Reports of Cases

OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 29 November 2011 [1]

Case C-453/10

Jana Pereničová,
Vladislav Perenič
v
S.O.S. financ, spol. sro

(Reference for a preliminary ruling
from the Okresný súd Prešov (Slovakia))

(Consumer protection — Directive 93/13/EEC — Articles 4(1) und 6(1) — Unfair terms in consumer contracts — Directive 2005/29/EC — Unfair business-to-consumer commercial practices — Consumer credit agreement providing for usurious interest — Impact of unfair commercial practices and unfair terms on the validity of the contract as a whole)

Table of contents

I – Introduction 3

II – Legislative background 4

A – European Union law 4

1. Directive 93/13 4

2. Directive 87/102 5

3. Directive 2005/29 6

B – National law 6

III – Facts of the case, main proceedings and questions referred for a preliminary ruling 7

IV – Proceedings before the Court of Justice 8

V – Main arguments of the parties 8

1 — Original language of the Opinion: German.
Language of the proceedings: Slovak.

A – The first question referred 8

B – The second question referred 9

1. Incorrect indication of the annual percentage rate of charge as an unfair commercial practice 9

2. The consequences of unfair commercial practices for the validity of the contract 9

VI – Legal appraisal 10

A – Introductory comments 10

B – The first question referred 12

1. Minimum level of protection prescribed by European Union law 12

a) In principle, only invalidity of individual contractual terms 12

b) By way of exception, invalidity of the contract as a whole 13

2. Member States' freedom to raise the level of protection 16

C – The second question referred 17

1. First part of the question: incorrect indication of the annual percentage rate of charge as an unfair commercial practice 17

a) Directive 2005/29 17

b) Scope of Directive 2005/29 18

i) Existence of a commercial practice 18

ii) Importance of the delimitation in Article 3(2) of the directive 18

iii) Interim conclusion 20

c) Existence of an unfair commercial practice 20

i) Need for a coherent interpretation of consumer protection law 20

ii) Examination of the unfair nature of a commercial practice 22

– Presence of a misleading practice within the meaning of Article 5(4)(a) in conjunction with Article 6(1)(d) of Directive 2005/29 22

– Alternatively, identification of a failure to meet the requirement to exercise professional diligence 24

d) Conclusion 25

2. Second part of the question: the consequences of unfair commercial practices for the validity of the contract 25

a) Relevance of Directive 87/102 25

b) Relevance of Directive 2005/29 25

c) Relevance of Directive 93/13 25

i) Scope of the directive 26

ii) Scale of the substantive assessment 26

iii) Unfair nature of the contractual term 27

d) Conclusion 29

3. Summary conclusions 29

VII – Conclusion 29

I – Introduction

1. The present case is based on a reference for a preliminary ruling from the Okresný súd Prešov, Slovakia, ('the referring court') pursuant to Article 267 TFEU, in which it submitted to the Court a number of questions concerning the interpretation of Directive 93/13 on unfair terms in consumer contracts [2] and Directive 2005/29 concerning unfair commercial practices in the internal market. [3]

2. The reference for a preliminary hearing was prompted by an action brought by Mr and Mrs Perenič ('the applicants in the main proceedings') for the annulment of the consumer credit agreement concluded between them and the company SOS, s.r.o. ('SOS'). They claim that the agreement contains many terms worded to their disadvantage and harmful to them in their capacity as consumers. That being the case, those terms should be regarded as unfair within the meaning of Directive 93/13 or as an expression of unfair commercial practices within the meaning of Directive 2005/29. They therefore conclude that the agreement in question must be declared invalid, the interests of consumer protection being inadequately safeguarded by only partial invalidity. Provision must rather be made for the invalidity of the agreement as a whole.

3. The present case gives the Court an opportunity to develop its case-law on consumer protection further and, in so doing, to clarify in particular how, where unfair terms are found, their non-binding nature, as ordered by the Union legislature, can be so ensured that appropriate account can be taken of the requirements of legal certainty and consumer protection. It must be considered in this context whether the determining factor here is any interest the consumer may have in wishing to cease being bound by a contract or whether he can reasonably be expected to abide by a partly invalid contract in the interests of the consistency of legal relationships and contractual autonomy. It must also be considered how the protection which the two directives afford the consumer takes effect in circumstances such as those obtaining in the main proceedings and whether conclusions for the assessment of the unfairness of a contractual term can possibly be drawn, pursuant to the provisions of Directive 93/13, from the finding of an unfair business practice within the meaning of Directive 2005/29.

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

3 — Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) (OJ 2005 L 149, p. 22).

II – Legislative background

A – *European Union law*

1. Directive 93/13

4. According to 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 between a seller or supplier and a consumer.

5. Article 3 of Directive 93/13 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 8 of the directive provides:

'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.'

9. Point 1(g) of the annex to Directive 93/13 describes as unfair 'terms which have the object or effect of … enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so'.

2. Directive 87/102

10. The purpose of Directive 87/102[4] is to approximate the laws, regulations and administrative provisions of the Member States concerning consumer credit. It was repealed, with effect from 12 May 2010, by Directive 2008/48,[5] which entered into force on 11 June 2008. As the credit agreement in dispute was concluded by the parties to the main proceedings on 12 March 2008, only Directive 87/102 applies to the main action.

11. Article 1 of Directive 87/102 provides as follows:

'1. This Directive applies to credit agreements.

2. For the purposes of this Directive:

...

(e) "annual percentage rate of charge" means the total cost of the credit to the consumer, expressed as an annual percentage of the amount of the credit granted and calculated according to existing methods of the Member States.'

12. Article 4 of the directive reads as follows:

'1. Credit agreements shall be made in writing. The consumer shall receive a copy of the written agreement.

2. The written agreement shall include:

(a) a statement of the annual percentage rate of charge;

(b) a statement of the conditions under which the annual percentage rate of charge may be amended.

In cases where it is not possible to state the annual percentage rate of charge, the consumer shall be provided with adequate information in the written agreement. This information shall at least include the information provided for in the second indent of Article 6(1).'

13. Article 14 of the directive reads as follows:

'1. Member States shall ensure that credit agreements do not derogate, to the detriment of the consumer, from the provisions of national law implementing or corresponding to this Directive.

2. Member States shall further ensure that the provisions which they adopt in implementation of this directive are not circumvented as a result of the way in which agreements are formulated, in particular by the device of distributing the amount of credit over several agreements.'

4 — Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48).

5 — Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66).

3. Directive 2005/29

14. Article 3 of Directive 2005/29 defines the scope of the directive as follows:

‘1. This Directive shall apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product.

2. This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.’

B – *National law*

15. The Slovak Civil Code contains the following provisions governing the law of consumer contracts:

‘Paragraph 52

1. “Consumer contract” means any contract, regardless of its legal form, made between a supplier and a consumer.

2. Provisions on consumer contracts and all other provisions governing the legal relations into which a consumer has entered shall always be applied to the advantage of the party to the contract who is a consumer. Other contracts or agreements whose content or purpose is to circumvent these provisions shall be invalid.

...

4. A “consumer” is a natural person who, when concluding and performing a consumer contract, does not act in the course of his trade or of another commercial activity.

…

Paragraph 53

1. A consumer contract must not contain provisions which cause a significant imbalance in the rights and obligations of the parties to the contract to the detriment of the consumer (“unfair terms”). That does not apply in the case of contractual terms which relate to the main object of the contract or the appropriateness of the price, where those terms are expressed precisely, clearly and intelligibly...

...

4. Provisions shall be regarded as unfair terms in a consumer contract are in particular if they

…

(k) require a consumer who has failed to fulfil his obligations to pay a disproportionately high sum as a penalty for not fulfilling the obligations;

...

5. Unfair terms in consumer contracts shall be invalid.’

16. Law No 258/2001 on consumer loans, as last amended, provides as follows:

‘Paragraph 4

Consumer credit agreements

1. A consumer credit agreement must be in written form, and the consumer shall receive one copy of the agreement.

2. A consumer credit agreement, in addition to the general elements, must contain:

…

(j) the annual percentage rate of charge and the consumer’s total costs in connection with the consumer credit, calculated on the basis of the data valid at the time of the conclusion of the agreement.

…

If, however, a consumer credit agreement does not contain the elements listed in subparagraph 2(j), the credit granted shall be regarded as free of interest and charges.’

17. Annex 2 to Law No 258/2001 lays down the method of calculating the annual percentage rate of charge.

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

18. SOS is a non-bank institution which offers loans to consumers and others on the basis of standard-form contracts.

19. On 12 March 2008 SOS granted the applicants in the main proceedings a loan of SKK 150 000 (EUR 4 979), which they were to repay in 32 monthly instalments of SKK 6 000 (EUR 199). The 33rd and final monthly instalment was to be as high as the loan itself, that is, SKK 150 000 (EUR 4 979). Mr and Mrs Perenič were thus required to repay SKK 342 000 (EUR 11 352). SOS had indicated an annual percentage rate of charge of 48.63%. According to the calculations of the referring court, however, the annual percentage rate of charge amounts to 58.76%. SOS did not include in the calculation of the annual percentage rate of charge a fee of SKK 2 500 (EUR 83) for the granting of the loan.

20. The agreement contains a number of terms which the applicants see as being unfavourable to them. Their precise content is shown in the order for reference. For the purposes of the present proceedings, a reference to that document suffices.

21. The order for reference reveals that the applicants in the main proceedings fell behind with the payment of the instalments, which resulted in SOS invoicing them for a contractual penalty of EUR 209. On 23 December 2009 they brought an action before the referring court for the annulment of the credit agreement.

22. The referring court is doubtful whether the agreement in dispute contains an unfair term within the meaning of Directive 93/13 and what consequences that has for the validity of the agreement. Above all, however, the referring court wonders how far the interests of consumer protection must be respected — through the agreement as a whole being declared invalid, for example — and whether any

such suggestion is possibly precluded by the provisions of Directive 2005/29. In the view of the referring court, an interpretation of European Union law is needed. It has therefore stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Is the scope of consumer protection under Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts such as to make it possible, where unfair contractual clauses are found in a consumer contract, to conclude that the contract as a whole is not binding on the consumer, if that is more advantageous to the consumer?

