deters the seller or supplier using unfair terms. As the Court stated in *Commission* v *Italy*,[13] judicial means of deterrence include not only actions seeking a finding that the terms in question are invalid but also preventive measures, such as actions for injunctions against their continued use.[14]

41. The collective action as a means of enforcing collective rights not only provides access to this legal remedy but also has characteristics that make it an effective deterrent.[15] As can be seen from the abovementioned judgment, this assessment is shared by the Court.[16] Collective actions offer many advantages over individual actions. By bundling consumers' common interests together, they make it

12 — In all the Member States of the European Union, it is possible to bring a collective action against unfair terms. Almost all the Member States provide at least for an injunction against persons using or recommending unfair terms. As a rule, it is also possible to apply to the court for interim measures in urgent cases. Some Member States also provide for actions for damages. In Germany the history of collective actions goes back more than a century. The right for trade associations to bring an action was first enshrined in the 1896 version of the Gesetz gegen den unlauteren Wettbewerb (Law on unfair competition). Some 80 years later this collective action by consumer and business associations was incorporated into the law on GBC, under which authorised bodies such as consumer associations and chambers of industry and commerce may bring an action for an injunction against a person who uses provisions that are invalid under Paragraphs 307 to 309 of the Bürgerliches Gesetzbuch (Civil Code) or who recommends their use in contracts, and in the case of recommendations they may also apply for withdrawal (Paragraphs 1 and 3 of the Unterlassungsklagengesetz (Law on injunctions)). In France consumer associations have had the right to bring collective actions since 1988, alongside provision for administrative and judicial verification in individual disputes (Article L. 421-1 et seq. of the code de la consommation (Consumer Code)). They can apply for an injunction (Articles L. 421-2 and L. 421-6), and they can also claim collective damages if an action by the user has harmed collective consumer interests (Articles L. 421-1 and 421-7). In Poland provisions for the *in abstracto* verification of terms by means of collective actions were introduced into civil law for the first time with the transposition of Directive 93/13 (Article 479 et seq. of the Civil Code). Actions may be brought not only by consumer associations, local consumer ombudsmen and the president of the Office for the Protection of Competition and Consumers but also by any person who could have signed the contract in the light of the offer from the user of the term. In the United Kingdom consumer associations are entitled to lodge complaints and the consumer association bringing the complaint is entitled to initiate proceedings (Regulations 11 and 12 of the Unfair Terms in Consumer Contracts Regulations 1999). In Spain consumer associations also have the power to bring proceedings (Article 12 et seq. of Ley 7/1998 sobre condiciones generales de la contratación (Law 7/1998 on general contract terms)), which allows them to apply for injunctions, withdrawal and damages. Since 2001 consumer organisations have been able to seek damages under Spanish civil law for a group of consumers who cannot be identified individually. Austria also provides for collective actions to protect consumers (Paragraph 28 et seq. of the Konsumentenschutzgesetz (Law on consumer protection)). The consumer and business associations named in the Law may apply for an injunction in the event of an infringement of consumer protection law. The legal situation in Italy is similar (Article 37 of the Codice del consumo (Consumption Code)). In Slovenia any organisation with legal personality that has been founded to protect the rights and interests of consumers and has been in actual operation for at least one year may bring proceedings to prevent an undertaking from using unlawful GBC or to have contracts or individual provisions or GBC they contain declared invalid (Article 74 et seq. of the Zakon o varstvu potrošnikov (Law on consumer protection). In Portugal consumers and consumer associations that are not directly affected are entitled to bring actions for injunctions and damages (Article 13 of Lei no 24/96 de defesa do consumidor (Law No 24/96 on consumer protection)).

13 — Case C-372/99 [2002] ECR I-819.

14 — Ibid., paragraphs 14 and 15.

15 — To that effect, see Paisant, G., 'Les limites de l'action collective en suppression de clauses abusives', *La Semaine Juridique – Édition Générale*, No 18, 2005, II-10057, who refers to the preventive nature of collective actions. According to the author, the purpose of the collective action is to prevent new consumers from falling victim to contract terms that have been deemed unfair.

16 — See *Commission* v *Italy*, cited in footnote 13 above, paragraphs 14 and 15, in which the Court ascribes a deterrent effect to the collective action by referring inter alia to the 'deterrent nature' and 'dissuasive purpose of the measures to be adopted'.

possible to enforce them judicially. By means of collective actions, consumer protection associations give consumers a voice and a weight that they would often not have in this form in isolated proceedings because of their generally weaker position. Lastly, a collective action helps to enhance the status of the consumer at the procedural level and relieves him of the risk of costs in civil proceedings if he is unsuccessful, which may deter a consumer from individually asserting his rights just as much as a low value in an individual case, for which it would not be worthwhile for an individual to incur the expense.[17] The successful enforcement of rights by way of a collective action creates a just balancing of the interests of consumers and undertakings, ensures fair competition and shows that collective actions are just as necessary as individual actions in order to protect the consumer.

42. If no special provisions for this kind of action exist — such as the rule of interpretation set out in Article 5 of the directive[18] — such persons or organisations authorised to bring proceedings should, for the reasons stated above, rely on the case-law of the Court on Article 6(1) in order to prevent the use of unfair terms.

43. It follows from the above that a system for the legal protection of collective rights, as provided for in the Hungarian legal order, which makes use of collective actions, essentially accords with the requirements of Directive 93/13. However, this says nothing about whether that system as it is actually configured meets those requirements. This must be examined below.

3. The configuration of the collective action in detail

44. As is apparent from the 12th recital in its preamble, Directive 93/13 carries out only a partial and minimum harmonisation of national legislation concerning unfair terms.[19] Against that background, it cannot be assumed that the aim of the directive is to standardise collective actions in consumer protection cases. This does not, however, prevent it being held that Article 7(2) of the directive contains a partial harmonisation of the law on collective actions.[20]

45. The specific requirements for the organisation of the procedure point towards partial harmonisation. Apart from that, the possibility provided for in Article 7(2) of the directive for the Member States to permit collective actions in the public interest in their legal systems also furnishes indirect information on the way in which such a procedure should be structured, and especially on the legal effects that judgments by national courts must have, because only if certain requirements are met can such a system of protection achieve the objective of consumer protection effectively and adequately.

