Reports of Cases

OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 13 September 2012[1]

Case C-92/11

RWE Vertrieb AG
v
Verbraucherzentrale Nordrhein-Westfalen e.V.

(Reference for a preliminary ruling from the Bundesgerichtshof (Germany))

(Price increase terms in gas supply contracts — Concept of mandatory statutory or regulatory provision in Article 1(2) of Directive 93/13/EEC — Terms in general terms and conditions referring to mandatory statutory or regulatory provisions — Transparency requirement under Article 5 of Directive 93/13 and Article 3(3) in conjunction with Annex A, points (b) and (c), of Directive 2003/55/EC — Unfairness of a contract amendment term under Article 3 of Directive 93/13 in the light of points 1(j) and 2(b) of the annex to Article 3)

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I – Introduction

1. This reference for a preliminary ruling from the Bundesgerichtshof (German Federal Court of Justice) concerns questions of consumer protection in connection with gas supply agreements. The claimant in the main proceedings ('the claimant') is a consumer protection association which is challenging, under rights assigned by 25 customers of an energy supply undertaking, price increases effected by that undertaking from 2003 to 2005. At that time, domestic customers and smaller business customers obtained gas either as ordinary standard tariff customers or as special customers. At that time a national regulation, the Regulation on general terms and conditions for the supply of gas to standard tariff customers ('the AVBGasV'), applied solely to standard tariff customers.[2] Standard tariff customers under that legislation were customers who were eligible for the basic supply and were supplied on the basis of generally applicable prices. However, gas customers were able to depart from the requirements of this national legislation. Frequent use was made of this possibility, inter alia because customers paid more favourable prices outside the statutory requirements. The energy supply undertakings entered into 'special' customer agreements with these customers, which did not come within the scope of the AVBGasV, and special contractual conditions and prices were agreed with them. Substantively, these agreements in their general terms and conditions either referred to the AVBGasV or reproduced its provisions verbatim. Some at least of the claimant's assignors are such special customers. An essential point at issue between the parties in the main proceedings is whether the energy supply undertaking – the defendant in the main proceedings – can rely on a provision of the AVBGasV which confers the right to increase prices on energy supply undertakings.

2. Against that background, the referring court wishes to ascertain, first, whether Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[3] is also applicable, having regard to Article 1(2), when, in a contract between a supplier and a consumer, on the basis of a contractual term not individually negotiated, it is agreed that a statutory or regulatory provision is to apply which is not applicable to the contracting parties and the contract entered into by them but is none the less adopted unamended by the user of the term. Secondly, the referring court asks whether a non-transparent term, in the light of Articles 3 and 5 in conjunction with points 1(j) and 2(b) of the annex to Article 3 of Directive 93/13 and in the light of Article 3(3) in conjunction with points (b) and/or (c) of Annex A to Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC,[4] can none the less be regarded as being sufficiently plain and intelligible if it is ensured that the supplier informs its customers of every price increase in good time and those customers have the right to judicial review of the price increase, in addition to the right to terminate the contract.

2 — BGBl I 1979, p. 676. The AVBGasV was in force until 7 November 2006. It was superseded by the Regulation of 26 October 2006 on general terms and conditions for the basic supply of domestic customers and the substitute supply of gas from the low pressure network (GasGVV), BGBl. I pp. 2391, 2396.

3 — OJ 2004 L 95, p. 29.

4 — OJ 1998 L 176, p. 57.

II – Legal background

A – *European Union law*

1. Directive 93/13

3. The 13th, 14th and 20th recitals in the preamble to Directive 93/13 read as follows:

'Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the Community are party; whereas in that respect the wording "mandatory statutory or regulatory provisions" in Article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established;

Whereas Member States must however ensure that unfair terms are not included …

…

Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail'.

4. Article 1(2) of Directive 93/13 provides as follows:

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

5. Articles 3(1) and (3) of Directive 93/13 are worded as follows:

'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 Directive 93/13 provides 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 5 of Directive 93/13 provides as follows:

‘In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. …’

8. Point 1(j) of the annex to Directive 93/13 (‘Terms referred to in Article 3(3)’) mentions terms ‘enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract’.

9. The second indent of point 2(b) of the annex to Directive 93/13 elucidates the scope of point 1(j) as follows:

‘Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.’

2. Directive 2003/55 [5]

10. Article 3(3) of Directive 2003/55 is worded as follows:

‘Member States shall take appropriate measures to protect final customers and to ensure high levels of consumer protection, and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers, including appropriate measures to help them avoid disconnection. In this context, they may take appropriate measures to protect customers in remote areas who are connected to the gas system. Member States may appoint a supplier of last resort for customers connected to the gas network. They shall ensure high levels of consumer protection, particularly with respect to transparency regarding general contractual terms and conditions, general information and dispute settlement mechanisms. Member States shall ensure that the eligible customer is effectively able to switch to a new supplier. As regards at least household customers, these measures shall include those set out in Annex A.’

11. Annex A to Directive 2003/55 (‘Measures on consumer protection’) provides as follows:

‘Without prejudice to Community rules on consumer protection, in particular Directive 97/7/EC of the European Parliament and of the Council … and Council Directive 93/13/EEC …, the measures referred to in Article 3 are to ensure that customers:

(a) …

Conditions shall be fair and well known in advance. In any case, this information should be provided prior to the conclusion or confirmation of the contract. Where contracts are concluded through intermediaries, the above information shall also be provided prior to the conclusion of the contract:

(b) are given adequate notice of any intention to modify contractual conditions and are informed about their right of withdrawal when the notice is given. Service providers shall notify their subscribers directly of any increase in charges, at an appropriate time no later than one normal

5 — Directive 2003/55, which was applicable in the period of the price increases at issue from 1 July 2004 to 1 October 2005, was repealed from 3 March 2011 by Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55 (OJ 2009 L 211, p 94), which contains provisions analogous to Articles 2 and 3(3) of and Annex A to Directive 2003/55. However, Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (OJ 1998 L 204, p. 1), which was still applicable during the period of the price increases at issue from 1 January 2003 to 30 June 2003, contains no comparable provisions.

billing period after the increase comes into effect. Member States shall ensure that customers are free to withdraw from contracts if they do not accept the new conditions notified to them by their gas service provider;

(c) receive transparent information on applicable prices and tariffs and on standard terms and conditions, in respect of access to and use of gas services;

(d) ... General terms and conditions shall be fair and transparent. They shall be given in clear and comprehensible language. Customers shall be protected against unfair or misleading selling methods'.

12. In accordance with Article 33(1) of Directive 2003/55, the directive had in principle to be transposed in the Member States by 1 July 2004.

B – *National law*

1. AVBGasV of 21 June 1979[6]

13. Paragraph 1(2) of the regulation contains the following definition:

'A customer within the meaning of this regulation is a standard tariff customer.'

14. Paragraph 4(1) and (2) of the AVBGasV confers, as determined by the case-law of the Federal Supreme Court, a right on the gas supply undertaking to alter the general tariff prices according to its own properly exercised discretion (Paragraph 315 of the BGB).[7] It reads as follows:

'Paragraph 4:

Type of supply

(1) The gas supply undertaking provides gas on the relevant general tariffs and conditions. The calorific value with the margin of fluctuation arising from the undertaking's circumstances of production and use and the static pressure of the gas relevant for supplying the customer are determined according to the general tariffs.

(2) Changes to the general tariffs and conditions come into effect only after they are published.'

2. Civil Code

15. Paragraph 307 of the Civil Code (Bürgerliches Gesetzbuch, 'the BGB') is worded as follows:

'(1) Provisions in general terms and conditions are of no effect if they unreasonably disadvantage the contracting partner of the party using them, contrary to the requirements of good faith. Unreasonable disadvantage may also arise from the provision not being clear and intelligible.

(2) In case of doubt, unreasonable disadvantage is to be assumed to exist if a provision

1. is incompatible with essential basic principles of the statutory rule from which it diverges, or

6 — Footnote 2.

7 — Paragraph 14 of the order for reference.

2. restricts essential rights or obligations arising from the nature of the contract in such a way that achieving the purpose of the contract is jeopardised.

(3) Subparagraphs 1 and 2 and Paragraphs 308 and 309 apply only to provisions in general terms and conditions by which terms are agreed that diverge from statutory rules or supplement them. Other provisions may be of no effect in accordance with the second sentence of subparagraph 1 in conjunction with the first sentence of subparagraph 1."

16. Paragraphs 308 and 309 of the BGB give specific effect to Paragraph 307(2) of the BGB by means of specific prohibitive clauses.

17. Paragraph 310(2) of the BGB provides as follows:

'Paragraphs 308 and 309 do not apply to contracts of electricity, gas, block heating and water supply undertakings for the supply of electrical energy, gas, block heating and water from the supply network to special customers, in so far as the conditions of supply do not diverge, to the disadvantage of the customers, from regulations on general terms and conditions for the supply of electrical energy, gas, block heating and water to standard tariff customers. The first sentence applies by analogy to contracts for the collection of waste water.'