2. Are the criteria determining what is an unfair commercial practice in accordance with European Parliament and Council Directive 2005/29C of 11 May 2005 concerning unfair business to consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council such as to permit the conclusion that, if a supplier quotes in the contract a lower annual percentage rate of charge than is in fact the case, it is possible to regard that step by the supplier towards the consumer as an unfair commercial practice? If there is a finding of an unfair commercial practice, does Directive 2005/29 permit there to be any impact on the validity of a credit agreement and on the achievement of the objective in Articles 4(1) and 6(1) of Directive 93/13, if invalidity of the contract is more advantageous for the consumer?'

IV – Proceedings before the Court of Justice

23. The order for reference dated 31 August 2010 was received by the Registry of the Court of Justice on 16 September 2010.

24. Written observations were submitted by the applicants in the main proceedings, the Slovak, German, Austrian and Spanish Governments and the European Commission within the period laid down in Article 23 of the Statute of the Court of Justice.

25. The hearing of 15 September 2011 was attended by the representatives of the applicants in the main proceedings, the Slovak Government and the Commission in order to present argument.

V – Main arguments of the parties

A – *The first question referred*

26. The *applicants in the main proceedings* argue that Article 6 of Directive 93/13, according to which unfair terms are not binding on the consumer, should be interpreted as meaning that the contract containing such terms must be declared invalid as a whole if that is more advantageous for the consumer and he claims that the contract is invalid.

27. The *German Government* argues that Article 6 of Directive 93/13 lays down a principle whereby a contract containing unfair terms must retain its validity. Only in exceptional circumstances may a contract be declared invalid as a whole, where it cannot continue to exist without the terms concerned. None the less, Directive 93/13 provides for a minimum harmonisation of the national legal systems in the area of unfair terms, so that the Member States are free to provide for the invalidity as a whole of contracts containing unfair terms if that is more advantageous for the consumer.

28. The *Spanish Government* points out that the objective pursued with Directive 93/13 is to guarantee the protection of the consumer against a seller or supplier rather than to safeguard the freedom of the parties to a contract to arrange their own affairs. In view of the objective of protecting the consumer, a contract may be deprived of its entire validity towards the consumer if it results in an imbalance to the detriment of the consumer even after the removal of the unfair terms.

29. The *Slovak Government* argues, with a reference to the case-law of the Court of Justice, that it is for the national court to consider whether the contract in question can continue to exist without the unfair term. The national court is under an obligation to draw all conclusions from national law that arise in such a situation to ensure that the consumer is not bound by the unfair term.

30. The *Commission* recalls that, according to the case-law of the Court of Justice, the national courts are under an obligation to apply to a given contractual term the general criteria laid down in Directive 93/13 relating to the assessment of its unfair nature. If it is impossible to predict precisely which terms will be classified as unfair, it will be equally impossible to predict the extent to which such an assessment will lead to the conclusion that the credit agreement is invalid.

31. As regards situations in which, pursuant to Article 6(1) of Directive 93/13, the contract is not binding on the parties thereto, the Commission points out that that is the case where it proves to be objectively impossible for the contract to remain applicable without the unfair terms. The claim by one of the contracting parties that the conclusion of the contract would not have been approved in the absence of such terms is not in itself a reason for declaring the contract as a whole to be invalid. However, national law can provide for a contract containing unfair terms to be non-binding on the consumer in its entirety, since Directive 93/13 effects no more than minimum harmonisation of the Member States' legal systems and so permits the Member States to guarantee a higher level of consumer protection.

B – *The second question referred*

1. Incorrect indication of the annual percentage rate of charge as an unfair commercial practice

32. Both the *German* and the *Spanish Government* take the view that the indication of an annual percentage rate of charge which is lower than is in fact the case is an unfair commercial practice within the meaning of Directive 2005/29.

33. Although Directive 87/102 requires the annual percentage rate of charge to be indicated, it does not state what legal consequences an incorrect indication has. Furthermore, the reference to Article 3 of Directive 87/102 in Annex II to Directive 2005/29 allows of the conclusion that the indication of the annual percentage rate of charge is material information within the meaning of Article 7 of Directive 2005/29. Accordingly, the omission of such information constitutes deception through omission, which is prohibited by Article 7 of Directive 2005/29.

34. The *Commission* and the *Austrian Government* point out that the incorrect indication of the annual percentage rate of charge can be classified as an unfair commercial practice, the latter emphasising that it is a practice prohibited by Article 6 of Directive 2005/29. That is, however, an assessment to be made by the national court, which, according to the Commission, must consider in particular how far the practice in question is likely to influence the behaviour of the average consumer.

35. In the view of the *Slovak Government* the reference to Directive 2005/29 is irrelevant to the current proceedings. As regards the applicability of that directive, it is not apparent from the order for reference that the main action concerns a commercial strategy pursued by a trader for the purpose of marketing products. The indication of an annual percentage rate of charge cannot, at any rate, be classified as a commercial practice.

2. The consequences of unfair commercial practices for the validity of the contract

36. The *applicants in the main proceedings* argue that Directive 2005/29, the purpose of which is to protect the consumer against unfair commercial practices, cannot be applied in isolation from the protective mechanism of Directive 93/13. It must therefore be interpreted as meaning that, if an

unfair commercial practice is to the consumer's disadvantage, that fact must also be taken into account in the interpretation of Article 4(1) of Directive 93/13 as relevant to the assessment of the unfairness of a contractual term. Consequently, that fact must also have an effect on the validity of a contract.

37. The *German Government*, on the other hand, takes the view that, in the absence of reciprocal references in the directives in question, the finding of an unfair commercial practice does not have a direct influence on the assessment of the unfairness of a contractual term. Nor is it likely to have any effect on the question of the validity of a contract containing unfair terms, since Directive 2005/29 is without prejudice to the rules on the validity of a contract, as Article 3(2) of that directive reveals. None the less, the finding of an unfair commercial practice may be taken into account as a circumstance attending the conclusion of a contract within the meaning of Article 4(1) of Directive 93/13.

38. In the view of the *Spanish Government*, the existence of an unfair commercial practice, such as the incorrect indication of the annual percentage rate of charge, has, pursuant to Article 4(1) and Article 6(1) of Directive 93/13, consequences for the validity of a consumer credit agreement as a whole if that is more favourable to the consumer.

39. The *Austrian Government* argues that Directive 2005/29 rules out the possibility of unfair commercial practices having consequences for the validity of a consumer credit agreement. Having regard to Article 13 of that directive, the legal consequence consisting in the invalidity of the contract concerned seems disproportionate. Moreover, it cannot be inferred from Article 3(2), according to which that directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract, that the finding of an unfair commercial practice has an effect on the validity of the contract.

40. The *Slovak Government* infers from Article 3(2) of Directive 2005/29 that the matter of the incorrect indication of the annual percentage rate of charge must be examined in the light of Directives 87/102 and 93/13. Referring to the order in *Pohotovosť*,[6] it points out that the incorrect indication of the annual percentage rate of charge may be a factor which the national court may take into account when considering whether a contractual term is worded in plain intelligible language within the meaning of Article 4 of Directive 93/13. Such an assessment may therefore lead to the conclusion that a term is unfair even though it concerns the main subject-matter of the contract.

41. The *Commission* points out that Directive 2005/29, pursuant to Article 3(2) thereof, excludes the question of the validity of a contract, while effecting full harmonisation of legislation on unfair commercial practices. National legislation which penalises a possible infringement of that directive by declaring a consumer credit agreement as a whole to be invalid is thus not compatible with European Union law. As, however, Directive 87/102 does not provide for a specific penalty in the event of the incorrect indication of the annual percentage rate of charge and, moreover, effects no more than minimum harmonisation of national rules on credit agreements, each Member State is free to enact suitable legislation. In the exercise of this legislative competence, the Member States are required to observe the principles of equivalence and effectiveness.

VI – Legal appraisal

A – *Introductory comments*

42. The questions referred concern various aspects of the system created by the European Union legislature to protect the consumer against the use of unfair terms in business-to-consumer commercial practices. To place them in their correct objective context, it seems worthwhile to me, before considering them, to describe briefly the essential parameters of the system of protection as it was originally devised by the Union legislature and on which the case-law of the Court of Justice has left a lasting imprint.

6 — Order of 16 November 2010, Case C-76/10 [2010] ECR I-11557.

43. According to the settled case-law of the Court, 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. [7] In view of that weaker position, Article 6(1) of that directive provides that unfair terms are not binding on the consumer. As is evident from the case-law, that is a mandatory provision, which seeks to replace the formal balance between the rights and obligations of the parties to the contract with an effective balance which re-establishes equality between them. [8]

44. In order to guarantee the protection intended by Directive 93/13, the Court of Justice 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. [9] It is in the light of those principles that the Court of Justice has therefore held that the national court is required to assess of its own motion whether a contractual term is unfair. [10] A court's power to determine of its own motion whether a term is unfair is, in the view of the Court of Justice, 'a proper means of achieving the result sought by Article 6 of the Directive, namely, preventing an individual consumer from being bound by an unfair term, and of contributing to the attainment of the objective of Article 7, since, if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms being used by traders in contracts concluded with consumers'. [11] The Court of Justice has deemed it necessary for the courts to have that power 'to ensure 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.' [12]

45. Although the questions posed by the referring court in its request for a preliminary ruling relate to the system of protection whose essential features are described here, they concern different legal aspects. In its first question the referring court begins by asking about the scope of the protection afforded to the consumer by Article 6(1) of Directive 93/13. It wishes to know, in the final analysis, whether that provision of the directive permits the Member States to provide in their national legislation for the presence of an unfair term to result in the contract as a whole being declared invalid if that would be more favourable to the consumer than the continued validity of the contract without the unfair term. Answering that question will require a study of the issue of the partial invalidity of consumer contracts and of the preconditions for their continued existence. For its part, the second question referred concerns the somewhat different issue of the interaction of the legal instruments with which the European Union legislature seeks to guarantee the protection of the consumer when he is faced with certain commercial practices which must be classified as unfair. Those instruments are primarily Directives 93/13 and 2005/29, to which the referring court expressly refers. As the second question has been posed in the particular context of a consumer credit agreement, its consideration will require that the rules laid down in Directive 87/102 also be taken into account.

