

OPINION OF ADVOCATE GENERAL

TIZZANO

delivered on 22 September 2005¹

1. By order of 10 June 2004, the Szombathelyi Városi Bíróság (Szombathely City Court) referred three questions to the Court for a preliminary ruling; two of these specifically relate to the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (hereinafter 'Directive 93/13' or, simply, 'the Directive'),² while the third concerns the applicability of Community law to a dispute which arose in a Member State before it acceded to the Union.

nities and their Member States, of the one part, and the Republic of Hungary, of the other part (hereinafter the 'Association Agreement') was signed on 16 December 1991.³ That agreement entered into force on 1 February 1994.

3. In terms of Article 67 of the Association Agreement:

I — Legal background

A — *Community law*

Association Agreement and Treaty of Accession

2. The Europe Agreement establishing an association between the European Commu-

'The Contracting Parties recognise that the major precondition for Hungary's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community. Hungary shall act to ensure that future legislation is compatible with Community legislation as far as possible.'

1 — Original language: Italian.

2 — OJ 1993 L 95, p. 29.

3 — OJ 1993 L 347, p. 2.

4. Article 68 provides as follows:

‘The approximation of laws shall extend to the following areas in particular; ... consumer protection ... ’

5. Subsequently, on 16 April 2003, the Treaty of Accession by Hungary to the European Union⁴ and the Act concerning the conditions of accession (hereinafter the ‘Act of Accession’)⁵ were signed at Athens and both came into force on 1 May 2004.

6. Article 2 of the Act of Accession provides that:

‘From the date of accession, the provisions of the original Treaties and the acts adopted by

the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.’

7. In particular, as regards existing directives, Article 53 provides that:

‘Upon accession, the new Member States shall be considered as being addressees of directives and decisions within the meaning of Article 249 of the EC Treaty ..., provided that those directives and decisions have been addressed to all the present Member States. Except with regard to directives and decisions which enter into force pursuant to Article 254(1) and 254(2) of the EC Treaty, the new Member States shall be considered as having received notification of such directives and decisions upon accession.’

4 — Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (OJ 2003 L 236, p. 17).

5 — Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33).

8. Article 54 of the Act of Accession provides that:

‘The new Member States shall put into effect the measures necessary for them to comply, from the date of accession, with the provisions of directives and decisions within the

meaning of Article 249 of the EC Treaty ..., unless another time-limit is provided for in the annexes referred to in Article 24 or in any other provisions of this Act or its annexes.'

faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

Directive 93/13

12. Article 4(1) provides that:

9. The purpose of Directive 93/13 is 'to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer' (Article 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.'

10. Pursuant to Article 2(b), 'consumer' means:

'any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession'.

13. Further, Article 6(1) provides that:

11. Article 3(1) provides:

'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good

'Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.'

14. Finally, Article 7(1) requires as follows:

and adoption of national legal rules complied with the Agreement. Under Article 3(2) of that law, in drafting and adopting legal rules it was also necessary to meet the requirements imposed by Article 67 of the Association Agreement.

‘Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.’

15. Since neither the Act of Accession nor its annexes provided any other time-limit, Hungary was an addressee of Directive 93/13 and was required to put into effect the measures necessary for it to comply with that directive from the date of accession to the Union, that is, from 1 May 2004.

18. Law No CXLIX/97 was approved in accordance with that provision; this law amended a number of provisions of the Hungarian Civil Code (hereinafter the ‘Ptk’), introducing into national law rules on unfair terms in consumer contracts compatible with the rules in Directive 93/13. The documents before the Court indicate that those rules were not further amended after accession.

B — *National law*

19. Article 209/B of the Ptk provides that:

16. Hungary ratified the Association Agreement by way of Law No 1/1994.

‘1. A general condition of a contract or a term of a contract concluded between a consumer and a seller or supplier shall be regarded as unfair if, contrary to the requirement of good faith, it unilaterally and without justification establishes the parties’ contractual rights and obligations to the detriment of one of the parties.

17. Pursuant to Article 3(1) of that law, the Hungarian legal system was required to ensure that the preparation and conclusion of international agreements and the drafting

2. Rights and obligations shall be regarded as having been established unilaterally and without justification to the detriment of one of the parties where:

(a) they deviate significantly from the substantive rules applicable to the contract; or

(b) they are incompatible with the purpose and function of the contract.