III – Facts, main proceedings and questions referred

18. The claimant is a consumer protection association with legal personality which, by virtue of rights assigned by 25 gas consumers, is making claims for recovery against the defendant in the main proceedings ('the defendant'), an energy supply undertaking, on account of price increases in the years 2003 to 2005. The defendant based these price increases on contractual terms which refer to the AVBGasV or contain identical provisions. Paragraph 1 of the AVBGasV expressly stated, however, that it applied only to standard tariff customers. Under Paragraph 36(1) of the Law on energy (Energiewirtschaftsgesetz, 'the EnWG') 2005 (formerly the first sentence of Paragraph 10(1) of the EnWG 1998), standard tariff customers are customers who are eligible for the basic supply by the relevant basic supplier and are supplied on the basis of generally applicable prices. These are mostly customers with a relatively small energy requirement.[8] However, gas customers were at that time able to depart from the requirements of the AVBGasV. Frequent use was made of this possibility, not least because customers not falling within the statutory requirements paid more favourable prices. With these customers, the energy supply undertakings entered into what were known as special customer contracts which did not come within the scope of the AVBGasV, agreeing special contractual terms and prices with them. Substantively, these agreements either referred, within the framework of general terms and conditions, to the AVBGasV or reproduced its provisions verbatim. Some at least of the customers who have assigned their rights to the claimant are such special customers.

19. In the period from 1 January 2003 to 1 October 2005, the defendant increased gas prices four times in all. In this period, the 25 customers had in fact no possibility of changing gas supplier because the liberalisation of the energy market was not yet sufficiently advanced, and therefore no alternative supply undertaking which could have supplied them with gas was available.[9] They therefore paid – subject in some cases to the right to claim repayment – the increased charges invoiced to them for the gas supplied in the period from 2003 to 2005.

8 — According to the uncontested arguments of the parties; see on this point inter alia the statement of claim of 7 September 2006, p. 61.

9 — According to the defendant itself in its reply of 22 December 2006.

20. The claimant regards the gas price increases as invalid and is therefore seeking repayment of the amounts paid under the price increases. The Landgericht (Regional Court) upheld the action and the defendant's appeal against that decision was unsuccessful. As grounds, the appellate court explained that the defendant was not entitled to increase tariffs under Paragraph 4 of the AVBGasV as, under Paragraph 1(2) of the AVBGasV, that provision was applicable only to standard tariff customers. The price variation terms contravened Paragraph 307 of the BGB, because they were not sufficiently clear and specific and caused unreasonable disadvantage to customers, who were unable to verify whether the price increase was justified. That was not altered by the defendant's interests to be taken into account in view of the long-term contractual relationship, or by the fact that the price variation term followed the statutory example in Paragraph 4 of the AVBGasV. The appellate court gave leave for the defendant's appeal on a point of law, by which the defendant continues to seek the dismissal of the claim.

21. The Bundesgerichtshof, hearing the appeal on a point of law, is asking, first, about the applicability of Directive 93/13 in the light of Article 1(2) thereof, and seeks elucidation as to whether a review of a term under Directive 93/13 is also precluded where, in a contract between a gas undertaking and a consumer, on the basis of a contractual term that was not individually negotiated, it is agreed that a statutory or regulatory provision applies without restriction, even if that statutory or regulatory provision does not, by virtue of statutory law, apply to the contracting parties and the type of contract entered into by them. In this connection, the referring court gives to understand that there is no reason for customers with 'special' contracts to be placed in a better position than standard tariff customers. That position is also borne out by the provision of national law in Paragraph 310(2) of the BGB.

22. Secondly, the referring court seeks to ascertain whether contractual terms in gas supply contracts giving the supplier the right to alter its prices but not indicating the grounds, conditions and extent of a price change can, in the light of Articles 3 and 5 of Directive 93/13 in conjunction with point 1(j) and point 2(b) of the annex thereto and in the light of Article 3(3) of Directive 2003/55 in conjunction with points (b) and/or (c) of Annex A thereto, none the less be adjudged to be sufficiently plain and intelligible if it is ensured that the supplier notifies its customers of any price increase within a reasonable period and the customer is entitled to seek judicial review of that price increase and to terminate the agreement. In this context, the referring court expresses doubts as to the applicability of point (c) of Annex A to Directive 2003/55 to the present case by reference to the fact that that provision refers only to 'applicable prices and tariffs' but not to price increases.

23. In those circumstances, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) Is Article 1(2) of Directive 93/13 to be interpreted as meaning that contractual terms concerning price variations in gas supply contracts with consumers who are to be supplied outside the general obligation to supply gas and on the basis of the general freedom of contract (special customers) are not subject to the provisions of the directive if, in those contractual terms, the statutory provisions which apply to standard tariff customers within the framework of the general obligation to provide a connection and supply gas are incorporated unchanged in the contractual relationships with special customers?

(2) Are Articles 3 and 5 of Directive 93/13 – in so far as they are applicable – in conjunction with point 1(j) and the second sentence of point 2(b) of the annex to Article 3(3) of that directive, and Article 3(3) of, in conjunction with points (b) and/or (c) of Annex A to, Directive 2003/55 to be interpreted as meaning that contractual terms concerning price variations in natural gas supply contracts with special customers meet the requirements for plain and intelligible wording and/or possess the requisite degree of transparency if, although the grounds, conditions and scope of a change in price are not set out, it is nevertheless ensured that the gas supply

company informs its customers of every price increase in good time in advance and those customers have the right to terminate the contract by way of notice if they do not wish to accept the amended conditions of which they have been informed?

IV – Procedure before the Court of Justice

24. The reference for a preliminary ruling dated 9 February 2011 was received at the Court Registry on 28 February 2011.

25. Written observations were submitted by the parties in the main proceedings, the Governments of the Kingdom of Belgium and of the Federal Republic of Germany, and the European Commission within the period laid down in Article 23 of the Statute of the Court of Justice.

26. At the hearing on 28 June 2012 the representatives of the parties in the main proceedings, the Government of the Federal Republic of Germany and the Commission presented oral submissions.

V – Essential arguments of the parties

A – *First question*

27. On the first question the *claimant* and the *Commission* take the view that Article 1(2) of Directive 93/13 is to be interpreted as meaning that price variation terms in gas supply contracts with consumers who are supplied outside the context of the general duty to supply and under general freedom of contract are subject to the provisions of Directive 93/13 even where the contracts incorporate statutory provisions that do not apply to them but only to other customers. In support of their argument they refer to the 13th recital in the preamble to Directive 93/13. If a contractual term is declared applicable to a type of contract other than that provided for by statute, a disparity arises and it cannot be presumed that the legislature automatically assumed, in a context not covered by the scope of the provision, that the term was reasonable. The reference is based on an autonomous decision by the contracting parties and not on a mandatory statutory or regulatory provision. If it were otherwise, any user of a term could exempt himself from substantive review by means of a general reference to certain provisions and thus circumvent the requirements of Directive 93/13. As a derogating provision, Article 1(2) of Directive 93/13 may not be interpreted beyond its literal meaning.

28. The *Belgian Government* also takes this view but considers that in any case only such mandatory statutory or regulatory provisions as are intended to satisfy mandatory requirements in the public interest could preclude the applicability of Directive 93/13 under Article 1(2). That argument is supported by the fact that Article 1(2) of Directive 93/13 is to be viewed against the background of the internal market, under which legal provisions may be adopted only in the case of specific mandatory requirements relating to the public interest.

29. Conversely, the *defendant* and the *German Government* are of the view that Article 1(2) of Directive 93/13 also applies where the parties to a gas supply contract refer in the contract to mandatory statutory or regulatory provisions. Logically, the scope of Directive 93/13 does not come into play. In this context, the German Government takes the view that the concept of ‘mandatory statutory or regulatory provision’ is not defined in Article 1(2) of the Directive, and the 13th and 14th recitals concern only the scope of that concept. For that reason, the concept is to be interpreted in accordance with the national laws of the Member States, and whether a statutory provision has binding effect is to be decided on the basis of national law. Only such an interpretation is in keeping with the meaning and purpose of Article 1(2), which is intended to prevent a review as to unfairness in the case of mandatory statutory or regulatory provisions.

B – *Second question*

30. On the second question, the *claimant* and the *Commission* take the view that lack of transparency in a price adjustment term cannot be offset by the possibility of termination or judicial review, or by a notification in due time of the price increase, particularly as in the present case there cannot be assumed to have been such timeliness or any possibility of termination. In that connection, the Commission additionally submits that the transparency requirement does not in principle require the reasons, extent and conditions applicable to a price increase to be stated, since it is a matter for the national courts to assess the intelligibility and clarity of such a term. However, the transparency rule is in any event not satisfied if a provision is incorporated which itself is not transparent. The legal consequences of provisions lacking transparency are, however, to be determined by the national courts.