46. As the two questions differ in their subject-matter, they must be considered in the following individually and in the given sequence.

7 — 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.

8 — See *Mostaza Claro*, cited in footnote 7, paragraph 36, and Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraph 25.

9 — See *Océano Grupo Editorial and Salvat Editores*, cited in footnote 7, paragraph 27; *Mostaza Claro*, cited in footnote 7, paragraph 26; and Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 31.

10 — *Asturcom Telecomunicaciones*, cited in footnote 9, paragraph 32.

11 — Case C-473/00 *Cofidis* [2002] ECR I-10875, paragraph 32, and *Mostaza Claro*, cited in footnote 7, paragraph 27.

12 — *Cofidis*, cited in footnote 11, paragraph 33, and *Mostaza Claro*, cited in footnote 7, paragraph 28.

B – *The first question referred*

47. Before the first question can be answered, it must be decided precisely what rules Directive 93/13 lays down with a view to the possible continued existence of contracts containing unfair terms. For this it will be necessary to interpret its more important provisions, with account taken of the legislative objective set out in the recitals.

1. Minimum level of protection prescribed by European Union law

48. As Directive 93/13 lays down no more than minimum requirements on the one hand and permits certain derogations at Member State level on the other, determining the scale of the protection prescribed by European Union law will require, above all else, clarification of the question of which measures Directive 93/13 obliges the Member States to take to protect the consumer. The primary purpose of interpretation must therefore be to ascertain what binding legal requirements the legislature has imposed on the Member States, which ultimately represent the minimum level of protection prescribed by European Union law. Those requirements must be isolated from the provisions which grant the Member States some room for manoeuvre in the shaping of their legislation.

a) In principle, only invalidity of individual contractual terms

49. The interpretation begins with the most important provision, the first half of Article 6(1) of Directive 93/13, since it defines the legal consequences which the legislature wishes the use of unfair terms to have. It requires the Member States to lay down in their national law that such clauses in contracts concluded by a seller or supplier with a consumer 'shall not be binding on the consumer'. It is evident from the very wording of this provision that the legal consequence of invalidity ordered by the legislature is to be to the advantage of the consumer only, whereas the contractual term classified as unfair does not cease to be binding on the seller or supplier.

50. That provision is complemented by a further rule in the second half of Article 6(1), which, in a way, further defines the first rule. It requires the Member States to ensure that 'the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms'. According to that provision, the presence of an unfair term in a contract results, as a rule, in that term alone being invalid, while the remainder of the contract remains in existence and, after the imbalance to the detriment of the consumer has been corrected, continues to bind the parties. This corresponds to the interpretation given by Advocate General Tizzano in his Opinion in the *Ynos* case.[13] As he convincingly explained, that rule must be viewed in the light of its legislative purpose. Its aim is, after all, to improve the contractual position of the consumer by preventing him from being bound by an unfair term. It is not, on the other hand, intended to protect the seller or supplier, for whom the removal of one or more terms might prove to be less advantageous and who might therefore have every interest in escaping the obligations arising from the contract.[14] As regards its protective function, Article 6(1) would be reversed into its opposite if, on every occasion and regardless of other factors, the invalidity of one or more terms resulted in the invalidity of the contract as a whole.

51. The rule laid down in Article 6(1) of Directive 93/13 can therefore be understood to mean that, where an unfair term is found, the Member States are not in principle obliged to order the invalidity of the entire contract. The consequence of invalidity for the consumer can rather be limited, in principle, to the term concerned, while the contract as such remains valid.[15]

13 — Opinion of Advocate General Tizzano in Case C-302/04 *Ynos* [2006] ECR I-371.

14 — Ibid., point 80.

15 — Similarly, Pfeiffer, T., in *Das Recht der Europäischen Union* (E. Grabitz/M. Hilf, eds), Vol. IV, A5, Article 6, paragraph 10, p. 3. He infers from the wording of the second half of Article 6(1) of the directive that the legal consequences of the unfairness of a term (inexistence, absolute or relative invalidity or non-binding nature of the term, depending on national law) should as a rule be confined to the unfair terms, which also means that the the remainder of the contract remains valid.

b) By way of exception, invalidity of the contract as a whole

52. However, the legal consequence of the continued existence of the contract, as clearly emerges from the conditional clause ('if') in the second half of Article 6(1) of the directive, does not apply without exception. If at all possible, the contract is to remain applicable to both parties without the unfair term. That means, conversely, that the contract is not binding in cases where it cannot continue to exist without the unfair term.

53. That statement raises the further question of the criteria by which it is to be determined whether a contract 'is capable of continuing in existence' in accordance with that provision without the unfair term. The answer to this question proves to be relevant particularly as the referring court requests information on the importance to be attached to the consumer's actual or assumed interest in not being bound by the contract.

54. As several of the participants in the proceedings have rightly stated, an assessment based on either subjective or objective criteria is theoretically possible. In an assessment based on subjective criteria, in which the determining factor is the consumer's actual or assumed interest as a party to the contract, the national court would be called upon to consider in each instance whether the invalidity of the contract as a whole would be more favourable to the consumer. However, an assessment might also be based on objective criteria, the decisive criterion then being, for example, the possibility of executing the contract despite the invalidity of individual unfair terms.

55. As a general rule, the question submitted by the referring court determines the subject-matter of the legal examination to be undertaken. It should be pointed out in this context that the question referred concerns only the possible relevance of subjective criteria — and, indeed, the possible advantages of a contract for the consumer — in an assessment of the possible continued existence of a contract. Consequently, the examination to be undertaken by the Court of Justice might in principle be confined to that aspect, there being no compelling need to extend the subject-matter to include the possible relevance of other criteria. I shall therefore begin by considering whether the Member States are obliged by Directive 93/13 to provide in their national legislation that, in the matter of the possibility of a partly invalid contract continuing in existence, the consumer's actual or assumed interest in continuing to be bound by that contract must be taken into account.

56. That question clearly calls, in my view, for a negative reply. There are significant arguments against an interpretation that requires an assessment as to whether a contract is capable of continuing in existence without the unfair term, pursuant to the second half of Article 6(1), to be based on subjective criteria.

57. The wording of Article 6(1) of Directive 93/13 can in itself be cited as an argument against that interpretation.

58. The directive does not state in so many words that the contract as a whole is to be deemed invalid if that is more favourable to the consumer. The way in which that provision is worded rather allows of the conclusion that the legislature was at pains to limit the invalidity of the contract as a whole to a few exceptional cases. That is evident from the fact that it refers to that legal consequence only in a subordinate clause and restricts it to clearly definable cases. A comparison of the various language versions of that provision of the directive endorses the interpretation suggested here, according to which the continued existence of the contract is to be the rule and must not depend on a possibly more favourable situation for the consumer.

59. That interpretation is confirmed by the 22nd recital in the preamble to Directive 93/13, which is worded even more clearly in this respect than the rule itself. It shows that, without prejudice to the non-binding nature of individual unfair terms ordered by Article 6(1), 'the contract will continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair

provisions'. That wording indicates the objective possibility of the contract in question continuing in existence. The decision whether the contract may continue in existence is, at least, not left to one of the parties to the contract alone, but is apparently to be subject to an objective assessment conducted by an impartial body. Nowhere does the legislature rule that the fact of not being bound by the contract being more favourable to the consumer is to be a decisive criterion. If the legislature had attached any importance to that aspect, it could have included in the provision a subjective criterion, such as the reasonableness for the consumer of continuing to be bound by a partly invalid contract. The fact that it did not do so must be seen as a sign of a conscious decision not to include such a provision.

60. It cannot therefore be inferred from the wording or structure of Directive 93/13 at least that the position of the consumer and the possibility of his being placed in a more favourable situation by the termination of the contract are to determine whether the contract is capable of continuing in existence without the unfair term, within the meaning of Article 6(1).

61. The same conclusion is reached when the purpose and objectives of Directive 93/13 are recalled during interpretation.

62. As explained in the introduction to this Opinion, 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, which leads to his agreeing to the terms drawn up in advance by the seller or supplier without being able to influence their content. The European Union legislature seeks to correct any resulting imbalance in contractual rights and obligations within the meaning of Article 3(1) of the directive by requiring that the terms deemed to be unfair be declared not binding on the consumer in accordance with Article 6(1) of Directive 93/13. The Court of Justice has rightly seen that provision as mandatory and having as its aim, in effect, the replacement of the formal balance of the rights and obligations of the parties to the contract with an effective balance which re-establishes equality between them.

63. As is evident from its sixth recital, Directive 93/13 seeks, to this end, 'to remove unfair terms from those contracts'. As has already been pointed out, however, its aim is not that contracts as a whole should be declared invalid because they contain an unfair term. The legislature's sole objective is to ensure a balance, not to do away with the contract altogether. Declaring whole contracts to be invalid as a function of the consumer's interests would not lead to equality between the parties to those contracts. Corrective intervention to strike a balance in the contract concluded by the two parties in the exercise of their contractual autonomy is intended to heal and in no way to destroy the contract.

64. Moreover, the basis for commercial action taken by economic operators on their own responsibility would be destroyed. The victim of any system of rules which ordered, categorically and without exception, whole contracts to be deemed invalid if they benefited only one of the parties would be contractual autonomy. If favoured unilaterally, the consumer would, after all, be released from his responsibility carefully to weigh up the advantages and disadvantages and to draw a reasonable conclusion before entering into a contractual obligation. The approach adopted by the legislature takes appropriate account of this principle, to which considerable importance is attached in the European Union legal system,[16] in so far as it confines itself to what is necessary for equality to be achieved between the parties to a contract, while otherwise ordering that they be bound by existing agreements into which they have entered voluntarily.

16 — In its case-law the Court of Justice has often referred to the principle of the freedom of parties to arrange their own affairs in its various forms. See Case C-499/04 *Werhof* [2006] ECR I-2397, paragraph 23; Case C-240/97 *Spain* v *Commission* [1999] ECR I-6571, paragraph 99; Case C-215/97 *Bellone* v *Yokohama* [1998] ECR I-2191, paragraph 14; and Joined Cases C-90/90 and C-91/90 *Neu and Others* [1991] ECR I-3617, paragraph 13.