3. In assessing the unfairness of a contractual term, all of the circumstances attending the conclusion of the contract which led the parties to conclude it must be considered, as well as the nature of the service agreed and the relationship of the term at issue with other terms of the contract or of other contracts.⁶

20. For present purposes, particular note should be taken of the provisions in the Ptk on contesting unfair terms and those governing the consequences of including such terms in contracts.

21. With regard to the raising of an objection, the Ptk provides that if any general condition of the contract is unfair, the party prejudiced may contest it (Article 209(1)). The objection must be notified to the other party in writing within one year. Thereafter, the right of objection may still be exercised by raising an objection against the person seeking performance of the obligations under the contract (Article 236, paragraphs 1, 2(c) and 3).

22. Regarding the consequences of the inclusion of such terms, the Ptk adopts the principle that the contract is entirely invalid if the parties would not have concluded it without the invalid clause (Article 239).

II — Facts and procedure

23. The main proceedings are between Ynos Kft. (hereinafter 'Ynos'), a company operating as an estate agent, and Mr János Varga, a builder.

24. Intending to sell a building owned by his son⁷ and recently reconstructed as a

6 — Unofficial translation.

7 — The order for reference shows that Mr Varga's son owns the building concerned in the proportion of 232/1 038, but it does not show who owns the remaining portion of the property.

commercial-office centre, on 10 January 2002 Mr Varga initialled a property agency agreement with Ynos, based on a standard-form contract which included a number of general terms and conditions.

25. Under that contract, upon successful completion of the agency activity, Ynos would be entitled to commission of 2% of the sale price agreed. Clause 5 of the contract stated that the agency was to be regarded as having been successfully completed upon conclusion of a contract between two parties who had been brought together through the agent; in the second sentence of that clause it was stated further that the agent was entitled to the commission even where the owner rejected a written offer to purchase or lease the property for a price equal to or above that specified in the agency contract.

26. On 11 March 2002, the directors of Ynos, Mr Varga and his son (the last as vendor) and Mr Ragasits and Mr Kovács (as purchasers) signed an 'agreement in principle for the conclusion of the contract', in which they fixed the selling price for the property and agreed that, by 15 March 2002, they would make a contract or a commitment to sell.

27. However, at that date neither a final contract nor a commitment to sell had been made. None the less, Ynos took the view that its agency activity had been completed and so requested the agreed commission.

28. Failing to obtain payment, Ynos applied to the Szombathelyi Városi Bíróság, before which, among other points, Mr Varga objected that the second sentence of Clause 5 of the agency contract, on which the claim by Ynos was based, was an unfair term and, therefore, the commission sought was not owed. According to Ynos, that objection was unfounded inasmuch as the criteria laid down in Article 209/B of the Ptk for establishing that a term is unfair were not satisfied in this case.

29. The Szombathelyi Városi Bíróság held that 'in so far as it is possible to establish the existence of an unfair contractual term, as the defendant contends, the controversy must be resolved in the light of the Directive' and, pursuant to Article 234 EC, referred the following questions to the Court for a preliminary ruling:

'(1) May Article 6(1) of Council Directive 93/13/EEC ..., which provides that Member States are to lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier are, as provided for under their national law, not to be binding on the consumer, be interpreted as meaning that it may constitute the basis of a national provision such as Article 209(1) of the [Ptk], applicable when a general condition in a contract stating that

unfair terms do not cease to bind the consumer *ipso jure*, but do so only where an express declaration to that effect is made, that is to say, when they are successfully contested, is found to be unfair?

- (2) Does it follow from that provision of the Directive, according to which the contract is to continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms, that where the unfair terms inserted by a seller or supplier are not binding on the consumer as provided for under national law, but where in the absence of those terms, which form part of the contract, the seller or supplier would not have concluded the contract with the consumer, the validity of the contract as a whole cannot be affected if it is capable of continuing in existence without the unfair terms?
- (3) From the point of view of the application of Community law, is it relevant that the main dispute arose before the accession of the Republic of Hungary to the European Union, but after the adaptation of its domestic law to the Directive?

30. In the proceedings thus initiated, written observations were submitted by the Governments of Hungary, Austria, Latvia, Poland, Spain and the Czech Republic and by the Commission.

31. The Hungarian and Spanish Governments, and the Commission, submitted oral arguments before the Court at the hearing on 21 June 2005.

III — Legal analysis

32. As we have seen, the Szombathelyi Városi Bíróság asks three questions; two of these relate to the substance of the main action and concern the interpretation of Directive 93/13, while the third raises a more general, preliminary issue and addresses the Court's jurisdiction to give a ruling in the present case.