31. Conversely, the *Belgian Government* takes the view that notification in due time of a price increase and the possibility of termination do satisfy the requirement of transparency. A price variation term as referred to in point 1(j) of the annex to Article 3 of Directive 93/13 may none the less be unfair, but an assessment of this is a matter for the national courts.

32. The *German Government* says that any assessment of unfairness or transparency under Directive 93/13 is a matter solely for the national courts, and also takes the view that Directive 2003/55 is not applicable because it confers no direct right on the consumer, its object being rather to open up the internal energy market completely. The *defendant* additionally submits in that connection that Directive 2003/55 is also not applicable because the contracts at issue in the main proceedings had already been entered into by the time the directive was adopted.

33. Both the *defendant* and the *German Government* suggest in the alternative that, should their view not be shared, the effect of the Court's judgment should be limited: in the German Government's view, to contracts entered into after delivery of the judgment and, in the defendant's view, to a period of 20 months after delivery of the judgment.

VI – Legal analysis

A – *First question*

34. The subject matter of the first question is the interpretation of Article 1(2) of Directive 93/13, under which contractual terms based on mandatory statutory or regulatory provisions, or on provisions or principles of international conventions to which the Member States or the Community are parties, are not subject to the provisions of the directive. The referring court would like to know how the term 'mandatory statutory or regulatory provision' is to be construed. Specifically, the question is whether the term is to be construed in such a way as to refer only to statutory provisions which relate to a type of contract regulated by statute in regard to which the Member State has adopted legislation, or whether it is sufficient for a contract not actually covered by the binding effect of a national statutory provision to refer, as regards individual terms, to the full content of provisions of national legislation. This question thus concerns the material scope of Directive 93/13.

1. Absence of a legal definition of the concept of mandatory statutory or regulatory provision and varying language versions

35. The term 'mandatory statutory or regulatory provision' in Article 1(2) is not defined in detail in Directive 93/13, thus leaving open the above question and the problem – not discussed by the parties – of whether it refers only to mandatory or also to optional legal provisions.

36. A grammatical interpretation of Directive 93/13 provides the chief ground for understanding Article 1(2) to be an exception for mandatory law only. According to the German understanding of the term, 'bindende Rechtsvorschriften' ('binding provisions') are those which bind the parties and thus cannot be deviated from even by agreement between the parties. None the less, this interpretation appears doubtful because the legally correct concept is the concept of 'zwingende' ('mandatory') provisions. However, the English, French and Spanish versions with their wordings 'mandatory', 'impératif' and 'imperativo' also appear to support an interpretation according to which an exception is permitted only for mandatory law.

37. However, in that connection the 13th recital in the preamble to the directive affords an appropriate aid to interpretation. It states that provisions which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms, and it is made clear in particular in the third clause of the recital that the term statutory provisions 'also' covers provisions which, according to the law, apply between the contracting parties provided that no other arrangements have been made. This latter clarification, combined with the concept of requisite binding effect, can only be construed in such a way that the statutory or regulatory provisions mentioned in Article 1(2) may also be such provisions as are available to the parties. This clarification, it is true, is to be found only in the preamble and not in the text of the directive itself, yet where interpretation is required, particular attention is to be paid to the recitals in the preamble to a directive because these reflect the will and intention of the legislature and therefore shed light to a significant extent both on the motives that led to the adoption of the directive and on the objectives pursued by it.[10] Under Article 295 TFEU/Article 253 EC, they are an integral component of the legislative instrument and a consistent interpretation of the text of the directive in the light of the recitals is therefore essential.[11] If, therefore, a recital explains how a specific concept used in the directive is to be understood, that is an indication that that interpretation should also be binding in regard to the text of the directive itself.

38. The concept of the mandatory statutory provision should cover both mandatory and also optional law is further supported by a historical and teleological interpretation, as will be shown further below.

39. Such a historical and teleological interpretation is in particular required because the German word 'beruhen' ('are based on') in Article 1(2) is widely divergent from other language versions. The French version speaks of 'clauses contractuelles qui reflètent des dispositions législatives ou réglementaires impératives', the English of 'contractual terms which reflect mandatory statutory or regulatory provisions'. Those terms 'reflètent' and 'reflect', which are wider than the term 'beruhen' used in the German version, could indicate that a reference to mandatory provisions also removes a contract from the scope of Directive 93/13 where the statutory provision refers to another type of contract and/or another group of persons.

40. However, according to settled case-law, the need for a uniform application of European Union law prohibits a provision in one of its language versions from being viewed in isolation. In particular, if the different language versions of an act of the Union show discrepancies or doubts remain, the provision at issue must be interpreted according to the context and the objective of the legislation to which it belongs.[12]

10 — Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions, point 10.

11 — Köndgen, J. in: Riesenhuber, K. (ed.), *Europäische Methodenlehre*, 2nd ed., Paragraph 7, paragraphs 39, 42.

12 — See my Opinion of 17 January 2012 in Case C-510/10 *DR and TV2 Danmark* [2012] ECR, points 41 and 49.

2. Genesis and spirit and purpose of the provision

41. Both a historical interpretation and an interpretation in accordance with the scheme and purpose of Directive 93/13 support the view that a 'mandatory statutory or regulatory provision' within the meaning of Article 1(2) of the directive may also relate to optional law, but the directive may be presumed not to apply and Article 1(2) have exclusionary effect only if that legal provision is tailored by the legislature to the contract entered into between the seller or supplier and the consumer.

a) Genesis

42. If one contemplates the genesis of Directive 93/13,[13] it appears that no provision which corresponded in content to Article 1(2) of the directive was yet included in the original Commission proposal of 3 September 1990.[14] Rather, this aspect was brought into discussion for the first time at the hearing of the Economic and Social Committee on the Commission proposal in which it was lamented that the proposal contained no statement about the relationship with existing or future national law on unfair contract terms. In this context it was suggested that it should be made clear that the Member States may retain or introduce rules going beyond the protective provisions of the directive. The absence of any statement on the relationship to other provisions of Community law and to international legal provisions was also criticised.[15] In accordance with this suggestion, the European Parliament in its Opinion of 20 November 1991 proposed inserting a provision under which provisions of the directive should apply only to general terms and conditions agreeing arrangements departing from statutory provisions or supplementing them.[16] On the basis of these proposals the Commission, on 5 March 1992, submitted an amended proposal for a Council directive on unfair terms in consumer contracts, which however initially contained no rules on the mandatory statutory or regulatory provisions of the Member States.[17] The provision at issue in this case was inserted only by the Council when determining the common position in September 1992 in the light of the Opinions of the Economic and Social Committee and of the European Parliament, by which Directive 93/13 received the form that ultimately entered into force, but with no further elucidation concerning the concept of mandatory statutory or regulatory provisions being forthcoming.[18]

13 — For an overview of the genesis of Directive 93/13 see Nebbia, P., *Unfair Contract Terms in European Law – A Study in Comparative and EC Law*, Oxford 2007, p. 7.
The development of European contractual law proceeds unimpeded. The Commission proposal of 11 October 2011 for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM (2011) 635 final) should be mentioned in this connection. This proposal provides for a European sales law to be applied optionally to cross-border sales contracts if the parties expressly so decide. Chapter 8 (Articles 79 to 86 – 'Unfair contract terms') of the document contains provisions on unfair terms in contracts both between an undertaking and a consumer (B2C), which to a great extent reflect those of Directive 93/13 and also between undertakings (B2B). See in detail, on the various options for the introduction of a European contract law, including the method of optional legal instrument favoured by the Commission, Von Bar, C., 'Eine neue Vertragsrechtsordnung für Europa', *Deutschland und Polen in der europäischen Rechtsgemeinschaft* (ed. Christian von Bar/Arkadiusz Wudarski), Munich 2012, p. 3.

14 — COM (1990) 322 final.

15 — Opinion on the proposal for a Council Directive on unfair terms in consumer contracts of 24 April 1991 ('the 1991 opinion'), OJ 1991 C 159, p. 34, points 2.6 and 2.7.

16 — Legislative resolution (cooperation procedure: first reading) with Opinion of the European Parliament on the proposal for a Council Directive on unfair terms in consumer contracts of 20 November 1991 ('the 1991 legislative resolution'), OJ 1991 C 326, p. 108, amendment no. 9, p. 111.

17 — Amended proposal for a Council Directive on unfair terms in consumer contracts COM(1992) 66 final, under Article 149(3) of the EC Treaty of the Commission, presented on 5 March 1992, OJ 1992 C 73, p. 7.

18 — Common position of the Council of 22 September 1992 adopted in light of the acceptance of Council Directive on unfair terms in consumer contracts, Doc. 8406/1/92, published in OJ 1992 C 283, p. 1 ('the 1992 common position'), No 2, full text published in ZIP 1992, p. 1591 et seq.