65. The legal situation would therefore be quite different if the assessment of the question whether a contract containing unfair terms might continue in existence was guided solely by the situation most favourable to the consumer in each case. For there would then be a danger of the relationship between the consumer and the seller or supplier again becoming biased, this time solely in the consumer's favour. Although the difference in contractual rights and obligations to the advantage of the seller or supplier would be removed, which would no doubt be consistent with the objectives of the directives, the balance sought by the legislature would not be guaranteed. The legislature had its mind on neutralising disadvantages for the consumer. It cannot be assumed, however, that it was intent on helping the consumer to gain a legal position which exceeded that normally held in business transactions by two equal parties to a contract. Nor is there, strictly speaking, any objective justification for releasing the consumer from the obligations imposed on him by a contract with an equal partner, provided that he has entered into those obligations voluntarily and aware of their consequences.

66. That also corresponds to the view expressed by Advocate General Tizzano in his Opinion in the *Ynos* case. In that Opinion he states that it is possible to depart from the rule laid down in Directive 93/13 (that a contract must continue to exist despite the presence of an unfair term) only when a contract is objectively incapable of continuing in existence without the unfair term, but not when, upon subsequent examination, it is found that either party would not have made the contract without it.[17]

67. The arguments advanced in connection with the need to uphold the principle of the freedom of the parties to arrange their own affairs and to guarantee that contractual relations between sellers or suppliers and consumers are balanced must, finally, be assessed in the light of a further objective of the directive. It should be remembered that, as its first recital shows, Directive 93/13 was adopted with the aim of progressively establishing the internal market.[18] As can be seen from its second and third recitals, it seeks to remove the marked divergences in national legislation on unfair terms in contracts with consumers. Besides affording the consumer better protection, the legislature intended, according to the seventh recital, to promote commercial activity in the area of application of the directive ('sellers of goods and suppliers of services will thereby be helped in their task of selling goods and supplying services, both at home and throughout the internal market'). However, a commercial activity is capable of developing only where economic operators are guaranteed legal certainty. That includes the protection of their confidence in the endurance of contractual relations. An arrangement in which the validity of a contract as a whole depends on the interests of only one party is not only incapable of promoting that confidence, but may even unsettle it in the long term. Just as the willingness of sellers or suppliers to make contracts with consumers would be likely to decline as a consequence, so might the goal of establishing the internal market be frustrated. Article 6 of Directive 93/13 takes that into account by confining itself to ensuring a balance in contractual relations.

68. It follows from the above deliberations that the consumer's subjective attitude towards the remainder of the contract, which cannot be classified as unfair, is not to be regarded as the criterion which determines its fate. To my mind, other factors, such as the objectively assessed actual possibility of further executing the contract, are more likely to be decisive.[19] That possibility might not obtain if, as a consequence of the invalidity of one or more terms, both parties held that the basis

17 — Opinion in *Ynos*, cited in footnote 13, point 79.

18 — It should be borne in mind in this context that, in setting the goal of establishing a common market, the European Union legislature assumed that the principle of the freedom to arrange one's own affairs, as reflected in the contractual freedom previously mentioned, would also apply. The freedom to arrange one's own affairs, the market economy and competition are mutually dependent (see Riesenhuber, K., *Privatrechtsgesellschaft: Entwicklung, Stand und Verfassung des Privatrechts*, Tübingen 2007, pp. 13 and 14). The freedom to arrange one's own affairs presupposes the existence of a market and leads to competition; the protection of competition against distortions ensures the continuing existence of the market and thus the freedom of choice for interested parties. The freedom of the individual to form legal relationships as he sees fit is the common core of the fundamental freedoms, which extend the freedom of the individual to arrange his own affairs beyond the frontiers of the Member States.

19 — Kapnopoulou, E., *Das Recht der missbräuchlichen Klausel in der Europäischen Union*, Tübingen 1997, p. 152, at least does not consider the further execution of the contract possible if the gaps left in such a contract after certain terms have been found to be unfair ultimately prove to be too large.

for the conclusion of the contract no longer existed.[20] By way of exception, the invalidity of the contract as a whole might be considered, for example, if it could be assumed that, without the invalid part, the transaction could not be effected as both parties had actually or hypothetically agreed, because the *purpose* or *legal nature* of the contract was no longer the same. It is for the national court entrusted with the application of Directive 93/13, or the legislation transposing it, to consider whether these conditions are satisfied in the particular case.

69. The national courts have a special role to play in assessing whether a contract is capable of continuing in existence despite the presence of an unfair term,[21] not least because of their knowledge of national law and also of the background to the case on which a ruling is to be given. In this context, reference will be made only to the judgment in *Freiburger Kommunalbauten*,[22]in which the Court of Justice pointed out that whether a particular term in a contract is unfair under Article 4 of Directive 93/13 is decided by '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'.[23] In that judgment the Court of Justice particularly emphasised the need for the contractual term in question to be considered in the overall context of relevant national law, since it had reached the conclusion that, in the assessment to be undertaken, 'the consequences of the term under the law applicable to the contract must also be taken into account. This requires that consideration be given to the national law'.[24]It should thus be remembered that, from time to time, national law has an important role to play in deciding whether a contract is capable of continuing in existence, despite its partial invalidity.[25]

70. To summarise, it can be said that the Member States are not obliged under European Union law to prescribe in their national legislation that, where a contract with a consumer is found to contain unfair terms, that contract as a whole is not binding on the consumer, if that is more favourable to him. Consequently, if, when it comes to assessing the validity of a contract, the law of the Member States attaches no importance to the actual or assumed interest of the consumer in no longer being bound by such a contract, it does not fall short of the level of protection required by Directive 93/13.

2. Member States' freedom to raise the level of protection

71. It should be remembered, however, that, as is to be clearly seen from its twelfth recital, Directive 93/13 undertakes no more than partial and minimum harmonisation of national legislation relating to unfair terms.[26] A fundamental normative expression of the minimum harmonisation approach on which that directive is based is the authorisation in Article 8, which expressly provides for the

20 — The condition for the continued existence of the contract is that it is capable of continuing in existence 'auf derselben Grundlage' [on the same basis] in the German version. This somewhat unclear formulation means continuing in existence on otherwise the same terms. This is evident from a comparison with other language versions, which all refer to the terms of the contract (French: 'selon des même termes'; English: 'upon those terms'; Italian: 'secondo i medesimi termini'; Spanish: 'en los mismos términos'). That condition is satisfied if the contract is capable of continuing in existence even without the unfair terms, according to its purpose and legal nature (see Pfeiffer, T., op. cit. (footnote 15), paragraph 11, p. 3).

21 — See the Order in *Pohotovosť*, cited in footnote 6, paragraph 61.

22 — Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403.

23 — Ibid., paragraph 21.

24 — Ibid. The consequences of a contractual term being found to be unfair may differ from one legal system to another. It is not least because of this that Article 6(1) of Directive 93/13 states in neutral terms that unfair terms must 'not be binding' on the consumer. That provision is limited to prescribing a certain outcome whose attainment must be guaranteed by the Member States when they transpose the directive, without specifying whether the term concerned is to be declared invalid or ineffective. This is left to national law, which determines the precise legal consequence. The use of neutral terms by the European Union legislature is ultimately based on the recognition of the variety of systems and traditions of civil law within the Union (for the origins of European civil law see Rainer, M., *Introduction to Comparative Law*, Vienna 2010, pp. 27 and 28).

25 — See Kapnopoulou, E., op. cit. (footnote 19), p. 151, who points out that Directive 93/13 does not contain a conclusive concept of legal consequences, but merely sets out guidelines and refers, for the precise definition of individual legal consequences, to the national laws of the Member States. According to Kapnopoulou, it is for the national legal systems to determine what is to happen to defective contracts: depending on the circumstances, the options include recourse to non-mandatory provisions of law, supplementary interpretation of the contract, reframing of the contract and total invalidity.

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

Member States to have the right to adopt more stringent provisions compatible with the Treaty in the area covered by the directive to ensure a greater degree of protection for the consumer. Conversely, it can also be inferred from that provision that a downward divergence, that is to say, a level of consumer protection lower than that sought by the directive, would not be compatible with the requirements of the directive. As I have already stated in my Opinion in *Caja de Ahorros y Monte de Piedad de Madrid*, that minimum harmonisation approach leaves the Member States considerable discretionary scope,[27] which is restricted only by the general limits to European Union law, and above all by primary law.[28]

72. The Member States may therefore lay down more stringent rules on the consequences of invalidity than provided for in Article 6 of Directive 93/13 in order to protect the consumer. The adoption on the basis of Article 8 of more stringent national legislation providing for the invalidity of an entire contract containing one or more unfair terms if that is more favourable to the consumer[29] expresses a lawful exercise of an authorisation granted by the European Union legislature to achieve a higher level of consumer protection.

73. There are no reservations about the compatibility of national legislation that serves to protect the consumer with the aforementioned objective of establishing the internal market,[30] provided that the fundamental freedoms are not unduly affected.[31] The assessment of this question, however, ultimately depends on the content of the national legislation concerned.

74. From all the above it follows that the Member States are free to provide in their national legislation for the invalidity of the whole contract to be the legal consequence in cases where that is more favourable to the consumer than the continued existence of the contract. Restricting the legal consequence of invalidity to the contractual term concerned is not required by European Union law.

C – *The second question referred*

75. The second question has two parts. In the first part the referring court asks whether the incorrect indication of the annual percentage rate of charge in a consumer credit agreement constitutes an unfair commercial practice within the meaning of Directive 2005/29. In the second part of the question the referring court wants to know what consequences such classification as an unfair commercial practice has for the validity of the contract concerned.

1. First part of the question: incorrect indication of the annual percentage rate of charge as an unfair commercial practice

a) Directive 2005/29

76. Where the first question is concerned, it should first be pointed out that Directive 2005/29 carries out a complete harmonisation of the rules concerning unfair commercial practices of undertakings vis-à-vis consumers. Unlike the transposition of Directive 93/13, this means that Member States maynot adopt stricter rules than those provided for in the directive, even in order to achieve a higher level of consumer protection.[32]

27 — Ibid., paragraphs 28 and 29.