33. Since the answer to this third question may render an answer to the first two redundant, I feel that I must reverse the order of the questions put to the Court and consider first whether the present case has been brought before the Court in accordance with Article 234 EC.

Jurisdiction of the Court

34. Both the governments which have submitted observations and the Commission

have discussed at length whether Directive 93/13 can apply to facts occurring before Hungary's accession to the Community (1 May 2004), either disputing or upholding the admissibility of the questions of substance put to the Court, on the basis of their respective answers.

35. In particular, according to the Austrian and Spanish Governments, Directive 93/13 is unquestionably applicable to the present case. They take the view that, under Articles 67 and 68 of the Association Agreement and Article 3 of Law No 1/1994 ratifying the Agreement, even before its accession Hungary was required to adapt its national legislation to the provisions of the Directive. In order to comply with that requirement, Hungary adopted the national rules on unfair contract terms regarding which there is now uncertainty as to whether they are compatible with Community law.

36. The Latvian Government reaches the same conclusion, although it follows a separate line of reasoning: if I have understood correctly, it accepts that Directive 93/13 did not apply as such within Hungary prior to accession and that, therefore, the present case should be resolved solely in the light of the Hungarian rules on unfair terms as they applied at the time of the relevant facts. However, as the Latvian Government

points out, although those rules predate accession, they were none the less intended to make the national system compatible with the Directive, the requirements of which they copied exactly. An answer would therefore be needed from the Court to the principal questions referred, in order to guarantee that the Community rules and the identical national rules receive a common interpretation. As the Latvian Government continues, the Court has already held that it has jurisdiction to rule on the interpretation of Community rules where the case is governed not by Community law but by domestic provisions which refer to Community law or which conform to it by reproducing its content.⁸

37. However, the Commission and the Hungarian and Czech Governments believe otherwise: for reasons which we shall see more fully below (see points 41 to 43), they consider that, since the facts in the case occurred in 2002, that is, at a time when Hungary had not yet acceded to the Union, Directive 93/13 cannot be applied in the main proceedings and there is therefore no need for the Court to interpret it.

38. I must first of all point out that, under Article 234 EC, a national court or tribunal may request the Court of Justice to give a

⁸ — Here the Latvian Government refers in particular to Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763.

preliminary ruling on a question where it considers that the answer to that question is 'necessary' to enable it to give its own judgment.

39. As we know, however, the Court retains for itself a certain power of review of the assessments made by national courts which may lead it, in an appropriate case, to declare a reference inadmissible. In particular, it has repeatedly 'held that it cannot give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual facts of the main action or its purpose, [or] where the problem is hypothetical'.⁹

40. In that context, the Court has excluded its own jurisdiction where 'the provision of Community law referred to the Court for interpretation was manifestly incapable of applying'.¹⁰

⁹ — Case C-36/99 *Idéal tourisme* [2000] ECR I-6049, paragraph 20. See also Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraphs 17 and 18, Case C-83/91 *Meitcke* [1992] ECR I-4871, paragraph 25, Case C-415/93 *Bosman and Others* [1995] ECR I-4921, paragraph 61, Case C-437/97 *EKW and Weim & Co.* [2000] ECR I-1157, paragraph 52, and Case C-318/00 *Bacardi-Martini and Celier des Dauphins* [2003] ECR I-905.

¹⁰ — Case C-85/95 *Reisdorf* [1996] ECR I-6257, paragraph 16.

41. That is, in my view, precisely the situation in the present case. I agree with the Hungarian and Czech Governments and the Commission in their assertion that, in the main action, Directive 93/13 is incapable of applying, or of being relied upon by individuals, in so far as the facts at issue occurred in 2002 and, hence, at a time when Hungary had not yet acceded to the Union and was therefore not yet bound by the Directive.¹¹

42. The Act of Accession is in fact quite clear on this point. Article 2 provides that only '[f]rom the date of accession' are the provisions of the original Treaties and the acts adopted by the institutions to 'be binding on the new Member States and ... apply' to them. Moreover, according to Articles 53 and 54, it is only from that time that those States are to be considered as being addressees of existing directives and required to put into effect the measures necessary for them to comply with those directives, unless expressly provided otherwise, and the directive concerned does not do so.

43. It is in the light of these clear provisions that we must also interpret Articles 67 and 68 of the pre-existing Association Agreement, which came into force on 1 February 1994. As the Hungarian Government and the

¹¹ — On this point see the position expressed by the Court in a similar instance in Case C-321/97 *Andersson and Wäkerås-Andersson* [1999] ECR I-3551, paragraph 31.