43. Even from this historical background it is clear that no distinction was intended to be made between mandatory and optional law and that the crucial factor in the deliberations was the relationship of terms in general terms and conditions to existing law, be it national or supranational, and that such terms were only to be subjected to review if they departed from the applicable law. [19]

b) Teleological considerations

44. The same follows from the objective of Directive 93/13.

i) General considerations concerning Directive 93/13

45. The essential aim of Directive 93/13 was a minimum harmonisation of consumer protection for the purpose of gradually creating a functioning common internal market. [20] In its first draft directive of 3 September 1990, the Commission already pointed out that the multiplicity of Member States with different legal systems made it difficult for consumers to cross borders to access goods and services. Without a certain security that he will not be placed at a disadvantage by unfair terms as a result of a lack of knowledge of the language, the consumer will lack the necessary confidence to use the common internal market. [21] On the basis of the minimum harmonisation of the law governing unfair terms sought, existing contractual law in the Member States at that time was to remain unaffected. [22] Consequently, the directive that finally entered into force included requirements which already at that time were regarded as essential to the creation of a common internal market, and the first ten recitals in the preamble to the directive unmistakeably reflect this aim.

ii) Specific considerations concerning Article 1(2)of Directive 93/13

46. The exception in Article 1(2) of Directive 93/13 must also be seen against the background of the objective pursued by the directive.

47. This exception was to apply to standard contracts whose content the national legislature had already regulated by national provisions and for which it had already conducted a fair balancing of the justified interests of all contracting parties. [23] It was therefore presumed that terms which had received the approval of the national legislature in a Member State were sufficiently balanced and were not founded on a misuse of the financial superiority of the seller or supplier. [24] Nothing in these fundamental considerations was altered by the text of Directive 93/13 finally adopted. For the

19 — See to this effect also Pfeiffer, T., in: Grabitz/Hilf, *Das Recht der Europäischen Union*, Vol IV, commentary A 5, Art. 1, paragraph 25; Eckert, H.-W., *Die EG-Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen und ihre Auswirkungen auf das deutsche Recht*, WM 1993, p. 1070,1072; Kapnopoulou, E., *Das Recht der missbräuchlichen Klauseln in der Europäischen Union*, Tübingen 1997, p. 97; Remien, O., *AGB-Gesetz und Richtlinie über missbräuchliche Verbrauchervertragsklauseln in ihrem europäischen Umfeld*, ZEuP 1994, pp. 34, 45; and Tenreiro, M., *The Community Directive on Unfair Terms and National Legal Systems*, ERPL 1995, p. 273.

20 — Wolf, M., in: Grabitz/Hilf, *Das Recht der Europäischen Union*, Vol IV, commentary A 1, paragraphs 1, 2. See, on the advantages and disadvantages of the minimum harmonisation approach, Nebbia, P., *Unfair Contract Terms in European Law – A Study in Comparative and EC Law*, Oxford 2007. Wendehorst, C., 'Auf dem Weg zu einem zeitgemäßen Verbraucherprivatrecht: Umsetzungskonzepte', in: Jud, B./Wendehorst, C. (ed.), *Neuordnung des Verbraucherprivatrechts in Europa*?, p. 165, points out that the majority of consumer private-law directives in the past pursued the principle of minimum harmonisation, that is to say a conceptually one-dimensional trend in favour of the protection of the consumer which only in this indirect way served to further the internal market.

21 — COM(1990) 322 final, introduction p. 2, pp. 68, 69.

22 — See in this connection the 1991 opinion, cited in footnote 15 above, point 2.1.2. See in detail also Pfeiffer, T. in Grabitz/Hilf, op. cit. (footnote 19), A 5, Article 1, paragraph 6.

23 — Thus the European Commission in its first discussion paper of 14 February 1984, COM(1984) 55 final, and with reference thereto in its Report on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, COM(2000) 248 final, Chapter III – Detailed analysis and discussion points, 1(b).

24 — Pfeiffer, T. in Grabitz/Hilf, op. cit. (footnote 19), A 5, Article 1, paragraph 30, refers in that connection to a 'presumption of reasonableness'.

purposes of the directive, the term 'mandatory' was not to relate to the traditional distinction in civil law between 'binding' and 'optional' provisions but rather to indicate that rules which under the law apply as between the contracting parties unless otherwise agreed are within the concept of 'mandatory statutory or regulatory provisions'. [25]

48. However, there can be no question of such a fair balancing of interests as mentioned above by a national legislature in the context of national legislation if no such statutory provision exists for the relevant contract or the factual situation governed by it. In that connection, it must not be forgotten that under Article 4 of Directive 93/13 the unfairness of a contract term is always to be assessed 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 and to all the other terms of the contract or of another contract on which it is dependent. [26] What is therefore required is, as I stated in my Opinion in *Pereničová and Perenič*, [27] an overall view of all the legislation in order to be able to ascertain whether the consumer is being placed at an unreasonable disadvantage, and it is not sufficient to presume unfairness solely on the basis of an individual term viewed in isolation. Conversely, it cannot be sufficient for the application of Article 1(2) of Directive 93/13 for a term to refer in isolation to a mandatory statutory provision which was created for an entirely different type of contract. In such a case it cannot be assumed that the overall assessment made by the legislature for a specific type of contract is also applicable to other contracts not covered by the provision. [28]

49. In this connection it should not be forgotten that general terms and conditions as a matter of principle seek by imposing contractual terms to override the legal solutions created by the legislature so that the balanced solutions provided for by the legislature are replaced by ones which unilaterally endeavour to ensure the maximum securing of one of the parties' own interests. [29] According to the settled case-law of the Court, the system of protection introduced by Directive 93/13 is based accordingly 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 the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence their content. [30] The failure to review such contractual terms may therefore only be justified in so far as a Member State enacts legal provisions for a specific type of agreement, for only then can it be assumed that the requisite overall assessment by the Member State has already been conducted in the course of the legislative process, it being immaterial whether those legal provisions are mandatory or optional. [31]

50. Accordingly, in the light of the aim of Article 1(2) of Directive 93/13, terms in general terms and conditions should be reviewed only if they are not based on applicable law. But if a seller or supplier in the context of his general terms and conditions uses terms having legal consequences which *de lege lata* do not apply to the contract to be entered into, such terms diverge from the applicable law. That is specifically reflected in the statement in the third clause of the 13th recital in the preamble to Directive 93/13, according to which the only terms which are excluded from assessment under the directive are those which merely reflect applicable law. In other words, where terms operate within the scope of the law applicable without any adaptation by the user of the term, the term in question may be considered not to raise any problem.

25 — COM(2000) 248 final, cited in footnote 23 above, Chapter III, 1(b), with express reference to the 13th recital.

26 — In the same express terms see also Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3043, paragraph 21.

27 — Case C-453/10, Opinion of 29 November 2011, point 69.

28 — Kapnopoulo, E., op. cit. (footnote 19), p. 97.

29 — COM(2000) 248 final, cited in footnote 23 above, Chapter III, introduction; to this effect also Remy-Corlay, P., 'L'influence du droit communataire sur l'office du juge', *Revue trimestrielle de droit civil*. 2009, p. 684; Lagarde, X., 'Qu'est-ce qu'une clause abusive?', *La Semaine Juridique Édition Générale*, No 6, 2006, p. 110 et seq.

30 — Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] I-4941, paragraph 25; Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 25; and Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 29.

31 — The arguments of Lagarde, X., op. cit. (footnote 29), p. 110 et seq., at B, seem also to be to this effect where he demonstrates that a term whose content is authorised by the legislature is exempt from review for unfairness.

51. Any other legal assessment would result in a user of a term being able to refer to any mandatory statutory provision whatever, even that of another Member State, or to reproduce its wording in order to remove the term in its entirety from judicial review. [32] It is obvious that this was not intended by the Union legislature. That view is also mirrored by the finding of the Court of Justice in *Cofidis*, to the effect that where terms 'do not merely reflect mandatory statutory or regulatory provisions … it is not obvious that the terms … are outside the scope of the directive, as defined by Article 1(2)'. [33]

52. Accordingly, Article 1(2) of Directive 93/13, as the Commission rightly points out, [34] is an exception to be interpreted narrowly.

53. This is borne out also by the abovementioned objective of the directive of facilitating the progressive creation of an internal market by ensuring that on acquiring goods or services abroad a consumer need not fear being placed at a disadvantage by the insertion of unfair terms in general terms and conditions. [35] Yet that is exactly what would happen if a user of terms could lawfully include in his general terms and conditions provisions which, while *in abstracto* corresponding to the legal provisions of one or more Member States, are *in concreto* not intended at all for the contract to be entered into.

54. Nor is that legal assessment altered by the fact that this case concerns the general terms and conditions of a supply undertaking which pursues objectives in the public interest. On the contrary, the legislature fully anticipated these circumstances, as is shown by Article 2(c) of Directive 93/13, which expressly declares the directive applicable also to businesses which are to be classified as public sector. [36] In this connection the only exclusions are contractual conditions of public authorities which – as frequently in Germany for supply undertakings – are provided for by regulations or statutes [37] and thus come within the scope of Article 1(2) of Directive 93/13.