46. From the procedural point of view, the existence of such a collective system of protection means first that persons or organisations representing consumer interests should be entitled to apply for a judicial finding that the contested unfair terms are invalid and for their continued use in contracts to be prohibited. Article 7(2) therefore provides that national provisions should be enacted to permit

17 — Del Chiappa, P., 'Le associazione, la rappresentanza e la partecipazione dei consumatori', *I diritti dei consumatori* (ed. Guido Alpa), Vol. II, Turin, 2009, p. 726, and 'La tutela individuale e collettiva dei consumatori', *I diritti dei consumatori* (ed. Guido Alpa), Vol. I, Turin, 2009, p. 146, and Fornage, A.-C., *La mise en oeuvre des droits du consommateur contractant* (eds Andreas Furrer and others), Brussels, 2011, p. 378, make apposite reference in this regard. If the cost-benefit ratio of legal action is not to the consumer's advantage, he will usually refrain from enforcing his rights in court. The authors consider that individual legal protection is therefore necessary but not sufficient to ensure consumer protection over the long term.

18 — See Case C-70/03 *Commission* v *Spain* [2004] ECR I-7999 with regard to the rule on interpretation set out in Article 5 of Directive 93/13 and the distinction made therein as between actions involving an individual consumer and actions for cessation which involve persons or organisations representative of the collective interest of consumers. The Court based that distinction on the different aims pursued by those actions. In the former case, the courts or competent bodies are required to make an assessment *in concreto* of the unfair character of a term contained in a contract which has already been concluded, while in the latter case it is their task to assess *in abstracto* the unfair character of a term which may be incorporated into contracts which have not yet been concluded.

19 — See Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid* [2010] ECR I-4785, paragraphs 28 and 29.

20 — Pfeiffer, T., op. cit. (footnote 11), Article 7, paragraph 20, p. 5.

them to apply to courts or administrative authorities. This provision means that they should have the power to bring judicial proceedings or apply to the competent authority.[21] In this way, they are granted a procedural status that enables them to defend the interests of third parties effectively and in an appropriate manner.

a) Legal effects of judgments against third parties

i) Principles of the *in abstracto* verification procedure under Article 7(2) of Directive 93/13

47. On the question of the legal effects that national judgments must have in order to take adequate account of the objective of consumer protection, the first point to note is that the key provision of Article 6(1) of Directive 93/13 stipulates that the term in question shall 'not be binding on the consumer'. The directive therefore makes the legal consequence of a finding of the unfairness of the term binding on the Member States. The fact that a term is not binding on the consumer means, within the meaning of the directive, that the consumer cannot be bound legally by the unfair term. The obligations imposed on the consumer by such a term therefore have no binding legal effect from the outset. The non-binding nature of the term therefore exists *ipso jure*, and is not dependent on any judicial decision. Hence, the court simply finds that the provisions in question could not bind the consumer.[22]

48. The concept of 'not binding' itself has a variety of meanings and takes account of the fact that the further consequences of finding a term unfair are ultimately determined by national law. They may differ from one legal system to another. For that reason, in particular, Article 6(1) of Directive 93/13 uses a neutral concept.[23] This provision of the directive merely prescribes an outcome that the Member States must attain by implementing the directive, but without determining in detail whether the term in question is to be declared invalid or void. Instead, this is left to national law, which lays down the precise legal consequence.[24] The use of neutral terms by the EU legislature reflects the recognition of the diversity of systems and traditions of civil law within the European Union.[25]

49. It is debatable, however, to what extent the non-binding nature of unfair terms laid down in this provision of the directive can apply to the consumers affected in the event of a collective action. Here the fundamental problem arises that judicial decisions in a contract dispute under the procedural law of the Member States in principle have legal effects only in the relationship between the parties.[26] To

21 — See Ulmer, P., 'Zur Anpassung des AGB-Gesetzes an die EG-Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen', *Europäische Zeitschrift für Wirtschaftsrecht*, 1993, p. 337.

22 — See Kapnopoulou, E., *Das Recht der missbräuchlichen Klausel in der Europäischen Union*, Tübingen, 1997, p. 150 et seq.

23 — Examination of the genesis of Directive 93/13 may help achieve a better understanding of this term. The proposals for a directive had still stated that unfair terms were 'void'. Given the difficulties associated with the highly specific national provisions behind this legal concept in the Member States, some resistance was expressed during discussion in the Council. In the common position, the Council therefore decided to adopt the less legalistic wording that unfair clauses 'shall not bind the consumer'. The precise legal classification of the consequences was to be left to the Member States to decide in the context of their legal system. This definition was clearly still not 'neutral' enough, for the European Parliament suggested the new wording 'not binding on the consumer', which the Commission incorporated into its re-examined proposal and which the Council accordingly adopted in the final version of the directive (see Ponick, A., *Die Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen und ihre Umsetzung im Vereinigten Königreich*, Münster, 2003, p. 68).

24 — See Pfeiffer, T., op. cit. (footnote 11), Article 6, paragraph 1, p. 1, who interprets Article 6(1) of Directive 93/13 as meaning that it is left to the Member States to determine the legal definition of the non-binding nature of unfair terms.

25 — On the origin of European civil law, see, for example, Rainer, M., *Introduction to Comparative Law*, Vienna, 2010, p. 27 et seq.