Commission have rightly observed, these provide only that ‘the major precondition for Hungary’s economic integration into the Community is the approximation of that country’s existing and future legislation to that of the Community’ and that Hungary is to ‘act to ensure that future legislation’, in particular that relating to ‘consumer protection’, is ‘compatible with Community legislation as far as possible’.

which apply by reason of the persons or matters covered but only national rules that simply refer to or comply with the Community rules.¹²

44. Contrary to the contention of the Austrian and Spanish Governments, the articles cited did not require Hungary to implement Directive 93/13 prior to the time clearly prescribed by the Act of Accession but, as the Commission observes, required it only to ‘act’ to ‘approximate’, ‘as far as possible’, its internal law to the Community system, in order to allow ‘Hungary’s economic integration into the Community’ and its future accession.

46. In other words, although it somewhat forces the meaning, one might extend to the present case the approach adopted in those precedents, although here it remains questionable whether Community law can apply *ratione temporis*.

47. It might therefore be said, with reference also to the present case, that ‘where, in regulating internal situations, domestic legislation’, such as the Hungarian legislation on unfair contractual terms, ‘adopts the same solutions as those adopted in Community law ... it is clearly in the Community interest that, *in order to forestall future differences of interpretation*, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply’.¹³

45. However, the opposite view might, as the Latvian Government has done, turn to the Court’s well-known precedents upholding the admissibility of a reference for preliminary ruling even though, in the main action, it is not the Community rules to be interpreted

12 — See *Dzodzi*, cited above, Case C-231/89, *Gmurzynska-Bscher* [1990] ECR I-4003, Case C-88/91 *Federconsorzi* [1992] ECR I-4035, Case C-73/89 *Fournier* [1992] ECR I-5621, Case C-130/95 *Giloy* [1997] ECR I-4291, Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, Case C-7/97 *Brommer* [1998] ECR I-7791, Case C-1/99 *Kofisa Italia* [2001] ECR I-207, Case C-267/99 *Adam* [2001] ECR I-7467, and Case C-43/00 *Andersen og Jensen* [2002] ECR I-379. In the opposite sense, see Case C-346/93 *Kleinwort Benson* [1995] ECR I-615.

13 — *Dzodzi*, paragraph 37, and *Giloy*, paragraph 28, both cited above; emphasis added.

48. Using that approach therefore, one might rule the present reference for a preliminary ruling to be admissible.

49. However, I must say that such a conclusion would leave me somewhat perplexed.

50. If that conclusion were accepted, it would lead to a further extension of a precedent which, I feel, should only be the exception since, as has been the subject of objection both in the legal literature and by some Advocates General, in the context of references for a preliminary ruling it stretches the scope of the Court's jurisdiction to its limit (or even beyond), allowing the Court to give a ruling in cases where Community law clearly does not apply to the main action and there is only a *future*, and therefore purely hypothetical, interest in its uniform application.^{14 15}

51. However, I have no reason to dwell here on this matter and the controversy which it

has raised; I feel that in the present case there are other and even clearer reasons for this reference to be ruled inadmissible.

52. Firstly, the order from the Hungarian court seems to me to lack elements essential for the Court to give a ruling.

53. I might, for example, note that the order for reference does not indicate with certainty even whether Mr Varga can be described as a 'consumer', even though the applicability and relevance of Directive 93/13 are dependent upon such status in this case.¹⁶

54. That aside, however, I note that the questions referred — beginning with their very relevance for the purposes of the main proceedings — have in their entirety essentially been defined on the basis of the arguments set out by one party and notwithstanding the fact that the national court had not yet decided whether those arguments were well founded.

14 — See, in particular, the Opinion of Advocate General Tesouro in *Kleinwort Benson* and that of Advocate General Ruiz-Jarabo Colomer in *Kofisa Italia*, both cited in footnote 12.

15 — My uncertainty appears to be supported by the order of 26 April 2002 in Case C-454/00 *VIS Farmaceutici Istituto scientifico delle Venezie* (not published in the ECR), paragraph 21.

16 — It is common knowledge that the Directive applies only to 'contracts concluded between a seller or supplier and a consumer' (Article 1) and that 'consumer' means 'any natural person who ... is acting for purposes which are outside his trade, business or profession' (Article 2(b)). I have grave doubts whether one may regard as a 'consumer', in the sense indicated, a builder such as Mr Varga, who renovates a building to make it into a commercial-office centre and, with the intention of selling that building, enters into a real-estate agency agreement with a company (see above, at points 23 and 24).