55. Nor, finally, is there any reason to reach any other conclusion where the starting position of the contracting parties is similar to that set out in a legal provision, as the referring court assumes, with the concurrence of the defendant and the German Government, to be the case here. [38]

56. In this connection it cannot be left out of account that the German legislature could easily have extended the AVBGasV beyond the scope defined in Paragraph 1 to contractual customers whose legal position was analogous to that of standard tariff customers. However, it did not do so, but under Paragraph 310 of the BGB declared only the prohibitions of terms laid down in Paragraphs 308 and 309 of the BGB to be inapplicable without the possibility of assessment. But, where the legislature deliberately refrains from extending a specific legal provision to another group of persons, the criterion of 'mandatory statutory or regulatory provision' in Article 1(2) of Directive 93/13 also ceases to subsist.

57. Thus a teleological interpretation which accords with the spirit and purpose of the directive also leads to the result that under Article 1(2) of Directive 93/13 the only terms which were not to come within the scope of the directive were those which apply to the contract to be entered into on the basis of statutory provisions, whether of a mandatory or an optional nature.

32 — See on this possibility also Kapnopulo, E., op. cit. (footnote 19), p. 97; Pfeiffer, T. in Grabitz/Hilf, op. cit. (footnote 19), A 5, Article 1, paragraph 26; de Nova, G., 'Italian Contract Law and the European Directive on Unfair Terms in Consumer Contracts', ERPL, 1995, p. 221, 223.

33 — Case C-473/00 *Cofidis* 2002 [ECR] I-10875, paragraph 22.

34 — Commission's pleading dated 4 August 2011, paragraph 45; Wolf, M. in Grabitz/Hilf, op. cit. (footnote 20), A 1, paragraph 2.

35 — See paragraph 47; similarly Vigneron-Maggio-Aprile, S., *L'information des consommateurs en droit européen et en droit suisse de la consommation*, Zurich 2006, pp. 11, 15.

36 — Likewise also the European Commission, COM(2000) 248 final, cited in footnote 23 above, Chapter III, 1. (b), with reference to its opinion given on the occasion of the determination of the 1992 common position with the Council.

37 — Tilman, I., *Die Klauselrichtlinie 93/13/EWG auf Schnittstelle zwischen Privatrecht und öffentlichem Recht*, Munich 2003, p. 14.

38 — Paragraph 21 of the order for reference and paragraphs 23 and 24 of the written observations of the defendant dated 4 August 2011.

58. Consequently, I propose that the reply to the first question referred should be that Article 1(2) of Directive 93/13 is to be interpreted as meaning that the only provisions to be regarded as 'mandatory statutory or regulatory provisions' within the meaning of that provision are those which relate to the class of persons to which the contracting parties belong and to the type of agreement that they propose to enter into by operation of law, it making no difference whether those legal provisions are mandatory or can be excluded by the parties.

B – *Second question*

59. By its second question the referring court is asking about the requirements of the transparency condition in Directives 93/13 (Article 5) and 2003/55 (Article 3(3)). The referring court would essentially like to know whether price variation terms in gas supply contracts which contain no particulars as to the preconditions for entitlement to adjust prices may none the less be regarded as sufficiently plain and intelligible if it is ensured that the supplier notifies its customers in due time of the price increase and the customer is entitled both to seek judicial review and to terminate the agreement. The referring court takes into consideration that, in the case of contracts for an indeterminate period, an infringement of the transparency rule in Article 5 of Directive 93/13 could be without harmful consequence, in the light of points 1(j) and 2(b) of the annex to Article 3 of Directive 93/13. In particular, in the case of gas supply contracts the referring court considers that such a legal consequence may be inferred from points (b) and/or (c) of Annex A.

60. The second question raises problems in various individual respects:

1. First, the relationship of the transparency rule in Article 5 of Directive 93/13 to Article 3 must be examined. This is above all of significance because in respect of Article 5 there is no annex as there is to Article 3, with the result that the question of the applicability of points 1(j) and 2(b), second sentence, of the Annex to Article 3 also arises in regard to the scope of Article 5 of Directive 93/13.

2. Further, it needs to be determined whether the transparency rule under Article 3(3) of Directive 2003/55 has the same reach as that under Article 5 of Directive 93/13 and, if so, what legal consequences flow from that.

3. Then it is necessary to clarify the competence of the Court of Justice to review any infringement of the transparency rule in both directives, and in particular to ascertain whether such review is reserved to the national courts and to what extent the Court of Justice in an appropriate case is competent to provide pointers.

4. In the context of the established review power of the Court of Justice, a view must then be taken *in concreto* on the price variation term at issue in this case, in particular on whether there may be presumed not to have been an infringement of the transparency rule in Directive 93/13 if, by way of counterpart, the customer is afforded rights of termination or withdrawal as laid down in Article 3(1) and (3) of Directive 93/13 in conjunction with the requirements in the annex relating to points 1(j) and 2(b), second sentence.

5. Finally, it must be examined whether other legal principles are applicable to the transparency rule in Article 3(3) of Directive 2003/55, read with points (b) and (c) of the annex, on the basis of the specific features of gas supply contracts.

61. I will discuss these questions in the order set out above.

1. Relationship of the transparency rule in Article 5 of Directive 93/13 to the unfairness rule in Article 3 of Directive 93/13

62. The first matter to be gone into is the relationship of the transparency rule in Article 5 of Directive 93/13 to the unfairness rule in Article 3. On this point, it may be seen from the genesis of Directive 93/13 that the transparency requirement is a separately prescribed criterion of unfairness under Article 3. This aspect was first introduced into the discussion at the hearing of the Economic and Social Committee on the Commission proposal of 3 September 1990 when it was suggested that an additional criterion of unfairness should be expressly stated to be the unintelligibility of a contractual term.[39] The European Parliament adopted that suggestion in its Opinion of 20 November 1991[40] and, finally, the Council, when establishing the 1992 common position, stated that the relevant general rule[41] applicable to the review of 'unfairness' was Article 3(1) and was supplemented by a specifically highlighted transparency rule in Article 5(1).[42] The transparency rule in Article 5 of Directive 93/13 is thus one to which such great weight was attached that it was mentioned separately alongside the general rule on unfairness.

63. Accordingly, the transparency rule in Article 5 of Directive 93/13 is a separately laid down criterion of unfairness in accordance with Article 3 of Directive 93/13,[43] with the consequence that the provisions of the annex to Article 3 of Directive 93/13 are also of significance in connection with the transparency requirement.

2. Relationship of the transparency rule under Articles 5 and 3 of Directive 93/13 to the transparency requirement under Article 3(3) of Directive 2003/55

64. The Court has not hitherto had the opportunity of ruling on the transparency rule laid down in Directive 2003/55 for all contractual conditions. However, I shall demonstrate below, on the basis of the genesis and objectives of Directive 2003/55, that the scope of this provision corresponds to the transparency requirement in Article 5 of Directive 93/13.

65. The primary objective of Directive 2003/55 was to create an internal market in natural gas, which at that time necessitated complete liberalisation. The European Union legislature was, already at the outset of the project, aware that the market had to be opened up progressively because the point of departure was marked by strongly regulated, strictly national and frequently monopolistic markets. The challenge was to turn them into a single, entirely free European market in which all consumers would be able to buy gas from the supplier of their choice. Directive 98/30[44] was a first introductory step in this direction, which was then followed by Directive 2003/55, at issue in these proceedings, which provided in Article 23 for a progressive timetable leading to the elimination of barriers to

39 — Opinion on the proposal for a Council Directive on unfair terms in consumer contracts of 24 April 1991, OJ 1991 C 159/34 of 17.6.1991, point 2.5.3.

40 — Legislative resolution (Cooperation procedure: First reading) with Opinion of the European Parliament on the proposal for a Council Directive on unfair terms in consumer contracts of 20 November 1991, OJ 1991 C 326/108 of 16.12.991, amendment no.s 35 and 45.

41 — On the significance of general rules in European contract law, see Grundmann, S., 'General Standards and Principles, Clauses Générales, and Generalklauseln in European Contract Law – A Survey', *General Clauses and Standards in European Contract Law – Comparative Law, EC Law and Contract Law Codification* (ed. Stefan Grundmann/Denis Mazeaud), The Hague 2006, p. 1.

42 — 1992 common position, cited in footnote 18 above, point 5.

43 — In this connection it should be pointed out that – as Schillig, M., 'Inequality of bargaining power versus market for lemons: legal paradigm change and the Court of Justice's jurisprudence on Directive 93/13 on unfair contract terms', *European Law Review*, 2008, pp. 336 and 337, correctly notes – the transparency requirement compels the seller or supplier to lay down fair contractual terms and conditions. To that extent, Articles 3 and 5 of Directive 93/13 in the final analysis pursue the same effect.