28 — When exercising the authority granted in Article 8 of the directive, the Member States must observe the general limits to European Union law, meaning primary law, including the fundamental freedoms, and other secondary legislation (see Kapnopoulou, E., op. cit. (footnote 19), p. 163).

29 — As Kapnopoulou, E., op. cit. (footnote 19), p. 162, rightly states, the Member States may lay down only rules which represent a 'plus' compared with the level of the protection afforded by Directive 93/13, not an 'aliud,' let alone a 'minus.'

30 — See point 67 of this Opinion.

31 — In the specific context of the activity of granting credit on a commercial basis, of particular interest are the freedom to provide services and, to a lesser degree, the free movement of capital (see Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraph 43; for the freedom to provide services see Weiss, F./Woolridge, F., *Free Movement of Persons within the European Community*, 2nd edition, Alphen aan den Rijn 2007, pp. 123 and 124). In the case of contracts concerning the purchase of movable goods, on the other hand, the free movement of goods would be relevant.

32 — See Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag* [2010] ECR I-10909, paragraphs 27 and 30; Case C-304/08 *Plus Warenhandelsgesellschaft* [2010] ECR I-217, paragraph 41; and Joined Cases C-261/07 and C-299/07 *VTB-VAB and Galatea* [2009] ECR I-2949, paragraph 52.

77. One of the more important provisions of Directive 2005/29 is Article 5, which prohibits unfair commercial practices and also presents the criteria for determining unfairness. Thus, according to Article 5(2), a commercial practice is unfair if it is contrary to the requirements of professional diligence and materially distorts, or is likely materially to distort, the economic behaviour of the average consumer with regard to the product. Moreover, Article 5(4) of the directive defines two precise categories of unfair commercial practices, that is to say, 'misleading' practices and 'aggressive' practices, corresponding to the criteria set out in Articles 6 and 7 and in Articles 8 and 9 respectively. Lastly, Annex I to the directive contains an exhaustive list of 31 business practices which, according to Article 5(5), are regarded as unfair 'in all circumstances'. Consequently, as recital 17 in the preamble to the directive expressly states, only those commercial practices can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9 of the directive.

78. For the application of the law by the national courts and the administrative authorities it follows from the above that the list of 31 cases of unfair business practices in Annex I must first be considered. If a commercial practice can be subsumed under one of those situations, it must be prohibited; a further examination of the effects, for example, is unnecessary. If the practice in question is not covered by any of the situations on the banned list, it will be necessary to determine whether one of the regulated instances of the general clause — misleading or aggressive commercial practices — is involved. The general clause in Article 5(1) of the directive is directly applicable only where that is not the case. [33]

b) Scope of Directive 2005/29

i) Existence of a commercial practice

79. Before we proceed to examine the unfairness of a commercial practice by reference to the overall circumstances of the individual case, however, it must be determined whether the main action falls within the scope of Directive 2005/29 at all. For that to be the case, the commercial activity which is the subject of the main proceedings, that is, the conclusion of a consumer credit agreement, would have to satisfy the statutory definition of the term 'business-to-consumer commercial practices' in Article 2(d).

80. In that regard, it should be borne in mind that Article 2(d) of the directive gives a particularly broad definition of the term 'commercial practices': 'any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers'. [34] That definition therefore covers all actions of a trader intended to persuade the consumer to conclude a contract. [35] According to this broad definition, the commercial offering of credit transactions to consumers, which is at issue in the main proceedings, can also be regarded as an action connected with the sale of a product, namely a financial service. Contrary to the view of the Slovak Government, [36] therefore, those proceedings concern 'commercial practices' within the meaning of Article 2(d) of Directive 2005/29.

ii) Importance of the delimitation in Article 3(2) of the directive

81. As the activity at issue in the main proceedings satisfies the definition of 'commercial practice' in the widest sense of the term, the case is also to be regarded as falling within the scope of Article 3(1) of Directive 2005/29.

33 — See my Opinion in *Plus Warenhandelsgesellschaft* (judgment cited in footnote 32, paragraph 74).

34 — See *Mediaprint Zeitungs- und Zeitschriftenverlag*, cited in footnote 32, paragraph 17.

35 — See Orlando, S., 'The Use of Unfair Contractual Terms as an Unfair Commercial Practice', *European Review of Contract Law*, Vol. 7, 2007, No 1, p. 40, in whose view commercial practices embrace all the actions of a trader which may influence the consumer's decision on the conclusion of a contract.

36 — See paragraph 13 of the Slovak Government's written statement.

82. A question arising in this context, however, is whether Directive 2005/29 is at all relevant to the treatment of the subject of the main proceedings. It may not be applicable at the level of legal consequences. For that to be decided, however, the subject-matter of the request for a preliminary ruling should first be determined. A reasoned appraisal of the questions referred and of the statements contained in the order for reference shows that request to be essentially seeking an answer to the question whether European Union law disapproves of a situation in which a trader provides false information at the time of the conclusion of a contract with a consumer — that being, in the main proceedings, the indication of an annual percentage rate of charge lower than is in fact the case — and penalises that fact by declaring the contractual term concerned to be invalid.

83. The question of the relevance of Directive 2005/29 is particularly unavoidable because that legal act nowhere provides for the legal consequence to be the invalidity of such a term. Instead, Article 3(2) of Directive 2005/29 stipulates that the 'Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract'. From both its wording ('without prejudice to') and its systematic position in Article 3, which defines the scope of the directive and its relationship with other European Union legal acts, that provision must be seen as a delimiting rule which is, according to the Union legislature, to permit recourse to those specific provisions of Union law, regardless of the applicability of Directive 2005/29. In this way, it is to continue to be possible to use specific instruments provided for in the legal acts concerned in order to protect the consumer. The concept on which the rule in Article 3(2) is based does not permit the fact that Directive 2005/29 is applicable in a given set of circumstances to detract in any way from the consumer's means of obtaining legal protection under contract law, such as the termination of the contract or a reduction of the consideration.

84. The rules referred to in Article 3(2) of Directive 2005/29 concerning contract law and, in particular, the validity of a contract undoubtedly include the provisions of Directive 93/13. The system of protection introduced by the latter directive, which has been described above, its essential component being the rule laid down in Article 6, concerns aspects of contract law, especially as it relates to the legal validity of individual contractual terms used by sellers and suppliers in commercial transactions with consumers. It *regulates legal relationships under individual contracts* between two different categories of private parties, requiring that unfair terms not be binding on the consumer, the Member States being under an obligation to ensure that their civil law provides for that legal consequence.[37] In consistent application of the delimiting rule laid down in Article 3(2) of Directive 2005/29, the provisions of Directive 93/13 should accordingly be regarded as not having been superseded.

85. As it is not Directive 2005/29 but Directive 93/13 which provides for the invalidity of individual contractual terms to be the legal consequence under certain conditions, the former must, in effect, be regarded as irrelevant to the subject-matter of the main proceedings. None of its provisions can be taken as the legal basis for a declaration of the invalidity of the contractual

37 — This view is held by Orlando, S., op. cit. (footnote 35), p. 35, who points out that Article 6 of Directive 93/13 governs the legal treatment of unfair terms, that is, an aspect of legal relationships under an individual contract between sellers or suppliers and consumers. Similarly, Tilmann, I., *Die Klauselrichtlinie 93/13/EWG auf der Schnittstelle zwischen Privatrecht und öffentlichem Recht*, p. 10, holds that, of the European consumer protection directives, Directive 93/13 is particularly important in terms of the harmonisation of private law in the EU, since it concerns contract law and so a vital area of private law. The Member States' national contract law has undergone major changes as a result of the transposition of the directive. The directive is leading, according to Tilmann, to a gradual approximation of the various systems of contract law, paving the way for the emergence of European private law. Similarly, Basedow, J., 'Grundlagen des europäischen Privatrechts,' *Juristische Schulung*, 2004, p. 94, views the transposition of Directive 93/13 as part of the harmonisation of private law and points out that Directive 93/13 was transposed in different ways: in national civil codes (Germany, Italy, Netherlands), in a separate consumer law (Austria, France, Greece and, to some extent, Finland and Spain), in separate laws on commercial practices (Belgium), on consumer contracts (Sweden) and on general business conditions (Spain, Portugal), and, lastly, by a legal instrument which adopted the directive almost verbatim (United Kingdom, Ireland). In the view of Micklitz, H.-W., 'AGB-Gesetz und die EG-Richtlinie über missbräuchliche Vertragsklauseln in Verbraucherverträgen,' *Zeitschrift für Europäisches Privatrecht*, 1993, p. 533, Directive 93/13 marked the European Union's first intervention in the core area of private law.

terms in dispute.[38] The referring court also appears implicitly to proceed from that assumption, since in the second part of the question, which is still to be considered, it asks for information on the legal consequences which classification as an unfair commercial practice pursuant to Directive 2005/29 may have for the application of Article 6 of Directive 93/13. The question thus concerns the interactions between Article 5 et seq. of Directive 2005/29 and Article 6 of Directive 93/13, which will require an interpretation of the last of those provisions.

iii) Interim conclusion

86. To summarise, it can thus be said that Directive 2005/29 is inapplicable to subject-matter such as that of the main proceedings, at least where legal consequences are concerned.

c) Existence of an unfair commercial practice

i) Need for a coherent interpretation of consumer protection law

87. In principle, then, further comments on whether the activity in dispute has the characteristics of the concept of 'unfair commercial practices' within the meaning of Article 5 et seq. of the directive are superfluous.

88. However, the decision of the European Union legislature not to allow Directive 2005/29 to apply at the level of legal consequences in the individual cases specified does not necessarily mean that the assessments which it has made therein and on which the provisions of that directive are also based are not intended to have any effect on the interpretation of other legal acts governing the relationship between traders and consumers. An overall examination of the legal acts adopted to protect the consumer reveals many links between them, which must similarly be taken into account in the interpretation.[39] The acts of European Union law in the area of consumer protection law must therefore be seen as part of a single, overall set of rules which complement each other. The fragmentation that still persists in the Union's consumer protection law[40] is the consequence of a historical development in the course of which the Union legislature has gradually regulated individual

38 — As Abbamonte, G., 'The Unfair Commercial Practices Directive and its General Prohibition', *The regulation of unfair commercial practices under EC Directive 2005/29 — New rules and new techniques*, Norfolk 2007, p. 16, rightly states, the fact that a consumer concludes a contract because he has been the victim of an unfair commercial practice is to be considered irrelevant from the viewpoint of Directive 2005/29, since that directive does not provide any legal means of achieving the invalidity of the contract. None the less, Directive 2005/29 does not restrict the means of obtaining legal protection to which the consumer is entitled under contract law. The consumer must therefore seek legal protection before a civil court, where the fact that unfair commercial practices were used to conclude the contract will be an important aspect, which the civil court must take into account.