26 — It is common to the rules of procedure of most of the Member States that a judicial decision on the unfairness of a term in response to an actual contract dispute does not necessarily prevent the continued use of that term, for example because such a decision has legal effect only between the parties. However, some national legal systems derogate from this principle when it comes to the protection of consumers from unfair contract terms, such as in Poland, Hungary and Slovenia, which confer *erga omnes* effect on judicial decisions (see Ebers, M., op. cit. (footnote 10), p. 431). For the protection of consumers, some Member States have taken measures to prevent sellers or suppliers from using similar terms that may not be subject to the legal effect of a judicial decision. For example, in the United Kingdom under Regulation 12(4) of the Unfair Terms in Consumer Contracts Regulations 1999 an injunction may relate not only to a particular contract term but to any similar term or terms having like effect. Similarly, in Cyprus actions for injunctions may be brought not only against an individual seller or service provider but also against a group of entrepreneurs who use or recommend similar terms, irrespective of whether they operate in the same or another field of business. Hence, in these countries it is possible to prevent entrepreneurs from circumventing judicial decisions by replacing the contested term by similar unfair terms (see Ebers, M., op. cit. (footnote 10), p. 432).

interpret Article 6(1) of Directive 93/13 in the manner envisaged by the referring court in the first part of the question — namely as meaning that an unfair contract term cannot be binding on a consumer if a national court declares, in response to an action brought on behalf of consumers by a legally designated and duly authorised body, that an unfair term contained in a consumer contract is invalid — would be tantamount to extending the effect of a judicial decision to third parties. The question of the legal effects of such a finding on the legal relationship between the defendant seller or supplier and a third party not involved in the proceedings must be addressed, since Hungarian legislation provides for this possibility in Article 209/B(1) of the Civil Code.

50. Hitherto the Court of Justice has adopted a position solely on the meaning of Article 6(1) of Directive 93/13 in the context of individual actions, but it cannot be deduced from this that a judicial finding of unfairness cannot have legal effects for persons other than the parties to the proceedings. As I have already stated,[27] this central provision is not applicable only to individual cases but is a general provision with equal validity for the mechanisms for the collective protection of rights laid down in Article 7(2) of the directive.

51. However, in order effectively to achieve the objective of consumer protection in proceedings for collective judicial protection, the legal consequence of the non-binding nature of the term laid down in Article 6(1) of Directive 93/13 must also apply if the persons or organisations named in Article 7(2) of Directive 93/13 have brought proceedings in the interest of the consumers concerned, because otherwise a collective action would be of little benefit to consumers. It must not be forgotten that *in abstracto* verification, as an instrument of collective judicial protection, was designed to eliminate unfair terms 'drawn up for general use'. These terms are therefore intended for use in a large number of consumer contracts. They can therefore be combated effectively only if the decision of the national court finding a particular term to be unfair is accorded fairly wide applicability.[28]

52. Moreover, the directive is silent as to the way in which a judicial finding of the unfairness of a contract term should have legal effects extending beyond the individual case. In the absence of more precise provisions at the level of EU law, it must be assumed that the Member States retain legislative powers in this field. That conclusion is also logical, if one considers that the requirements laid down in Article 7 of Directive 93/13 apply equally to judicial and administrative procedures, the form of which can differ markedly from one Member State to another. Moreover, such an approach accords with the principle of the organisational and procedural autonomy of the Member States recognised in the case-law of the Court, under which, in the indirect implementation of EU law, the Member States remain responsible for the creation and institutional form of the competent authorities and as a matter of principle apply their own national procedural and constitutional law.[29]

53. Given that the present case relates only to collective actions, I shall confine my remarks to possible approaches under civil law. A conceivable effective means, to mention but one example, would be to extend the legal effect of a court finding of unfairness delivered in an individual case, which would be compatible with Directive 93/13.[30] First, as the Court last ruled in *Asturcom Telecomunicaciones*,[31] in the absence of EU legislation in this area, the rules implementing the principle of *res judicata* are a matter for the national legal order, in accordance with the principle of the procedural autonomy of

27 — See point 40 of this Opinion.

28 — Kapnopoulou, E., op. cit. (footnote 22), p. 161, notes that terms declared in a collective action to be unfair to the average consumer cannot, as a rule, subsequently continue to be used.

29 — See Augsberg, I., 'Europäisches Verwaltungsorganisationsrecht und Vollzugsformen', *Verwaltungsrecht der Europäischen Union* (ed. Jörg Philipp Terhechte), Baden-Baden, 2011, Section 6, paragraph 21, p. 219. In the view of Galetta, D.-U., *Procedural Autonomy of EU Member States: Paradise Lost?*, Heidelberg, 2011, p. 11, the procedural autonomy of the Member States can be attributed to the fact that the European Union has no powers in the field of procedural law. Nevertheless, the principles of the effectiveness and direct effect of EU law enable the EU legislature to draw on the procedural law of the Member States in order to achieve its objectives.

30 — To that effect, see Pfeiffer, T., op. cit. (footnote 11), Article 7, paragraph 3, p. 2.

31 — Cited in footnote 6 above.

the Member States.[32] Secondly, extending the legal effect to third parties would be an appropriate way of rendering the terms non-binding for the contractual relationship in question. It is ultimately for the Member States to determine which method is most appropriate and effective in the conditions of their national legal system. To that extent, the Member States have a prerogative to assess the effectiveness of the method to be chosen.

54. Nevertheless, the Member States remain under an obligation to take other measures if under national law an instrument is definitively proven to be ineffective.[33] Moreover, it must be emphasised that the Member States' scope for framing measures is by no means unlimited: in fact, the Member State may exercise its discretion only within the general limits of EU law, which ultimately means that excessive measures conflict not only with the protection of fundamental rights but also with the principle of proportionality under EU law.[34] The explicit reference to the criterion of 'appropriateness' in Article 7 of the directive with regard to the means chosen indicates that the principle of proportionality is a further important legal yardstick for assessing the compatibility of each means with EU law.

ii) Compatibility of an *erga omnes* effect of national judgments finding a term to be unfair

55. Having described the essential characteristics of an *in abstracto* verification procedure set out in Article 7(2), I shall now examine whether Directive 93/13 precludes a national provision such as that in question, which confers legal effect on findings of unfairness delivered by national courts not only for the parties to the judicial proceedings but also for every person (*erga omnes*) who concludes a contract with the seller or supplier.