44 — Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ 1998 L 204, p. 1.

competition on the market in natural gas.[45] For this purpose it was regarded as essential to eliminate the distinct rules of procedure of the different Member States and the distortions to competition attendant thereon and, for this purpose, to define minimum requirements for the conclusion of contracts and transparency of information.[46]

66. In that connection, Article 3 of Directive 2003/55 lays down essential preconditions for the attainment of the common internal market in energy. While Article 3(2) of the directive provides for the creation of public service obligations as a competence exercised by the Member States in the public interest, under Article 3(3) the Member States have a general commitment to take appropriate measures to protect final customers and to ensure a high level of consumer protection.[47] Thus Article 3(3) contains an obligation to protect customers with specific consideration being given to those amongst them in most need of protection. At least in the case of domestic customers, the requisite measures include the measures listed in Annex A to Directive 2003/55, in which connection particular emphasis is again placed, in the second sentence of point (d), on the transparency requirement for domestic customers. Already in its first proposal of 13 March 2001, the Commission had pointed out that in the provision to be enacted it was of prime importance to ensure that all Community citizens had a universal right to a supply at reasonable prices, and that a minimum standard of consumer protection was to be secured, the objective being to introduce freedom of choice for consumers at low prices.[48] In the light of the Opinion of the Economic and Social Committee dated 17 January 2001 and the common position of the Council of 3 February 2003, the Commission not only adhered to this objective but included in its amended proposal of 7 June 2002 additional amendments to the annex, which ultimately were resolved upon.[49]

67. This already shows that on the creation of a common internal market in energy, great value was attached to consumer protection and that the objective pursued by the directive was not only to bring about greater competitiveness of the European Union but also to ensure supplies at the most favourable prices to individual consumers, whose interests were to be taken into account as far as possible.

68. If one compares the situation as it prevailed on the enactment of Directive 93/13 with that obtaining on adoption of Directive 2003/55, the parallels become evident: in both cases a common internal market was to be gradually established and in both cases it was considered indispensable in that connection for the growing competition not to be impeded by the fact that a consumer may be unwilling to enter into an agreement with an undertaking established in another Member State because of contractual terms that are unintelligible to him or unfair. Therefore the same effect and the same legal consequences are to be attached to the transparency rule in Article 3(3) of Directive 2003/55, in particular in conjunction with the second sentence of point (d) of Annex A to that directive, as to the transparency rule in Directive 93/13. This interpretation is supported in particular by the fact that under the wording of Annex A the rights of the consumer inter alia under Directive 93/13 are not affected ('without prejudice to … rules on consumer protection').

45 — See only in this connection, on the history, the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-265/08 *Federutility and Others* [2010] I-03377, points 36 and 37; also Opinion of the Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council amending Directives 96/92/EC and 98/30/EC concerning common rules for the internal market in electricity and natural gas, and the Proposal for a Regulation of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity of 17 October 2001, OJ 2002 C 36, p. 1019 ('the 2001 ESC opinion'), paragraphs 1.1, 1.2 and 2.4.

46 — 2001 ESC opinion, paragraphs 6.1.2 and 6.4.4. The Council followed this in its Common Position (EC) No 6/2003 of 3 February 2003, OJ 2003 C 50E, p. 36.

47 — COM(2001) 125 final, pp. 22, 37.

48 — Ibid., pp. 21, 37.

49 — COM(2002) 304 final, p. 57.

69. Accordingly, the transparency rule in Article 3(3) of Directive 2003/55 laid down for general terms and conditions is a specially regulated example in the sector of the internal market for energy of the transparency requirement already secured under Directive 93/13. [50]

3. Scope of review by the Court of Justice and national courts

70. As regards the central question of the classification of the contested term itself as unfair, it should first be noted that in referring to the concepts of good faith and significant and unjustified imbalance between the rights and obligations of the contracting parties, Article 3 of Directive 93/13 merely defines in a general way the factors that make a contractual term that has not been individually negotiated unfair. [51] In that context, the annex to which Article 3(3) of the directive refers contains only an indicative and non-exhaustive list of terms that may be regarded as unfair. A term appearing in the list thus need not necessarily be considered unfair and, conversely, a term that does not appear in the list may none the less be regarded as unfair. Therefore, the mere fact that a term is listed does not necessarily lead to the inference that it is also unfair, and a separate and detailed assessment of the relevant contractual term in the light of the requirements of Article 4 of Directive 93/13 is always required. [52]

71. According to the Court's settled case-law, it is for the national court to determine whether a contractual term satisfies the requirements for it to be regarded as unfair under Article 3(1) of Directive 93/13. If it does, that court must assess the term, if necessary of its own motion, in the light of the requirements of consumer protection laid down by that directive. [53] For the purposes of the present reference for a preliminary ruling, this means – as all the parties to the proceedings have agreed in pointing out in their written observations – that it is for the national court and not for the Court of Justice to assess the unfairness of the term at issue.

50 — As I demonstrated in point 88 of my Opinion in *Pereničová and Perenič* (cited in footnote 27 above), there are many interconnections between the individual acts of European Union acts in the field of consumer-protection law. They must therefore be regarded as parts of a uniform comprehensive legislative code which complement one another (see Orlando, S., 'The Use of Unfair Contractual Terms as an Unfair Commercial Practice', *European Review of Contract Law*, 2011 p. 25). The fragmentation that still persists in the Union's consumer-protection law is the consequence of historical development, in the course of which the Union legislature has gradually regulated individual spheres of life, in line with the *acquis*, with a view to establishing a genuine internal market for transactions between businesses and consumers.

51 — Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraph 25; Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-4303, paragraph 20; Case C-137/08 *VB Pénzügyi Lizing* [2010] ECR I-10847, paragraph 42; Case C-472/10 *Invitel* [2012] ECR, paragraph 25; order in Case C-76/10 *Pohohtovosť* [2010] ECR I-11557, paragraphs 56 and 58. See also on this Remy-Corlay, P., op. cit. (footnote 29), p. 746. As Lagarde, X., op. cit. (footnote 29), p. 110, states, the imbalance in the relationship must give the trader an excessive advantage to the detriment of the consumer in order for the term to be regarded as unfair.

52 — See on this point my Opinion in *Invitel* (cited in footnote 51 above), point 80 et seq. with further references. As Hesselink, M., 'Fair prices in the common market on communitative and distributive justice in European contract law', *Diritto privato europeo – Fonte ed effeti, Materiali del seminario dell' 8-9 novembre 2002* (ed. Guido Alpa/Remo Danovi), pp. 248 and 249, states, the main function of European contract law is to bring about justice, equity and fairness. Contract law should contribute to achieving fair and just solutions. Many legal institutes of continental European contract law and the common law also have this function. The author points out, however, that the precise meaning of the terms 'justice' and 'fairness' has always been controversial.

53 — *VB Pénzügyi Lízing* (cited in footnote 51 above), paragraphs 42, 43 und 49. See on the division of competences between the Court of Justice and the national courts in the field of unfair terms Aubry, H./Poillot, E./Sauphanor-Brouillard, N., *Droit de la consommation – Études et commentaires, Recueil Dalloz*, 2010, No 13, p. 798; similarly Schulte-Nölke, H., 'Scope and role of the horizontal directive and its relationship to the CFR', in Schulze, R. (ed.) *Modernising and Harmonising Consumer Contract Law*, Munich 2009, p. 44, notes that the decision about the unfairness of a contractual term in general terms and conditions of business has in the end to be made by the national courts on the basis of national provisions. See also in that connection in general terms on the obligation of the national courts to adjudicate in accordance with directives and so as to implement Community law effectively, Griller, S. 'Direktwirkung und richtlinienkonforme Auslegung' in: Eilmannsberger, T./Herzig, Gl. (ed.), *10 Jahre Anwendung des Gemeinschaftsrechts in Österreich*, Vienna, Graz 2006, p. 94.

72. Consequently, the Court must limit itself in its reply to giving the referring court indications that the latter must observe in assessing the unfairness of the relevant term. [54]

73. These observations concerning the limited scope of review available to the Court of Justice apply equally to the transparency requirement specially laid down in Article 5 of Directive 93/13, as the Court has now expressly made clear. [55]

74. As stated above under VI.B.2., [56] these principles apply equally to the transparency requirement under Directive 2003/55 and in particular to the cases listed in Annex A thereto, as demonstrated by the reference therein to Directive 93/13.

75. Thus it must be concluded that the assessment of the question whether an infringement of the transparency rule in Directives 93/13 and 2003/55 respectively is to be regarded as unfair is a matter for the national courts, though the Court of Justice may give indications.