55. The order states firstly that, according to the defendant (Mr Varga), the second sentence in Clause 5 of the agency contract, acknowledging the agent's entitlement to commission even where the owner rejects a written offer to purchase or lease the property for a price equal to or above that specified in the agency contract, 'is an unfair term'; it also states that, according to the applicant company (Ynos), 'there is no unfair term, because Article 209/B of the Ptk (the relevant national law) sets out precisely the criteria for establishing whether a term is unfair'.

56. However, in explaining its reasons for referring the questions for a preliminary ruling, the Szombathelyi Városi Bíróság merely states that 'in so far as it is possible to establish the existence of an unfair contractual term, as the defendant contends, the controversy must be resolved in the light of the Directive'.

57. In so doing, that national court appears to be basing the need to interpret Directive 93/13 and, hence, the relevance of the questions referred, solely on the arguments of the defendant, who claims that there is an unfair term in this instance. On the other hand, the national court does nothing to demonstrate whether, in its own opinion, there is such an unfair term, as it merely

states that, if there is, the interpretation of Directive 93/13, which governs this type of term when included in contracts with consumers, will be relevant.

58. As the court making the reference has not adopted any position on this point, the relevance, for the purposes of the main proceedings, of the questions referred is linked solely to the acceptance of an argument by Mr Varga in respect of which the national court has not yet taken a decision.

59. I must note, however, that, in accordance with well-known and established case-law, '[i]n order that the Court of Justice may perform its task [under Article 234 EC] in accordance with the Treaty it is essential for national courts to explain, when the reasons do not emerge beyond any doubt from the file, why they consider that a reply to their questions is necessary to enable them to give judgment'.¹⁷

60. That is not the position here, however: by not adopting a position on this preliminary issue (that is, whether there is an unfair term in this case), the Szombathelyi Városi

¹⁷ — Case 244/80 *Foglia* [1981] ECR 3045, paragraph 17.

Bírószág has failed to explain why it considers it necessary, for the purpose of ruling on the main action, for the Court to interpret Directive 93/13 regarding unfair terms in consumer contracts.

established by that article of the Directive (absence of individual negotiation and significant imbalance in contractual obligations). Were it to do so, the Court would ultimately be applying the Community law to be interpreted to the particular case, thereby playing a role which falls not to it but only to the court to which the main action has been referred.¹⁹

61. I am also of the opinion that the Court may not substitute itself for the national court and itself determine whether Clause 5 of the agency contract between Ynos and Mr Varga is an unfair term. I would point out that it is settled case-law that 'the role of the Court of Justice is limited to providing the national court with the guidance on interpretation necessary to resolve the case before it, while it is for the national court to apply the rules of Community law, as interpreted by the Court, to the facts of the case under consideration'.¹⁸

63. In view of the foregoing, the unavoidable conclusion is that the national court is in fact asking the Court of Justice to provide simply a consultative opinion. Not only that but, quite plainly, the national court is seeking an opinion which appears to relate to purely hypothetical questions, since it is doubtful at the least whether the Court's ruling will be of use in resolving the main action.

62. Thus, the Court might also, as the Commission appears to suggest, give an interpretation of Article 3 of the Directive defining as unfair any 'contractual term which has not been individually negotiated' and which 'contrary to the requirement of good faith ... causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'. In no circumstances, however, could it take the place of the Szombathelyi Városi Bírószág in order to determine whether the term at issue in the proceedings pending before the court meets the criteria

64. Thus, although the order for reference does not include the information needed on these matters, it none the less does provide details which cast considerable doubt on the relevance of a Court ruling for the purpose of settling the first two questions referred.

18 — Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 11, and Case C-253/99 *Bacardi* [2001] ECR I-6493, paragraph 58.

19 — Particularly so because, in this case, the description of the term at issue appears to assume — as indeed is required by Article 4 of the Directive (see above in point 12) — that detailed account is taken of 'all the circumstances' attending the conclusion of the agency contract, with careful consideration of national case-law concerning the definition of the objective of that type of, apparently disparate, contracts which the national court merely mentions in its order.

65. From the national court's reference, we see that:

(i) Ynos sought payment of commission in respect of its agency activity, using Clause 5 of the contract as the basis of its claim;

(ii) Mr Varga disputed that claim, exercising his right to raise an objection claiming that the term was unfair;

(iii) in turn, Ynos responded that the term was not unfair and thus perfectly valid in that regard.