56. To that effect, the question of the compatibility of that national provision with the criterion of 'effectiveness' must first be examined, while according the national legislature sufficiently wide discretion to determine its national law on civil procedure, as stated in the above considerations.

57. The judicial finding that a term classified as unfair is invalid for all consumer contracts concluded with the defendant seller or supplier contributes objectively to the prevention of the continued use of this term in contracts. The *erga omnes* effect of such a judgment eliminates the disputed term at a stroke from all contracts in which it was used, without individual consumers having to contest it before the courts. The finding that the term is invalid imposes one of the most profound legal consequences available under civil law. This ensures that the requirement of Article 6(1) of Directive 93/13 — a declaration that the disputed term is not binding on the consumer — is implemented. It can be assumed, not least in view of the considerable implications of such a judgment, that it will also have a deterrent effect on other sellers or suppliers wishing to use similar terms in contracts. The national provision at issue is therefore likely to contribute to consumer protection in the long term as well.

58. Consequently, the national provision in question meets the requirement of 'effectiveness' set out in Article 7(2) of Directive 93/13.

59. The national provision also constitutes an adequate means of preventing the continued use of unfair terms 'in contracts concluded with consumers by [a seller or supplier]' (Article 7(1) of the directive). In any event, there is nothing to indicate that this national provision interferes disproportionately with fundamental rights protected under EU law and could therefore be an inappropriate means of protecting consumers. In particular, sellers and suppliers who are not party to

32 — Ibid., paragraph 38.

33 — See Paisant, G., op. cit. (footnote 15), II-10057, who refers to the requirement for effectiveness set out in Article 7(1) and (2) of Directive 93/13.

34 — See Pfeiffer, T., op. cit. (footnote 11), Article 7, paragraph 3, p. 2.

the proceedings leading to a judicial finding are not disproportionately subject to the effects of that judgment without the right to be heard, since under the national provisions reproduced in point 11 et seq. of this Opinion, in particular Article 209/B(2) of the Civil Code, it is to be assumed that the finding that the term is not binding affects only the defendant seller or supplier. The *erga omnes* effect of the judgment against him therefore does not apply indiscriminately to every other seller or supplier using a similar term but not involved in the proceedings that led to the finding that the term in question was not binding.

60. If that were the case, serious doubts would arise from the point of view of procedural law and fundamental rights: an *erga omnes* effect adversely affecting persons not party to the proceedings would be difficult to reconcile with the principles of a fair trial, particularly as such persons would be denied an opportunity to express their views on the accusation of using unfair terms in contracts before a judgment affecting them was delivered. The right to be heard, which is considered to derive from the principle of the rule of law and is one of the general principles of EU law recognised in case-law,[35] would not be adequately safeguarded if an *erga omnes* effect applied indiscriminately to persons not party to the proceedings and the national provisions in question would thus not be appropriate within the meaning of Article 7 of the directive. On the one hand, it must be emphasised in this connection, however, that the question of compatibility with fundamental rights enshrined in EU law arises only to the extent that an *erga omnes* effect of national judgments is one of the means that fall within the scope of Directive 93/13. On the other hand, there appears to be no objection to an *erga omnes* effect in favour of persons who are not party to the proceedings. Since there is no suggestion that fundamental procedural rights have been infringed, at least so far as can be judged from the information provided to the Court, for the purposes of the remainder of this Opinion it must be assumed that the criterion of 'appropriateness' is also fulfilled.

61. It follows from all the above considerations that Article 6(1) in conjunction with Article 7(1) and (2) of Directive 93/13 does not preclude a national provision under which an unfair contract term used by a particular seller or supplier is not binding on the consumer if, in an action brought by a body appointed by law and competent for that purpose, a national court declares an unfair term which has become part of a consumer contract to be invalid.

iii) Compatibility of actions for injunctions

62. In the second part of the question, the referring court essentially seeks to know whether Directive 93/13 precludes a national provision granting a body appointed by law and competent for that purpose the right to bring an action to prohibit the use of terms which a court has previously found to be unfair.

63. It must first be noted that Directive 93/13 — leaving aside the possibility of prior verification of the general conditions obtaining in individual economic sectors mentioned in the 24th recital in the preamble thereto — does not prevent the Member States from organising their procedural law in such a way that preventive measures to prohibit the use of unfair terms in contracts can be ordered. Indeed, the opposite is the case, as can be seen from the interpretation of Article 7(2) of the directive.

64. First, this provision of the directive lays down that persons or organisations must have the right to take action before the courts not only for a decision as to whether contractual terms are unfair but also so that the courts 'can apply appropriate and effective means to prevent the continued use of such terms'. In view of the specific legislative context of this provision, the indeterminate legal concept of 'means' must be understood to include any judicial or administrative decision for which the national legal system in question provides in its procedural law and which can be adopted on application or of

35 — See Case 32/62 *Alvis* v *Council* [1963] ECR 49, 55; Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, paragraph 21; and Case C-48/96 P *Windpark Groothusen* v *Commission* [1998] ECR I-2873, paragraph 47.

the court's own motion to protect consumers. It is clear from the very wording of this provision of the directive that the legislature distinguishes between two mutually complementary categories of collective actions. The first category includes the procedure for a finding that a term is unfair, while the second encompasses all other 'appropriate and effective means' to be determined by the Member States.

65. Secondly, it is clear from this provision of the directive that the measures to be taken are to be aimed at unfair terms 'drawn up for general use'. Hence, it is solely a question of whether the author drafted the term with a view to its possible use. It is therefore not necessary for general use to be actually or certainly planned.[36] The purpose of this provision of the directive is to give persons who might be affected the possibility of legal protection against future infringement of their rights. This interpretation is confirmed by the way in which the provision in question is worded in several language versions,[37] as it indicates that preventive measures should be taken to prevent the seller or supplier from using a particular unfair term in future contracts.