4. Review of the price alteration term at issue in the light of the transparency rule in Article 5 of Directive 93/13 with special reference to points 1(j) and 2(b) of the Annex to Article 3 of Directive 93/13

76. It must therefore be examined whether the price alteration term used by the defendant can satisfy the requirements of Directive 93/13, in particular the transparency rule laid down therein.

a) Basic requirements to be satisfied by an effective price alteration term

77. In accordance with the transparency rule in Article 5 of Directive 93/13, terms formulated in writing must always be plain and intelligible and, in the case of doubts as to the meaning of a term, the interpretation most favourable to the consumer is to be preferred. This rule is to ensure, in accordance with the objective of Directive 93/13 described above, both that the interests of the consumer are reasonably preserved and that the free internal market is promoted. [57] It is not contested that the gas supply contracts at issue contain in their general terms and conditions no provisions concerning the conditions for or the nature and extent of a price increase, but merely a reference to Paragraph 4 of the AVBGasV. Nor, however, does Paragraph 4 of the AVBGasV contain any further particulars, it merely refers, in regard to applicable prices for the supply of gas, to general tariffs and conditions which become effective only after publication.

54 — *Pannon GSM* (cited in footnote 51 above), paragraph 42; *Freiburger Kommunalbauten* (cited in footnote 26 above), paragraph 22; *Mostaza Claro* (cited in footnote 30 above), paragraph 22; *VB Pénzügyi Lízing* (cited in footnote 51 above), paragraphs 43 and 44; and *Invitel* (cited in footnote 51 above), paragraph 22. Eidenmüller, H./Faust, F./Grigoleit, H.C./Jansen, N./Wagner, G./Zimmermann, R., 'Towards a revision of the consumer acquis', *Common Market Law Review*, 2011, pp. 1093-1094, and 'The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems', *Oxford Journal of Legal Studies*, vol. 28, No 4 (2008), p. 677, and Basedow, J. 'Der Europäische Gerichtshof und das Privatrecht', *Archiv für die civilistische Praxis*, vol. 210 (2010), pp. 173-174, lament that the minimum harmonisation approach has not contributed substantially to a uniformisation of European private law. In addition the review of unfairness of contractual terms is entrusted to national courts which rely in that regard on national standards and principles. The current state of the review of unfairness is unsatisfactory because there are no uniform guidelines. Some of the authors therefore suggest that the Court of Justice should, on the basis of reference texts such as the Common Frame of Reference, develop European standards in order to ensure uniform practice Union-wide in the review of unfairness. To that effect see in particular von Bar, C. in 'Die Funktionen des Gemeinsamen Referenzrahmens', in Schmidt-Kessel, M. (ed.), *Der Gemeinsame Referenzrahmen*, Munich 2009, p. 26, and 'Gemeinsamer Referenzrahmen für europäisches Schuld- und Sachenrecht', *Zeitschrift für Rechtspolitik*, 2005, pp. 165, 168.

55 — Order in *Pohotovosť* (cited in footnote 51 above), point 3 of the operative part; *Invitel* (cited in footnote 51 above), paragraphs 27 and 30.

56 — Point 65 et seq. of this Opinion.

57 — Van Gool, R., *Die Problematik des Rechts der missbräuchlichen Klauseln und die EG-Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen*, Frankfurt am Main 2002, p. 199, and Aubert de Vincelles, C., 'Anmerkung zum Urteil Penzügyi Lízing, C-137/08', *Revue trimestrielle de droit européen*, 2011, p. 632.

78. Such a vague provision as a general rule lacks transparency for the consumer because under its wording it applies only to current prices and not to any price increases. It seems doubtful whether a possible infringement of the transparency requirement can be altered by the fact that national case-law derives from such a provision a right to increase prices on the part of the gas supply undertakings, as stated by the Bundesgerichtshof in its order for reference, especially as, in view of the scope of the AVBGasV, this provision refers only to standard tariff customers, and moreover it is probably not apparent to the consumer when and under what circumstances a price increase is lawful. Against that background it is likely to be impossible for a consumer to verify the justification of a price increase, particularly since it would not be apparent to a consumer, who is often not aware of the case-law especially in such fields, what requirements have to be met for a request for a price increase by the gas supplier to be effective.

79. Accordingly, reservations exist as to whether the price alteration term at issue in this case satisfies the requirements of the transparency rule in Article 5 of Directive 93/13.

b) Restrictions of the transparency rule by means of protective mechanisms in favour of the consumer

80. The observations of the referring court on this point indicate that it too does not simply assume that a term such as that employed in the main proceedings taken by itself is sufficiently transparent. However, the referring court would like to know whether the lack of transparency of a price variation term can be offset by protective mechanisms in favour of the consumer, that is to say by virtue of the fact that a price increase must be notified in good time and that the consumer has the right to seek judicial review of the price increase and to terminate the agreement.

i) Right of termination

81. The referring court raises the possibility, on the basis of Article 3(1) and (3) of Directive 93/13 read with points 1(j) and 2(b) of the annex, that an infringement of the transparency requirement could be offset by a right to terminate on the part of the consumer.

82. Point 1(j) of the annex to Article 3(3) of Directive 93/13 mentions as a factor that may render a contractual term that has not been negotiated unfair the fact that a seller or supplier may unilaterally, and without proper reasons set out in the contract, amend contractual terms, without any mention being made there of the possibility of termination. Since reasons for a price alteration on the part of the energy supplier are not mentioned in Paragraph 4 of the AVBGasV, no offsetting possibility can be inferred from this provision.

83. It is however otherwise in the case of the second sentence of point 2(b) of the annex to Article 3 of Directive 93/13, which restricts the requirements of point 1(j) to the extent that, in the case of contracts for an indeterminate period, the trader's right to alter prices is not disapproved if he is obliged to notify the consumer thereof in due time and the consumer is free to terminate the agreement.

84. Recently, however, the Court of Justice has clarified in the *Invitel* judgment that a contractual term providing for an amendment of the total price of the contract as a rule satisfies the requirements of points 1(j) and 2(b) only if the consumer not only has a right to terminate the contract but the reason for and method for varying that price is also set out.[58] In accordance with the express requirement laid down by the Court of Justice, this premise applies without exception, that is to say also for contracts of indeterminate duration within the meaning of the second sentence of point 2(b) of the annex to Article 3 of Directive 93/13. For that reason it cannot be presumed that an infringement of the

58 — *Invitel* (cited in footnote 52 above), paragraph 24. See also Rochfeld, J. 'Clauses abusives, Liste réglementaire noire et grise', *Revue trimestrielle de droit civil*, 2009, p. 383.

transparency rule may be remedied by the possibility of termination. The legislature was by this provision merely taking account of the protection-worthy interests of the trader who, particularly in the case of continuing obligations, cannot be expected to adhere for an unforeseeable period to contractual conditions agreed earlier. The equally protection-worthy interest of the consumer in being protected against such variations is satisfied by the supplier's obligation to give due notice of those alterations and the consumer's right to terminate. In particular, by requiring the supplier to give due notice, the consumer is accorded a reasonable period for consideration within which, inter alia by comparing other offers, he may decide whether he prefers to continue the existing agreement subject to the amended conditions or to choose another contractual partner.

85. According to the spirit and purpose of the exception in the second sentence of point 2(b) of the annex, it is also a requirement that the consumer be entitled not only to a formal right to terminate but also to be able to exercise this right effectively, following a reasonable period for consideration. For in accordance with the balancing of interests described above, the possibility of a unilateral price increase on the part of user of the term can only be justified by reasonable protection being afforded to the consumer by means of the possibility of not continuing with the contract under the changed circumstances. However, it may be inferred from the observations of the referring court that there was no such actually existing right of termination, and no obligation of the trader to give notice of the price increase in sufficiently good time for the consumer to be able to weigh up possible alternatives. Liberalisation of the gas market had not progressed sufficiently for another gas undertaking to be available which could have supplied the end consumer in place of the defendant. Also, price increases under the requirements of the AVBGasV became effective immediately on their being notified, so that not only was the consumer deprived of the period of reflection provided for in the directive, there was also no possibility of freeing himself from the contract early enough to that the price increases could not be passed on even for the short period until termination.

86. In my opinion, the fact that in the case of contracts for an indeterminate period the seller or supplier has a right to amend the contract even without a proper reason cannot mean that it is without harmful consequence for a contractual amendment, such as a price increase, to be based on a term which contravenes the transparency rule. Here, two situations have to be distinguished from one another. In the case of contracts of indeterminate duration, the right to amend a contract – and especially the right to increase previously agreed prices – presupposes an existing contract that merely has to be brought into line with changed circumstances which have come about by the passage of time. On the other hand, the transparency rule specifically also concerns freedom of choice for consumers who, as stated above, are to be enabled to access services and purchase goods in other Member States through the establishment of analogous provisions protecting the consumer against unfairness, in order thus progressively to create a common internal market. The transparency rule thus concerns in particular the time when the contract is entered into. As a rule, the consumer will make a close examination precisely of terms for contractual amendment, in order thus to be clear about the quality of the various offers. In this light the specific provision for contracts of indeterminate duration in the second sentence of point 2(b) of the annex to Directive 93/13 can be explained. If, on adoption of the directive at issue, an amendment to a contract was regarded as permissible only in the case of contracts of indeterminate duration, and only on observance of the further preconditions set out therein, the corollary is that such a manner of proceeding is not permissible in the case of other types of contract. That is also in line with the express statement of the Court of Justice in *Invitel* that the consumer must be in a position to foresee the costs arising in connection with the provision of the service.[59]

87. It must therefore be concluded that a term lacking transparency falls within the list in the annex to Article 3(3) even where the consumer has a right to terminate.