39 — See Orlando, S., op. cit. (footnote 35), p. 38, who refers to the need for 'normative coordination' between Directives 2005/29 and 93/13 to defuse the potential for conflict. He rightly points out that the difficulty of coordinating the directives through interpretation is due to the particular structural complexity of European Union law. The interplay between individual directives is not always evident at first glance. That is why a coherent interpretation extending to all legal acts is not always easy.

40 — Shortcomings in minimum harmonisation and the sector-specific approach have revealed the need for greater convergence and analysis of divergences in the European Union's consumer law (see Alpa, G./Conte, G./Carleo, 'La costruzione del diritto dei consumatori', *I diritti dei consumatori*, Guido Alpa (ed.), Vol. 1, p. 5). The debate on the further development of European consumer law dates back to 1999, when the European Council meeting in Tampere recognised in its final declaration the possible need for closer coordination of the Member States' civil law (see Čikara, E., *Gegenwart und Zukunft der Verbraucherkreditverträge in der EU und in Kroatien*, Vienna 2010, p. 47; for the specific approaches to harmonisation of law on fair trading practices see Wunderle, T., *Verbraucherschutz im Europäischen Lauterkeitsrecht*, Tübingen 2010, pp. 97 and 98). It was at that time that the Commission stepped up its efforts to consolidate contract law. The Commission communication 'A Coherent European Contract Law – an Action Plan' submitted in 2003 proposed the establishment of a 'common frame of reference' as an opt-in instrument which was to contain common rules and a common terminology of European contract law. Subsequently, the Study Group on a European Civil Code, an international network of researchers, drew up an academic draft of a common frame of reference. On the basis of this preparatory work the European Commission set up, in April 2010, a group of experts on a common frame of reference for European contract law, which submitted a feasibility study on 3 May 2011. The study presents a coherent system of contract law rules, which might be used in the future as an optional European contract law instrument (see also the Commission's Green Paper on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010) 348 final, especially Option 4). Mention must also be made in this context of the planned directive of the European Parliament and of the Council on consumers' rights, the aim of which is to overcome the fragmentation of consumer law. The European Parliament's position, approved at first reading on 23 June 2011 with a view to the adoption of that directive, provides for the amendment of Directive 93/13 and Directive 1999/44/EC on the purchase of consumer goods and associated guarantees and for the repeal of Directive 85/577/EEC on contracts negotiated away from business premises and of Directive 97/7/EC on distance contracts. The last two of these directives are to be replaced by a single directive.

spheres of life in line with the *acquis* with a view to establishing a genuine internal market for transactions between businesses and consumers. Directive 2005/29 forgoes any regulation of contract law, if only because those aspects had already been regulated by the Union legislature inter alia in Directive 93/13. Each of the two directives lays down rules on its own, quite specific sphere of life: Directive 2005/29 prohibits the use of unfair commercial practices which may materially influence the economic behaviour of consumers, while Directive 93/13 prohibits the use of unfair terms in business-to-consumer commercial practices.

89. Despite the existence of separate regulatory acts, it is not always easy to draw a clear line between the areas of application of the various directives. One reason for this is that the activities covered by the directives often merge in real life; another is that the concept of 'commercial practices' is very broad, encompassing a wide variety of commercial activities. That fact makes of Directive 2005/29, as it were, a general set of rules, as against such specific legislation as Directive 93/13.[41] The purpose and objective of the delimitation in Article 3(2) of Directive 2005/29 is to ensure that undesirable overlapping of the two directives does not occur at the level of legal consequences.

90. This delimitation is not, however, an end in itself, but follows a certain concept of regulation designed by the Union legislature. In particular, it cannot result in different legal assessments being made of a single set of circumstances to which both directives are in principle applicable. Instead, what is needed is a coherent interpretation of the relevant rules of law so as to avoid conflicting assessments, which is all the more necessary as the two directives demonstrate a convergence in the direction they take to afford protection, in as much as both seek to protect the ability to make judgments and the freedom of choice in business dealings.[42]

91. A number of situations will serve to illustrate the close link between the two directives: as regards the circumstances in the main proceedings, for example, it is conceivable that the unfairness of a commercial practice consists in the very use in consumer contracts of unfair terms within the meaning of Directive 93/13.[43] The trader's use of such terms is likely to be seen as a misleading act, since false information is provided or the consumer is unclear as to the actual scale of the contractual rights and obligations, especially with regard to rights and obligations arising from the clauses which are unfair and so invalid for the consumer. A similar assessment is likely to be made of a situation in which the trader words vital terms in language which is not plain or intelligible in order to withhold essential information from the consumer. Conversely, it is also conceivable, however, that false and thus misleading information in a contractual term within the meaning of Directive 2005/29 is the very reason for its unfair nature. This is also the situation which the referring court clearly suspects in the main action and which will need to be examined in the following.

92. In the interests of a coherent interpretation of the European Union's consumer protection law, it therefore seems necessary to consider whether the indication of an annual percentage rate of charge which is lower than is in fact the case can be classified as an 'unfair commercial practice' within the meaning of Article 5 et seq. of Directive 2005/29. What conclusions are to be drawn from this assessment for the interpretation of Directive 93/13 will be considered in the context of the second part of the question.

41 — A view also shared by Orlando, S., op. cit. (footnote 35), pp. 38, 40, with a reference to the broad definition of the concept of 'commercial practices.' He holds that, with Directive 2005/29, the European Union legislature introduced 'general law' into the Union's legal system by adopting a number of rules which laid down general principles, concepts and criteria.

42 — See recitals 6, 7 and 8 in the preamble to Directive 2005/29 and the 8th and 15th recitals in the preamble to Directive 93/13.

43 — This view is expressed by Orlando, S., op. cit. (footnote 35), p. 25. He considers whether the use of unfair terms within the meaning of Directive 93/13 also constitutes an unfair commercial practice within the meaning of Directive 2005/29. The answer is that in principle it does: their use is to be regarded primarily as a misleading commercial practice, since false information is as a rule conveyed or the consumer remains unclear as to his rights and obligations in the execution of the contract, particularly with regard to rights and obligations arising from the unfair (and, therefore, invalid) contractual terms. In addition, the author points out that the fact that the wording of vital contractual terms is not plain or intelligible can also be viewed as the withholding of important information within the meaning of Article 7 of Directive 2005/29.

ii) Examination of the unfair nature of a commercial practice

93. The presence of an 'unfair commercial practice' is to be considered in accordance with the approach described in point 78 of the present Opinion.

– Presence of a misleading practice within the meaning of Article 5(4)(a) in conjunction with Article 6(1)(d) of Directive 2005/29

94. It should first be noted that the incorrect indication of an amount, such as the annual percentage rate of charge, in a consumer credit agreement does not correspond to any of the unfair commercial practices listed in Annex I to the directive. As such indications are not included among the commercial practices listed in Annex I which are to be regarded as unfair in all circumstances, they may in principle be prohibited only if they constitute unfair commercial practices because, for example, they are misleading or aggressive within the terms of the directive.

Positive action by the seller or supplier

95. As an aggressive commercial practice can be ruled out from the outset in the main action, given that there are no signs of recourse to such means as harassment, intimidation, force or any other inadmissible influence, it remains to be seen in the following whether the characteristics of a misleading business practice within the meaning of Article 5(4)(a) of Directive 2005/29 obtain. It should be added that the directive makes a distinction between misleading actions (Article 6) and omissions (Article 7), each of the two categories being subject to its own rules. For a sound legal appreciation of the main action the relevant type of action must therefore be identified.

96. A commercial practice like that in the main action, consisting in the indication of a lower annual percentage rate of charge in a credit agreement than is in fact the case, is, to my mind, better assigned to the former category, since the influence on the consumer's transactional decision was largely achieved through a positive action by the trader consisting in the provision of false information on an aspect of the agreement which must be regarded as fundamental within the meaning of Article 6(1) of the directive. Such behaviour cannot be seen merely as an omission resulting from the withholding of information. That refutes the German Government's contention [44] that Article 7(1) of the directive, which concerns the specific case of the omission of material information, is applicable.

Influencing the consumer's transactional decision

97. The aspects of the agreement regarded as essential by the legislature are listed in Article 6(1). On the basis of a broad and, therefore, consumer-friendly interpretation of the provisions of the directive, the annual percentage rate of charge in a consumer credit agreement can in principle be subsumed under the concept of 'price' within the meaning of Article 6(1)(d), especially as the annual percentage rate of charge, according to the legal definition given in Article 1(2)(e) of Directive 87/102, is to be seen as part of the total cost to be paid by the consumer for the granting of a credit. Legally speaking, interest is the consideration for a loan granted for a given period. Accordingly, an incorrect calculation of the annual percentage rate of charge, such as that effected in this case, according to the information provided by the referring court, can also be classified as a 'price calculation' within the meaning of that provision.

44 — See paragraph 43 of the German Government's written statement.

98. It should be pointed out in this context that the referring court's assessment of the price calculation as incorrect is binding on the Court of Justice, firstly, because the annual percentage rate of charge is calculated, pursuant to Article 1(2)(e) of Directive 87/102, according to existing methods of the Member States, whose correct application can be verified by the national court itself, and secondly, because the national court is responsible for establishing the facts in the preliminary ruling procedure.

99. As regards the other requirements laid down in Article 6(1) of Directive 2005/29, it should be noted that false information on the annual percentage rate of charge — especially if indicated as being far lower than is in fact the case — is also likely to deceive the average consumer and to cause him to take a transactional decision which he would not otherwise have taken. In a true-to-life situation, after all, it can be assumed that an average consumer will normally obtain offers from a number of potential lenders and decide to take out a loan on the basis of a comparison of those offers, including the costs likely to be incurred. In other words, comparatively favourable credit conditions usually have a decisive influence on the opinion formed by the consumer.