66. In the light of these facts, the introduction of actions for injunctions appears not only permissible under EU law but in fact a procedural necessity in order to achieve the objective of the directive.[38] The collective legal remedy which Article 7 of Directive 93/13 requires of the Member States would be incomplete in the light of the meaning and purpose of this provision if it merely permitted the elimination of an unfair term existing at a given point in time without providing for the possibility of prohibiting the general use of this term and ordering measures to enforce such a prohibition in the event of contravention.

67. Aware of this need, the EU legislature adopted Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests.[39] The purpose of this directive, which repealed its much amended predecessor Directive 98/27/EC[40] with effect from 29 December 2009, is to approximate the laws, regulations and administrative provisions of the Member States relating to actions for injunctions aimed at the protection of the collective interests of consumers included in the directives listed in Annex I, with a view to ensuring the smooth functioning of the internal market. It should be emphasised in this connection that the directives listed in Annex I to this directive include Directive 93/13, which is of relevance for the purposes of the present proceedings. Directive 2009/22 complements the procedural legal protection provided by Article 7(2) of Directive 93/13.[41]

68. Under Article 3 of Directive 2009/22, 'any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the [consumer protection] provisions ... are complied with' is qualified to bring an action. Since this provision corresponds to a large extent to Article 7(2) of Directive 93/13, it is to be interpreted as meaning that consumer protection organisations such as the applicant in the main proceedings are in principle entitled to bring an action for an injunction, provided that they meet the national requirements in this regard.

36 — See Pfeiffer, T., op. cit. (footnote 11), Article 7, paragraph 9, p. 3.

37 — The language versions in German ('im Hinblick auf'), French ('en vue de'), Spanish ('con vistas a'), Portuguese ('com vista a') and Danish ('med henblik på').

38 — In its Report on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (COM(2000) 248 final, p. 24), the Commission observes that actions for injunctions are part of the traditional approach to eliminating unfair terms. Fornage, A.-C., op. cit. (footnote 17), p. 380, also holds, with reference to the wording of Article 7 and the 23rd recital in the preamble to Directive 93/13, that the Member States are required to permit consumer associations to bring actions for injunctions in the interest of consumers.

39 — OJ 2009 L 110, p. 30.

40 — Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ 1998 L 166, p. 51).

41 — To that effect, see Stuyck, J., 'Public and Private Enforcement in Consumer Protection: General Comparison EU-USA', *New Frontiers of Consumer Protection – The Interplay Between Private and Public Enforcement*, Oxford, 2009, p. 78.

69. If the national legislation in question, as set out in the second part of the question, is examined in the light of the above remarks, it does in any event objectively meet the requirement of 'effectiveness' in that it permits persons or organisations with a legitimate interest in protecting the consumer to apply for a court finding that a term is invalid and to obtain an injunction against the particular seller or supplier even before it uses the term classified as unfair in contracts. The early intervention of the national court responsible for *in abstracto* verification ensures that the term in question is not incorporated into contracts with consumers. Moreover, the possibility of establishing the invalidity of a term and applying this legal consequence for the future and for all contracts concluded by the seller or supplier also offers the advantage that it prevents the repeated use of a term that has already been classified as unfair. In particular, if, as is often the case under procedural law, contraventions against an injunction issued by the court were subject to a substantial penalty, the action for an injunction would be all the more incisive as a weapon against unfair terms.

70. For the sake of completeness, it must be pointed out that the national legislation in question makes no provision for a procedure comparable to a procedure for prior authorisation within the meaning of the 24th recital in the preamble to Directive 93/13, since the use of a particular term is not dependent on judicial or administrative approval, for example. Rather, the decision to institute proceedings for *in abstracto* verification lies solely with the persons or organisations entitled to bring proceedings listed in Article 7(2) of Directive 93/13.

71. Nor is there evidence that this national legislation interferes disproportionately with fundamental rights protected under EU law and hence could ultimately contravene the 'appropriateness' requirement. The concerns expressed in points 59 and 60 of this Opinion about an *erga omnes* effect for sellers or suppliers not involved in the proceedings none the less apply equally here. Since this criterion is also satisfied, it can be assumed that the national legislation is compatible with Directive 93/13.

72. The answer to the second part of the question must therefore be that Article 6(1) in conjunction with Article 7(1) and (2) of Directive 93/13 does not preclude national legislation under which, where an order which benefits consumers who are not party to the proceedings is made, or the application of an unfair standard contract term is prohibited, in an action in the public interest, an unfair term which has become part of a consumer contract is not binding as regards the future for the consumers concerned in relation to the seller or supplier against whom the action was brought.

iv) Refund of costs and expenses charged

73. A further issue, which admittedly is not included in the questions referred for a preliminary ruling but to which it is clear from the statements in the order for reference that the referring court seeks an answer, concerns the compatibility with Directive 93/13 of national legislation under which consumers who are not party to proceedings may claim a refund of the costs and expenses charged by the supplier of services under unfair terms. The referring court formulated this question to the effect that it wishes to know whether consumers who are not party to proceedings can rely on the provisions of Directive 93/13 in order to claim such a refund.

74. In my opinion, this question, stated in this way, is to be answered in the negative, because Article 6(1) of Directive 93/13 merely lays down that an unfair term must 'not be binding' on the consumer, as provided for under national law. This means that it is left to the Member States to implement the provisions regarding the non-binding nature of terms in their territory. However, the directive does not cover consumers' possible claims for refund of payments improperly charged by the seller or supplier because of the partial invalidity of the contract with the consumer. The object of refund claims is to reverse financial transfers that had legal effect but were unjustified. In this way,

financial relationships are brought into line with the legal situation consistent with the law. Claims for refunds therefore grant much more than Article 6(1) of Directive 93/13 actually intends, since the legislative purpose of this provision is merely to ensure that unfair contract terms do not impose any obligations on the consumer.