59 — *Invitel* (cited in footnote 51 above), paragraph 28; Vigneron-Maggio-Aprile, S., op. cit. (footnote 35), p. 158, also expressly points to the necessity of a prior possibility of review and comparison.

ii) Possibility of judicial review

88. Nor can a contravention of the transparency rule, in particular a price alteration term lacking transparency, be offset by affording the consumer under the national legal order the possibility of seeking judicial review of the price increase. This would run counter to the assessment in Article 5 of Directive 93/13 under which ambiguities are to be interpreted against the user. The consumer would instead be burdened with the risk of bringing proceedings whose outcome would be difficult to foresee, and the attendant risk of costs. Effective consumer protection can, however, only be guaranteed by enabling the consumer himself to review the justification of a price increase on the basis of the contractual requirements.

iii) Final analysis

89. The foregoing interpretation does not leave the seller or supplier bereft of rights. In the event of a contract of indeterminate duration he retains the possibility of normal termination in order to free himself from the contract. It is true that in certain cases he must himself finance, for the period of giving notice and the continuation of the agreement, the price increases occurring, for example, as a result of increased costs from his suppliers. That is, however, a risk which, in accordance with Directive 93/13, he must bear himself. This does not appear to be inequitable, in particular because he has created this consequence himself by the use of general terms and conditions which lack transparency.

90. Of no relevance, in this connection, is the consideration in the order for reference that the AVBGasV was already in the public domain on adoption of the directive, which is why it may be presumed that it was to have remained uncontested. [60] In this connection it must not be forgotten that at the time of the entry into force of Directive 93/13 only a few Member States, such as Germany, the Netherlands and Portugal, already had detailed statutory provisions concerning unfair terms whereas others, such as Ireland, Italy and Belgium, for example, had none or only limited ones, and it was therefore evident that what in certain cases amounted to appreciable amendments were going to be necessary in the national legislation of the Member States as a result of Directive 93/13. [61]

91. As an interim conclusion it may therefore be stated that a contravention of the transparency rule laid down in Article 5 of Directive 93/13 is not nullified by the fact that the customer is informed in due time of a price increase occurring as a result of a term lacking in transparency, or by the customer being afforded the possibility of seeking judicial review of that increase and/or a right to terminate the contract, even in the case of contracts of indeterminate duration.

5. Review of the contested price variation term with reference to the transparency rule in Article 3(3) of Directive 2003/55 with special reference to Annex A

92. The above statements apply in the same way in so far as the transparency rule under Article 3(3) of Directive 2003/55 is concerned.

60 — Paragraph 30 of the order for reference.

61 — Commission report COM(2000) 248 final, cited in footnote 23 above, Chapter IV – Further observations, point a.

93. The wording of the last indent of point (a) of Annex A makes clear that the contractual conditions must not only be fair but also known in advance. This is to take account of the fact – as with Directive 93/13 – that, for there to be a liberal and competitive internal market in natural gas, the contracts on offer must already be open to objective comparison in advance of the conclusion of the contract, as is also apparent from the requirements of point (d) for domestic customers. In particular, under the requirements of point (c) of the Annex, transparent information about current prices and tariffs must already be available at that moment in time.

94. On the other hand, point (b) in Annex A also covers the case of contracts of indeterminate duration covered by point 2(b) of the annex to Article 3 of Directive 93/13, which will normally apply to gas supply agreements. In view of this differentiation by the legislature, it would appear even less permissible than in the context of Directive 93/13 for infringements of the transparency rule, in particular with regard to the right to amend prices, to be compensated by affording the customer a right of termination or a right to seek judicial review. In that connection, for the avoidance of repetition, I would first refer to my statements on this point concerning the extent of the transparency rule of Directive 93/13.[62]

95. In particular, however, precisely within the scope of point (b) of Annex A is the existence of an actual possibility of termination to be presumed along with the attendant possibility of obtaining gas from another possibly more favourable supplier. In this connection particular attention should be paid to Article 3(3) of Directive 2003/55, which imposes on Member States the obligation to adopt measures in order to prevent customers from being excluded from gas supplies. Yet precisely such an exclusion from supply would occur if, in the event of a price increase, customers were to be referred to a right of termination that was in fact non-existent or to a change of supplier which was in reality impracticable. On the contrary, a supply undertaking would in such a case be able to implement price increases whose justification the customer could not check or verify but to which, because of there being no possibility of obtaining gas elsewhere, he could not object.

96. On the basis of the foregoing, it follows that an infringement of the transparency rule laid down in Article 3(3) of Directive 2003/55 cannot be offset or remedied by the fact that a price increase under a term lacking in transparency is notified to the customer in due time or that the customer is afforded the opportunity of a judicial review of the increase and/or of terminating or rescinding the contract.

6. Conclusion

97. I therefore propose that the reply to the second question referred for a preliminary ruling should be that infringements of the transparency rule laid down in Article 5 of Directive 93/13 and Article 3(3) of in conjunction with Annex A to Directive 2003/55 cannot be offset either by a notification in good time by the seller or supplier or by a right to terminate on the part of the consumer or by the possibility of obtaining judicial review.

C – *Possible limitation of the temporal effects of the judgment*

98. In conclusion, I should, at the behest of the defendant and the German Government, discuss the possibility of limiting the effect of the judgment to a period of 20 months after the delivery of the judgment, as the defendant requests, or to contractual relationships entered into after delivery of the judgment, as the German Government suggests.

62 — Points 69 and 70 of this Opinion.

99. In that connection it must be pointed out that in its judgment of 6 March 2007 in *Meilicke* the Court reaffirmed its settled case-law, under which judgments on preliminary reference proceedings have retroactive effect back to the time of entry into force of the provision of Community law to be interpreted, since the interpretation which the Court gives to a rule of Community law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. In that judgment, the Court further pointed out that it is only exceptionally that, in application of a general principle of legal certainty, it may be permissible to limit the temporal effects of a judgment, if legal relations established in good faith would otherwise be called into question. [63]

100. The conditions under which such a presumption might be justified are set out in the earlier case-law of the Court under which two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties for the State. [64] In the present case, it seems to me that neither of those two conditions is met. In this connection it should not be overlooked that the defendant is a private sector undertaking, even if a considerable number of shares in the undertaking are held by public authorities. For that reason alone there cannot be assumed to be serious difficulties as described above. This is all the more so since the AVBGasV has in the meantime been replaced by other statutory provisions, with the result that for that reason too there is no need for a temporal limitation of the effects of the judgment; the judgment would in fact thereby be entirely deprived of effect. In addition, however, it is not apparent to what extent the contracting parties settled their contractual arrangements in good faith on the basis of the justification of a price increase. It may be that the defendant relied on being able to enforce price increases without any specific contractual agreements. In the light of the requirement more specifically presented above in Article 5 of Directive 93/13, to opt, in the case of ambiguities, for the interpretation that most favours the consumer, [65] that would not however be an expectation worthy of protection.

101. A limitation of the effects of the judgment cannot therefore be considered.

VII – Conclusion

102. In the light of the above considerations, I propose that the Court should answer the question referred by the Bundesgerichtshof as follows:

(1) Article 1(2) of Council Directive 93/13/EC of 5 April 1993 on unfair contract terms in consumer contracts is to be interpreted as meaning that the only provisions to be regarded as 'mandatory statutory or regulatory provisions' within the meaning of that provision are those which relate to the class of persons to which the contracting parties belong and to the type of agreement that they propose to enter into by operation of law, it making no difference whether those legal provisions are mandatory or can be excluded by the parties.

(2) There may be an infringement of the transparency requirement in Articles 3 and 5 of Council Directive 93/13 in conjunction with point 1(j) and the second sentence of point 2(b) of the annex referred to in Article 3(3) of that directive, and Article 3(3) of in conjunction with points (b) and/or (c) of Annex A to Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, even if it is ensured that a gas supply company informs its

63 — Case C-292/04 *Meilicke and Others* [2007] ECR I-1835, paragraphs 34 and 35.

64 — Cases C-57/93 *Vroege* [1994] ECR I-4541, paragraph 21; C-372/98 *Cooke* [2000] ECR I-8683, paragraph 42; C-402/03 *Skov* [2006] ECR I-199, paragraph 51; C-184/04 *Uudenkaupungin kaupunki* [2006] ECR I-3039, paragraph 55; C-290/05 *Nádasdi* [2006] ECR I-10115, paragraph 63; and C-313/05 *Brzeziński* [2007] ECR I-513, paragraph 56.

65 — Points 80 and 81 of this Opinion.

customers of every price increase in good time in advance and those customers have the right to terminate the contract by way of notice if they do not wish to accept the amended conditions of which they have been informed.