100. European Union law takes account of the consumer's interest in information by expressly requiring in Directive 87/102, which was adopted with the twofold objective of establishing a common market in consumer credit (3rd to 5th recitals in the preamble) and of protecting consumers accepting such credit (6th, 7th and 9th recitals), that the consumer should receive adequate information on the conditions and cost of credit and on his obligations. That requirement emerges both from the 8th recital in the preamble and from the obligation laid down in Article 4(2)(a) of Directive 87/102 that the annual percentage rate of charge be stated in every written agreement. The purpose of the requirement that at the time of the making of the agreement the borrower be given any information which may have an effect on the scale of his obligations is, as the Court of Justice has repeatedly stated in its case-law, to protect the consumer against unfair credit terms and to enable him to have full knowledge of the terms of the future performance of the agreement. [45]

101. The aforementioned provisions of Directive 87/102 verify that in the context of the conclusion of credit agreements the annual percentage rate of charge is a critical piece of information, [46] without which the consumer cannot, as a rule, take a reasoned decision. The consumer is therefore very much dependent on that information being correct. Any misleading in respect of this information in particular, whether intentionally or as a result of negligence, is bound to be to his disadvantage. It is not least in view of the importance of that information for the consumer's ability to take a decision and of the far-reaching consequences of a wrong decision that Article 3 of Directive 87/102 calls for him to be informed through advertising well in advance of the conclusion of the agreement.

102. The view advanced here that false information at the time of the conclusion of credit agreements is in principle likely to influence a consumer's transactional decision within the meaning of Directive 2005/29 is further supported by recital 10 in the preamble to that directive, which, as the Slovak Government rightly points out, [47] forges something of a link to Directive 87/102, which is of relevance in this context. From this it emerges that Directive 2005/29 'provides protection for consumers where there is no specific sectoral legislation at Community level and prohibits traders from creating a false impression of the nature of products'. The legislature also points out that 'this is particularly important for complex products with high levels of risk to consumers, such as *certain financial services products*'. [48] These statements show that the European Union legislature was well aware what risk the consumer faces in this specific area of commerce. In the present case that risk has become a reality in the conclusion of the credit agreement.

45 — See the Order in *Pohotovosť*, cited in footnote 6, paragraph 68, and Case C-208/98 *Berliner Kindl Brauerei* [2000] ECR I-1741, paragraph 21.

46 — See the Order in *Pohotovosť*, cited in footnote 6, paragraph 70, and Case C-264/02 *Cofinoga* [2004] ECR I-2157, paragraphs 26 and 27.

47 — See paragraph 14 of the Slovak Government's written statement.

48 — Recital 10. Emphasis added here.

103. Objectively speaking, then, a misleading action within the meaning of Article 5(4)(a) in conjunction with Article 6(1)(d) of Directive 2005/29 has occurred. The indication of the incorrect annual percentage rate of charge in a consumer credit agreement thus represents, in effect, an 'unfair commercial practice' within the meaning of that directive.

– Alternatively, identification of a failure to meet the requirement to exercise professional diligence

104. Finally, there is a need briefly to consider the possible satisfaction of the definition of a failure to exercise professional diligence in accordance with Article 2(h) of Directive 2005/29, to which reference has been made both by the referring court in its order for reference [49] and by a number of the participants in the proceedings in their written submissions.

105. As can be seen from the wording of Article 5(4) ('in particular') of Directive 2005/29, misleading and aggressive commercial practices constitute only specific forms of unfair commercial practices. Nor does that provision contain any separate reference to the concept of professional diligence, since misleading or even aggressive dealings with consumers are regarded by the legislature as being in themselves inconsistent with the requirements of the duty of professional diligence. In the context of the application of that directive, therefore, a misleading or aggressive commercial practice need not be examined to see whether it also complies with the requirement that a trader exercise professional diligence. A legal examination to that end proves necessary only if the applicability of the general clause in Article 5(1) is a possibility. [50] Much the same is true, moreover, of the material distortion of the economic behaviour of the average consumer referred to in Article 5(2)(b), which essentially corresponds to the requirement in Article 6(1), according to which the commercial practice must be likely to influence the consumer's transactional decision.

106. As the legal assessment of the circumstances undertaken here has already shown there to have been a misleading action within the meaning of Article 5(4)(a) of the directive, I consider a separate examination of these elements to be superfluous. I will merely take the precaution of pointing out that false information on the annual percentage rate of charge as a result of its incorrect calculation is hardly likely to meet the requirements of professional diligence, since a trader must be expected to undertake his commercial activities in accordance with the relevant legislation and to demonstrate particular care in his dealings with a consumer, especially as the latter is dependent on the trader's expertise. As stated at the beginning of my comments on the purpose of the rules laid down in Article 6 of Directive 93/13, [51] the consumer's particular need for protection stems from the fact that he is usually in a weak position vis-à-vis the trader, as regards both his bargaining power and his level of knowledge. That makes him particularly susceptible to having to agree to terms previously laid down by the trader, without his being able to influence their contents. A correction in this respect is possible only if strict compliance with certain obligations concerning information provided is required of the trader.

107. Thus an alternative examination based on the criteria laid down in the general clause in Article 5(2) of Directive 2005/29 also leads to the conclusion that an 'unfair commercial practice' is involved in the case which is the subject of the main proceedings.

49 — See p. 11 of the order for reference.

50 — See Abbamonte, G., op. cit. (footnote 38), p. 28, according to whom the possibility of the failure to exercise professional diligence need not be considered in the event of a misleading or aggressive commercial practice, since a commercial practice of that kind is bound to constitute a failure to exercise professional diligence. A similar view is expressed by Henning-Bodewig, F., 'Die Richtlinie 2005/29/EC über unlautere Geschäftspraktiken', *Gewerblicher Rechtsschutz und Urheberrecht — Internationaler Teil*, 2005, No 8/9, p. 631, who points out that the general clause in Article 5(1) (set out in more precise terms in Article 5(2)) applies only when the actual circumstances are not covered by the unfair commercial practices on the 'black list' in Annex I to the directive and none of the regulated cases given as examples (misleading or aggressive commercial practices) in the general clause exists in practice.

51 — See point 43 et seq. of the present Opinion.

d) Conclusion

108. In view of all the above considerations, the answer to the first part of the question is that Directive 2005/29 should be interpreted as meaning that the behaviour of a trader who indicates a lower annual percentage rate of charge in the agreement than is in fact the case satisfies the criteria for classification as an unfair commercial practice.

2. Second part of the question: the consequences of unfair commercial practices for the validity of the contract

109. The second part of the question concerns the possible consequences of the classification of the commercial practice here at issue as unfair within the meaning of Directive 2005/29 for the validity of the contract in the context of Directive 93/13. To this end, both the relevance of the various legal acts applicable in principle to the case which is the subject of the main proceedings and the way in which they interact must be examined.

a) Relevance of Directive 87/102

110. It should be noted that it cannot be inferred directly from the failure to fulfil the obligation to provide information enshrined in Article 4(2)(a) of Directive 87/102 that the credit agreement may be partly or even entirely invalid, especially as Article 14(1) of the directive merely requires that the Member States ensure that credit agreements do not derogate, to the detriment of the consumer, from the provisions of national law implementing or corresponding to the directive. Although, objectively speaking, the obligation to provide information was not fulfilled in the present case, in that the correct annual percentage rate of charge was not indicated, the directive does not contain more precise rules requiring the national courts, for example, to order the invalidity of the credit agreement. As Directive 87/102 does not provide for such a legal consequence in the event of that requirement to provide information not being met, it is not relevant to the answer to the second part of the question.

b) Relevance of Directive 2005/29

111. The provisions of Directive 2005/29, on the other hand, are clearer, in that, as already pointed out,[52] they are, pursuant to Article 3(2), without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract. Although Article 13 provides for the Member States to be required to lay down penalties for infringements of national provisions adopted in application of the directive, an interpretation to the effect that provision may be made for a penalty to consist in a contractual term being declared invalid would clearly be inconsistent with the former rule. In view of the legislature's explicit decision not to use Directive 2005/29 to regulate contract law, such an interpretation would not be tenable. That directive too therefore has no direct relevance to the answer to the second part of the question.

c) Relevance of Directive 93/13

112. However, the irrelevance of Directive 2005/29 does not in any way preclude the application of other acts of European Union law and the legal remedies for which they provide for the protection of the consumer.[53] The application of Directive 93/13 is therefore conceivable, especially as the subject-matter which it regulates concerns contract law and, in particular, the validity of contracts.

52 — See point 81 et seq. of this Opinion.

53 — See Abbamonte, G., op. cit. (footnote 38), p. 16.

i) Scope of the directive

113. The contractual term in dispute would, first of all, have to fall within the scope of Directive 93/13. That scope is defined in Article 1. The scope *ratione personae* is restricted by Article 1(1), which states that the directive relates only to terms in contracts between sellers or suppliers and consumers. It follows that contracts between consumers and contracts between sellers or suppliers are excluded from the scope of the directive. The scope *ratione materiae* is, in turn, defined in such a way that, according to Article 1(1), in conjunction with Articles 2(a) and 3(1), the assessment provided for by the directive covers only 'contractual terms which have not been individually negotiated in consumer contracts'.

114. It is not disputed in the main proceedings that the credit agreement which the defendant in those proceedings has concluded with its customers is a contract between a seller or supplier and consumers. From the fact emphasised in the order for reference that loans are granted on the basis of standard-form contracts it can be inferred that the credit agreement in dispute was not negotiated individually with the consumer. From that it follows that that contract comes within both the scope *ratione personae* and the scope *ratione materiae* of the directive.

ii) Scale of the substantive assessment

115. In addition, the term containing an incorrect indication of the annual percentage rate of charge would have to be amenable to a substantive assessment pursuant to Article 4(2) of Directive 93/13.

116. Reference should be made in this context to the judgment in *Caja de Ahorros y Monte de Piedad de Madrid*, in which the Court of Justice made it clear that that rule does not, for example, define the scope of Directive 93/13, but is designed to 'establish 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'.[54] Accordingly, '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'.