75. The answer to this question is no different from the viewpoint of the requirements of collective legal protection, to which this provision of the directive is also applicable because of its general validity. It is true that Article 7(1) of the directive requires adequate and effective means to be provided in order to prevent the use of unfair terms, but it does not require any adjustment of financial relationships to the legal situation consistent with the law. Instead, this is left to national legislation.

76. Given that national legislation grants the consumer more rights than are provided for in Directive 93/13, it remains for me to examine the applicability of Article 8 of the directive. This provision permits Member States to adopt or retain the most stringent provisions compatible with the Treaty in the area covered by the directive, to ensure a maximum degree of protection for the consumer. The legal recognition of a right to refund of costs and expenses charged by the service provider on the basis of unfair terms undoubtedly serves to protect consumers. It is also a national provision affecting the field of unfair terms in consumer contracts covered by Directive 93/13. Since there is no doubt as to its compatibility with primary law, this national provision meets the requirements for the authorisation granted under Article 8 of the directive to be exercised in accordance with EU law. Consequently, Directive 93/13 does not preclude such a national provision.

B – *The second question referred*

77. The second question referred, when interpreted as to its meaning, can be divided into two thematic parts. First, the referring court seeks to establish whether a contract term in which the seller or supplier provides for unilateral amendment of the contract terms without explicitly describing the method by which prices vary or giving valid reasons in the contract is to be regarded as unfair within the meaning of Directive 93/13. If the answer to this is in the affirmative, the referring court then wishes to know whether national law may provide for this contract term to be invalid *ipso jure*. In the interests of clarity, I shall separate these two topics and deal with them in turn.

1. Assessment of the unfair nature of the contested term

a) Content of the substantive assessment

78. Before assessing whether the term is unfair, the national court must ascertain whether it is even open to substantive assessment, given Article 4(2) of Directive 93/13. Reference must be made in this regard to *Caja de Ahorros y Monte de Piedad de Madrid*,[42] in which the Court made clear that this article does not define the scope of Directive 93/13 but rather is concerned with 'establishing the detailed rules and the scope of the substantive assessment of contract terms which have not been individually negotiated and which describe the essential obligations of contracts concluded between a seller or supplier and a consumer'.[43] Under Article 4(2), assessment of the unfair nature of the terms 'shall relate neither to the definition of the main subject-matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods [to be supplied] in exchange, on the other, in so far as these terms are in plain intelligible language'.

42 — Cited in footnote 19 above.

43 — Ibid., paragraph 34.

79. The fact that the defendant in the main proceedings charged its customers for the cost of money orders could, at first sight, lead one to assume that the practice in question affects only the price, one of the essential obligations of the contract, which under Article 4(2) of Directive 93/13 can be subject to substantive assessment only if the term in question is not expressed in plain intelligible language. However, this would be to overlook the fact that the dispute hinges less on the amount of the cost itself than on the entitlement of the defendant in the main proceedings unilaterally to amend the contract terms for particular services. The question raised is thus more complex than it initially appears. In reality, it is necessary to assess, on the basis of Directive 93/13, a particular method of contract amendment which may significantly prejudice the consumer. The fact that Article 3(1) in conjunction with point 1(j) of the annex lists a similar situation should be seen as an indication that the intention of the legislature was to subject the method of unilaterally amending contracts to closer scrutiny on the basis of Directive 93/13. The scope of the provision and its consequences for the consumer militate in favour of recognising the need for substantive assessment. Against this background, the requirements for the term to be clear and intelligible, which determine whether a substantive assessment may be carried out and compliance with which must be ascertained according to the case-law of the competent national court,[44] should not be set too low.

b) Indicative nature of the list and division of powers

80. As regards the central question of the classification of the contested term itself as unfair, it should be noted that in referring to concepts of good faith and significant imbalance between the rights and obligations of the parties Article 3 of Directive 93/13 merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated.[45] In that context, the annex to which Article 3(3) of the directive refers contains only an indicative and non-exhaustive list of terms[46] that may be regarded as unfair.[47] A term appearing on the list need not necessarily be considered unfair and, conversely, a term that does not appear on the list may none the less be regarded as unfair.[48] Hence, the mere fact that a term appears on the list does not necessarily mean that it is also unfair.

81. Despite the fact that according to the case-law such a circumstance is indicative, an independent and detailed assessment is necessary to determine whether the contract term in question is unfair. That assessment is made under Article 4(1) of Directive 93/13, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which the term is dependent.

82. In this connection, it should be noted that the Court of Justice has consistently ruled that it is for the national court to decide whether a contractual term satisfies the requirements for it to be regarded as unfair under Article 3(1) of Directive 93/13.[49] For the purposes of the present reference for a preliminary ruling, this means — as all the parties to the proceedings have pointed out in their written observations — that it is for the national court and not for the Court of Justice to assess the unfairness of the term at issue.

44 — See *Caja de Ahorros y Monte de Piedad de Madrid*, cited in footnote 19 above, paragraph 32.

45 — See *Pannon GSM*, cited in footnote 5 above, paragraph 37, and Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, paragraph 19.

46 — As is apparent from the 17th recital in the preamble to Directive 93/13, the annexed list of terms can be of indicative value only and, because of the minimal character of the directive, the scope of these terms may be the subject of amplification or more restrictive editing by the Member States in their national laws.

47 — See *Pannon GSM*, cited in footnote 5 above, paragraph 38, and *Freiburger Kommunalbauten*, cited in paragraph 45 above, paragraph 20.

48 — See Case C-478/99 *Commission* v *Sweden* [2002] ECR I-4147, paragraph 20, and *Freiburger Kommunalbauten*, cited in footnote 45 above, paragraph 20.

49 — See *Freiburger Kommunalbauten*, cited in footnote 45 above, paragraph 25; *Pannon GSM*, cited in footnote 5 above, paragraph 43; *Mostaza Claro*, cited in footnote 4 above, paragraph 23; and Case C-137/08 *Pénzügyi Lízing* [2010] ECR I-10847, paragraphs 43 and 44.

83. However, it is also clear from the case-law that, in the context of its jurisdiction under Article 267 TFEU to interpret EU law, the Court may interpret general criteria used by the EU legislature in order to define the concept of unfair terms. As stated most recently in *Pénzügyi Lízing*,[50] this interpretative jurisdiction also extends to the terms contained in the annex to Directive 93/13. The Court cannot, however, rule on the application of those general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question.[51]

84. It may be deduced from the question referred that the referring court clearly assumes that the contested term broadly corresponds to the situation referred to in point 1(j) of the annex. There can be no objection to this classification on the basis of the factual information available to the Court. As is apparent from the case-file,[52] the defendant in the main proceedings introduced the contested business practice of charging for the cost of money orders by amending its GBC in stages between June and October 2008. All that remains unclear is whether the new GBC applied only to new contracts or to all customers. In the absence of more information, it must be assumed in the remarks that follow that the latter obtained. A realistic consideration of the facts also points in this direction, particularly as it can be assumed that a seller or supplier is more likely to prefer his GBC to apply across the board to all contracts with his customers. Seen in this light, the main proceedings do indeed relate to a subsequent amendment of contract terms of the kind described in point 1(j) of the annex.

85. In accordance with the division of powers in preliminary ruling proceedings, the Court of Justice will only interpret the cited provisions of the directive on the basis of the classification made by the referring court, although in the interest of providing a useful answer to the question referred it will also be necessary to take account of the circumstances in the main proceedings.

c) Interpretation of the pertinent term

86. The point of departure for the interpretation is the central provision of Article 3(1) of Directive 93/13, under which a contractual term which has not been individually negotiated is to 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'. If, as in the main proceedings, the seller or supplier reserves the right to amend important aspects of the contract unilaterally, including the price and costs of performing the contract, in certain circumstances this can lead to a situation in which the consumer is at the mercy of the seller or supplier unless he is granted the exceptional right to object to the amendment in certain cases. The more unspecific the term in question with regard to the aspects of the contract that may be amended unilaterally by the seller or supplier, the greater the risk that the consumer will be placed at a disadvantage. Such a provision may result in a substantial shift in the rights and obligations arising under the contract, to the detriment of the consumer, contravening the requirement of good faith. This is particularly true where, as in the present case, the seller's or supplier's power to amend terms relates to the main subject of the contract and not solely to other aspects of it. It was, in particular, on account of the risks that such a situation harbours for the consumer that the authors of the directive provided for it in general terms in point 1(j) of the annex.

87. However, terms that create a right to amend contracts unilaterally are not automatically unfair, but only those that permit amendments without a valid reason or which do not state the reason for the amendment in the term itself. The type of term described in point 1(j) of the annex is based on the assumption that the consumer is sufficiently protected if from the outset he is informed of the

50 — Cited in footnote 49 above, paragraph 44.

51 — See in *Freiburger Kommunalbauten*, cited in footnote 45 above, paragraph 22; *Pannon GSM*, cited in footnote 5 above, paragraph 42; *Mostaza Claro*, cited in footnote 4 above, paragraph 22; and *Pénzügyi Lízing*, cited in footnote 49 above, paragraphs 43 and 44.

52 — See page 3 of the statement of defence of the defendant in the main proceedings of 4 May 2009.

possibility of and the conditions for amendment of the contract. It does not have to be completely impossible to comply with every facet of the contractual description of the services for there to be a valid reason, as can be deduced *a contrario* from the criterion of serious grounds stated in point 1(g), in particular. Any sufficiently important legal reason for possible amendment of the description of the services pursuant to the term is sufficient. Hence the deciding factor is the existence of a legally overriding reason after assessment of the interests involved. The reason for the amendment must be explicitly stated in the term. If the reason is not stated, the term is typically deemed unfair on that ground alone. The description of the reason must be plain and intelligible to the consumer. This obligation stems from Article 5 of Directive 93/13, under which all terms in writing must always be drafted in plain, intelligible language. According to the wording and meaning of the type of term described in point 1(j) of the annex, for that purpose it is not sufficient that the term merely repeats the general concept of a valid reason. Rather, the possible reason must be stated with sufficient clarity.[53] As is directly apparent from the question referred, this requirement is not met in the case to which the main proceedings relate, so that there is certainly evidence for classifying the term as unfair. However, the final assessment lies with the competent national court.

2. Invalidity *ipso jure*

a) Consequences of a declaration of invalidity under national law

88. With regard to the final question whether national law may provide for an unfair contract term to be invalid *ipso jure*, I wish to refer first to my remarks in point 47 et seq. of this Opinion.

89. As I have pointed out in that section, Article 6(1) of Directive 93/13 provides merely that the term in question shall 'not be binding on the consumer', while the consequences of a finding that it is unfair are determined by national law. This provision of the directive only prescribes a particular outcome, the achievement of which the Member States must ensure by implementing the directive, but it does not lay down in detail whether the term in question is to be declared invalid or void. That is left to national law. Such a provision also corresponds to the legal nature of the directive as an instrument for the harmonisation of legislation, which under Article 288 TFEU is binding as to the objective to be attained, while it is left largely to national bodies to choose the form and means of doing so.

90. Against this background, the concept of invalidity is fundamentally compatible with Directive 93/13, as in accordance with the purpose of Article 6(1) it prevents an unfair contract term from producing legal effects to the detriment of the consumer.[54]

b) The *ipso jure* effect of invalidity

91. On the question whether national law can provide for such a term to be invalid *ipso jure* it is necessary to refer to the case-law of the Court of Justice on Article 6(1) of Directive 93/13, which lays down important requirements for national law on transposition in order to ensure that it satisfies the objective of consumer protection.

53 — See Pfeiffer, T., op. cit. (footnote 11), Annex, paragraph 91, p. 17.