117. As regards classification as subject-matter as referred to in Article 4(2) of Directive 93/13, it should be pointed out that the indication of the annual percentage rate of charge is considered important by the European Union legislature because it relates to an aspect of the main subject-matter of the credit agreement, in that it provides information on the amount to be paid by the borrower to the lender for granting him the loan. The annual percentage rate of charge thus stands for a central obligation to the lender within the overall structure of the parties' rights and obligations under the credit agreement. Accordingly, a term containing an incorrect indication of the costs, perhaps because the annual percentage rate of charge has been miscalculated, should be amenable to a substantive assessment pursuant to Article 4(2) of Directive 93/13, if it is not in plain intelligible language.

118. Indications of support for that conclusion can be found in the ruling of the Court of Justice in *Pohotovosť*, which has certain parallels with the present case. In that case the Court of Justice considered inter alia the question whether failure to indicate the annual percentage rate of charge in a credit agreement might be a decisive factor in the context of the examination to be undertaken by a national court of the question whether a term in a credit agreement on the costs involved, that clause

54 — See *Caja de Ahorros y Monte de Piedad de Madrid*, cited in footnote 26, paragraph 34.

not containing that indication, is in plain intelligible language within the meaning of Article 4 of Directive 93/13. The Court of Justice answered that question in the affirmative,[55] assigning to the national court the task of considering, in an individual assessment, whether the term in question satisfied the aforementioned requirements of clarity and intelligibility.

119. What proves to be of greater relevance in the context of the issue in dispute, however, is the fact that in that ruling the Court of Justice implicitly approves of the possibility of assessing a term of that kind.[56] The fact that *Pohotovosť* concerned the absence of an indication rather than an incorrect indication as in the present case is irrelevant in assessment terms to the question of the possible applicability of that case-law to the present case, especially as both cases concern the omission of decisive information from a credit agreement contrary to an express requirement of European Union law. As the circumstances in both cases concern the same contractual subject-matter, a substantive assessment is possible in principle. However, that ultimately depends on whether the requirement of plain and intelligible language is satisfied, which is something that the case-law requires the competent national court to consider.[57]

iii) Unfair nature of the contractual term

120. The competence of the national court also extends to assessing the unfairness of the term in question in each case. That assessment must be conducted in accordance with the general criteria laid down by the European Union legislature in Articles 3(1) and 4(1) of Directive 93/13.[58] As the Court of Justice found in its judgment in *Pannon GSM*,[59] Article 3 of the directive defines in abstract terms the factors which make a contractual term which has not been individually negotiated unfair, while the annex, to which Article 3(3) of the directive refers, contains an indicative and non-exhaustive list of terms which can be declared unfair.

121. Whether a commercial practice is classified as 'unfair' within the meaning of Directive 2005/29 may ultimately have an influence on the classification of a term as 'misleading' within the meaning of Directive 93/13, as suspected by the referring court in the second part of the question can, in my view, be answered only through an interpretation of Article 4(1) of Directive 93/13. As last made clear in the judgment in *Pénzügyi Lízing*,[60] the general criteria in the directive, which have been addressed above, are also subject to the interpreting competence of the Court of Justice.

122. That provision provides specifically for the unfairness of a contractual term to 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 the 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'. Owing to the broad wording of that provision, the national court is required to take into account not only the actual substance of the contract but also a wide range of other relevant factors.[61]

55 — See the Order in *Pohotovosť*, cited in footnote 6, paragraph 77.

56 — Ibid., paragraph 73.

57 — See *Caya de Ahorros y Monte de Piedad de Madrid*, cited in footnote 26, paragraph 32.

58 — See Case C-137/08 *VB Pénzügyi Lízing* [2010] ECR I-10847, paragraph 40; *Caja y Monte de Piedad de Madrid*, cited in footnote 26, paragraph 34; *Freiburger Kommunalbauten*, cited in footnote 22, paragraphs 18, 19 and 21; and Case C-478/99 *Commission* v *Sweden* [2002] ECR I-4147, paragraphs 11 and 17.

59 — *Pannon GSM*, cited in footnote 8, paragraphs 37 to 39.

60 — *Pénzügyi Lízing*, cited in footnote 58, paragraph 40.

61 — See Brandner, H.E., 'Maßstab und Schranken der Inhaltskontrolle bei Verbraucherverträgen', *Monatsschrift für Deutsches Recht*, 4/1997, p. 313.

123. However, there is a particular need to take account of factors with which certain legal assessments by the legislature are associated. That interpretation is endorsed by the fact that the provision requires 'all the circumstances attending the conclusion of the contract' to be taken into account. Both the meaning of the words and the purpose of the rule laid down in Article 4(1) of Directive 93/13 on the one hand and the relationship between the two directives within the European Union's consumer protection law on the other suggest that it should be seen as also including behaviour which, pursuant to the definition of 'commercial practices' given in Article 2(d) of Directive 2005/29, is intended to attract customers for the purpose of concluding contracts. That interpretation is clearly supported by recital 15 in the preamble to Directive 93/13, which requires that in the assessment of the unfairness of terms 'particular regard shall be had to … whether the consumer *had an inducement*'. [62]

124. It is at this juncture, in my view, that the possible qualification of a commercial practice as 'unfair' in accordance with the criteria set in Directive 2005/29 should be taken into account in the assessment of the unfair nature of a contractual term. The designation 'unfair' within the meaning of Directive 2005/29 circumscribes nothing other than an influence of which the European Union legislature disapproves on the consumer's ability to make judgments and his freedom of choice. It should also be pointed out that the unfair nature of a commercial practice which is reflected in an influence of that kind will ultimately also provide information on an essential factor which must be taken into account in the assessment of the unfairness of a contractual term, that factor being the possibility that the trader has acted contrary to the requirement of good faith enshrined in Article 3(1) of Directive 93/13. This is apparent from the 15th recital in the preamble to Directive 93/13. Against that background, Article 4(1) of Directive 93/13 can be regarded as something of a gateway for assessments under the legislation on fair trading practices.

125. The convergence in the direction taken by the two directives in affording protection, to which I have already referred, [63] will be evident from the fact that inadmissible influence by the trader on the consumer's development of an intention not infrequently culminate in an imbalance in contractual relations to the consumer's detriment. [64] That in no way means, however, that the unfairness of a commercial practice is automatically a sign of the unfairness of a contractual term. Rather, the assessment of the unfair nature of a contractual term must be undertaken primarily on the basis of the provisions of Directive 93/13 as the directly applicable legislation. The fact that the commercial practice which has led to the conclusion of the credit agreement must be described as 'unfair' can, at most, be regarded as relevant as one of several factors on which the competent court will base its assessment within the meaning of Article 4 of Directive 93/13. [65] In this respect, agreement must be expressed with the German Government's view [66] that the finding of an unfair commercial practice can have no more than indirect effects on a finding of the unfairness of a contractual term.

62 — Emphasis added here. In the view of Pfeiffer, T., op. cit. (footnote 15), paragraph 13, p. 5, the following may be of significance where freedom of choice is impaired: an actual or legal monopoly position of one party to the contract; an existential or pressing dependence of one side on performance; prior education and commercial experience; recognisably thorough prior examination by the consumer; a brief, everyday transaction; a standard-form contract; disreputable methods of persuasion (for example, an immoral appeal to willingness to help within the family), trivialisation (such as signing 'only for the files') or a surprise situation.

63 — See point 90 of this Opinion.

64 — See Kapnopoulou, E., op. cit. (footnote 19), p. 152, who takes the view that the fact that influence is exerted on a consumer to accept a contractual term and has not resisted that 'influence' is a sign of imbalance in the consumer contract concerned.

65 — Abbamonte, G., op. cit. (footnote 38), p. 16, does not comment explicitly on the question whether assessments under Directive 2005/29 should inform the interpretation of Directive 93/13, but he does state that, when granting legal protection in the context of a civil action brought by the consumer (for the termination of the contract or a reduction in the price), the national court must take account of such important factors as the use of unfair commercial practices.

66 — See paragraph 51 of the German Government's written statement.

d) Conclusion

126. The answer to the second part of the question is therefore that Directive 2005/29 should be interpreted as meaning that finding a commercial practice to be unfair has no direct effects on the question whether the credit agreement concluded in the context of that commercial practice is invalid.

3. Summary conclusions

127. The above examination has shown that the behaviour of a trader who indicates a lower annual percentage rate of charge than is in fact the case satisfies the criteria for classification as an unfair commercial practice, as laid down in Directive 2005/29.[67] Although that directive is in principle without prejudice to the validity of individual contracts,[68] it must be said that it contains certain assessments made by the European Union legislature, which should be taken into account by the national court in its assessment of the unfairness of a contractual term. It is required to do so by Article 4(1) of Directive 93/13, especially as 'all the circumstances attending the conclusion of the contract' are to be taken into account in that assessment. The aforementioned assessments also include the disapproval of a certain commercial practice in the form, for example, of inadmissible influence exercised by the trader on the consumer's capacity to make judgments and freedom of choice. The use of an unfair commercial practice can be seen as a sign of the unfair nature of a contractual term, but it does not release the national court from its duty to consider all the circumstances of the individual case when making its assessment.[69]

VII – Conclusion

128. In the light of the foregoing considerations, I propose that the Court's answer to the questions referred by the Okresný súd Prešov should be as follows:

(1) . Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that the question of the continued existence of a consumer contract containing unfair terms does not depend on that being more favourable to the consumer. That provision does not, however, prevent Member States from providing in their national legislation for the legal consequence of the invalidity of the contract as a whole in a case of that kind.

(2) . Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) must be interpreted as meaning that the behaviour of trader who indicates in the contract a lower annual percentage rate of charge than is in fact the case satisfies the criteria for classification as an unfair commercial practice.

The finding of that unfair commercial practice has no direct effects on the assessment of the unfair nature and the validity of a term or the credit agreement as a whole in accordance with Directive 93/13, but it may be regarded as a circumstance attending the conclusion of the contract, which the competent national court will take into account in its assessment pursuant to Article 4(1) of Directive 93/13.

67 — See point 108 of this Opinion.

68 — See points 86 and 111 of this Opinion.

69 — See point 120 et seq. of this Opinion.