54 — To that effect, see Ebers, M., op. cit. (footnote 10), p. 405, who argues that the concept of absolute invalidity satisfies the requirements of case-law, whereas relative invalidity does not. In his view, other concepts, such as protective nullity, appear to accord with the case-law of the Court of Justice, provided the consumer is also protected if he fails to complain about the unfairness of the term, either because he is ignorant of his rights or even because he is reluctant to assert those rights (on the principle of protective nullity under Italian civil law, see Schurr, F., *Handbuch Italienisches Zivilrecht* (eds Bernhard Eccher, Francesco Schurr and Gregor Christandl), Vienna, 2009, p. 323, paragraph 3/437).

92. I wish to draw attention first to *Océano Grupo Editorial and Salvat Editores*,[55] in which the Court held that 'the aim of Article 6 of the directive ... would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms[, and that] effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion'.[56] Secondly, I wish to point to *Pannon GSM*,[57] in which the Court clarified this case-law by stating that 'Article 6(1) of the directive cannot be interpreted as meaning that it is only in the event that the consumer has brought a specific application in relation to it, that an unfair contract term is not binding on that consumer.' The Court justified this on the ground that 'such an interpretation would rule out the possibility of the national court assessing, of its own motion, in the context of examining the admissibility of the action which is before it, and without a specific application from the consumer to that effect, the unfairness of a contractual term'.[58]

93. As I have already stated in my Opinion in *Pénzügyi Lízing*,[59] this case-law is to be interpreted as meaning that first there is an obligation under EU law for the national court to undertake an examination of unfair terms of its own motion and secondly that a contractual term must become ineffective *ipso jure*.[60] Only if these requirements are met can it be ensured that the consumer need take no action for the term not to be binding on him.

94. The Member States are thus free to implement in their legal system the requirement that a term classified as unfair is not binding on the consumer in such a way that it is regarded as invalid *ipso jure*.

C – *Summary of conclusions*

95. The essential conclusions from the above examination of the questions referred for a preliminary ruling can be summarised briefly as follows.

96. Examination has shown that Directive 93/13 not only permits the adoption of collective actions in national legal systems but regards it as an 'effective' and 'appropriate' means of collective legal protection under Article 7(2) 'to prevent the continued use' of unfair terms in contracts.[61]

97. Although the general prescriptions set out in Article 7 of Directive 93/13 and the minimum harmonisation approach adopted by the EU legislature allow the Member States wide discretion in the organisation of their procedural law, certain requirements must be met in order to ensure that the legislative objective of consumer protection is achieved. This includes the requirement that once a contract term has been classified as unfair it continues to be 'not binding' on the consumers concerned under Article 6(1).[62] A provision that gives legal effect to national courts' findings of

55 — Cited in footnote 4 above.

56 — Ibid., paragraph 26.

57 — Cited in footnote 5 above.

58 — Ibid., paragraph 24.

59 — Opinion of 6 July 2010 (judgment cited in footnote 49 above), point 105.

60 — See Heinig, J., 'Die AGB-Kontrolle von Gerichtsstandsklauseln – zum Urteil Pannon des EuGH', *Europäische Zeitschrift für Wirtschaftsrecht*, 2009, p. 885, who interprets the findings of the Court of Justice in this judgment as meaning that it is compatible with the obligation for the court to undertake an examination of its own motion only if the term becomes ineffective under Article 6(1) of Directive 93/13 *ipso jure* and the consumer does not need to bring proceedings. See also Borges, G., 'AGB-Kontrolle durch den EuGH', *Neue Juristische Wochenschrift*, 2001, p. 2061.

61 — See points 39 to 43 of this Opinion.

62 — Ibid., point 51.

unfairness of a term not only for the parties to the proceedings but to all persons (*erga omnes*) who concluded contracts with the seller or supplier using the term meets this objective in any event.[63] Actions for injunctions, the essential characteristics of which are governed by Directive 2009/22, are a procedural necessity for achieving the objective of Directive 93/13.[64]

98. Furthermore, I have established that although claims by consumers for the refund of costs and expenses charged as a result of the use of an unfair contract term are not governed by Directive 93/13, that directive does not in principle preclude a national provision in that regard.[65] Lastly, the examination I have conducted has shown that although there are compelling indications for assuming that the contested term corresponds to the type of term described in point 1(j) of the annex and meets the criteria for being classified as unfair within the meaning of Article 3(1) of Directive 93/13, it remains for the national court to rule definitively on the unfair nature of the term.[66] If the term is ruled to be unfair, Directive 93/13 does not prevent its being declared invalid *ipso jure* under national law.[67]

VII – Conclusion

99. In the light of the foregoing considerations, I propose that the Court's answer to the questions referred by the Pest Megyei Bíróság should be as follows:

(1) Article 6(1) and Article 7(1) and (2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts are to be interpreted as meaning that they do not preclude a national provision under which an unfair contract term used in contracts by a particular seller or supplier and which a national court has ruled, in an action brought in the public interest by a body appointed by law and competent for that purpose, to be invalid or not binding has no legal effect in any consumer contract concluded by that seller or supplier.

(2) Article 6(1) and Article 7(1) and (2) of the directive grant consumers who are not party to proceedings no right to the refund of costs resulting from the unfairness of a term if the unfairness of a term has been determined in other proceedings not affecting them. However, Article 8 of the directive does not preclude a national provision granting consumers a right to refund in such a case.

(3) A contract term in which a seller or supplier provides for a unilateral amendment of the general business conditions without explicitly describing the method by which prices vary or giving valid reasons in the contract falls within the category described in point 1(j) of the annex referred to in Article 3(3) of the directive. However, it remains for the national court to assess on a case-by-case basis whether the term in question is unfair. The directive does not preclude a national provision under which such a term is invalid *ipso jure*.

63 — Ibid., point 61.
64 — Ibid., point 66 et seq.
65 — Ibid., point 76.
66 — Ibid., point 87.
67 — Ibid., point 94.