66. In the light of these points, I feel that, firstly, we may regard it as clearly irrelevant to give an answer to the first question, in which the national court asks whether Article 6(1) of Directive 93/13 precludes national legislation under which an unfair term may be ruled not to have effect as regards the consumer only if the latter has expressly contested it.

67. As the Hungarian Government has rightly observed, even if Clause 5 of the

agency contract were an unfair term and therefore did not bind Mr Varga, the first question would be no less irrelevant: as in this case the invalid status of the term was asserted by way of an objection, as permitted by national law (see above, in point 21), it is, for the purposes of the main action, pointless now to establish whether the declaration that the term itself is without effect resulted from the objection raised or whether that declaration might have been obtained also upon the court finding of its own motion that the term was invalid.

68. In the light of these same points, I also have considerable doubt as to the relevance of an answer to the second question, in which the national court asks whether Article 6(1) of the Directive precludes national legislation, such as the Hungarian legislation, laying down that, when there is an unfair term, the remainder of the contract is still binding only if the parties would have concluded it without that term.

69. As I have stated, Ynos is seeking payment of the commission on the basis of Clause 5 of the agency contract. What counts here is therefore whether that term is unfair or not and thus binding upon the consumer. But it is entirely beside the point whether and on what conditions the invalid status of the term held to be unfair extends to the remaining provisions of the contract. If Clause 5 of the contract is invalid, whether such invalidity attaches only to that clause or

affects also the other terms of the contract, Ynos would in any event not be entitled to the commission agreed, as it was based on just that clause of that contract.

Article 6(1) of Directive 93/13 precludes national legislation under which an unfair term may be ruled not to have effect as regards the consumer only if the latter has expressly contested it.

70. In the light of the above considerations, therefore, I consider that the questions put by the Szombathelyi Városi Bíróság are, on the one hand, merely hypothetical and, on the other, without relevance to the resolution of the main proceedings. In consequence, I propose that the Court should declare that it does not have jurisdiction to answer them.

73. Here I agree with the Spanish Government and the Commission, which maintain that the answer to that question is to be found clearly in the case-law of the Court.

71. However, in the event that the Court should not wish to adopt that approach, then, rather than for the sake of completing the examination, I feel it is appropriate to consider also the two questions of substance relating to the interpretation of Article 6(1) of Directive 93/13.

74. On two occasions, the Court has stated that 'the protection provided for consumers by the Directive entails the national court being able to determine of its own motion whether a term of a contract before it is unfair', because 'the court's power to determine of its own motion whether a term is unfair must be regarded as constituting a proper means both of achieving the result sought by Article 6 of the Directive, namely, preventing an individual consumer from being bound by an unfair term, and of contributing to achieving the aim of Article 7, since if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers'.²⁰

Substance

The first question

72. In the first question, as we have seen, the national court is essentially asking whether

²⁰ — See Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraphs 28 and 29, and Case C-473/00 *Cofidis* [2002] ECR I-10875, paragraph 32.

75. In the light of those precedents, it therefore seems clear to me that Article 6 (1) of Directive 93/13 precludes national legislation under which an unfair term may be ruled not to have effect as regards the consumer only where the latter has expressly contested it.

The second question

76. In the second question, the national court asks whether Article 6(1) of the Directive precludes national legislation, such as the Hungarian legislation, laying down that, when there is an unfair term, the remainder of the contract is still binding only if the parties would have concluded it without that term.

77. I share the view expressed by the Austrian and Polish Governments and the Commission that this question must be answered in the affirmative since such legislation seems to me to be incompatible with the wording and the purpose of the Directive.

78. Under Article 6(1), 'Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their

national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms *if it is capable of continuing in existence without the unfair terms*'.²¹

79. According to Article 6(1), therefore, the normal consequence of an unfair term in a contract is for that term alone to have no effect and for the remainder of the contract to stand and, after the imbalance to the detriment of the consumer has been removed, continue to bind the parties. It is possible to depart from this general rule only when that contract is objectively incapable of continuing in existence without the unfair term but not when, upon subsequent examination, it is found that either party (presumably the seller or supplier who drew it up) would not have made the contract without it.

80. This interpretation is also borne out by the purpose of Article 6(1) and, more generally, of the Directive. As I have noted above, the aim of the Directive is to rebalance the contractual position of the consumer by preventing him 'from being bound by an unfair term' rather than to safeguard the contractual freedom of the parties, and particularly that of the seller or supplier, who might indeed have every interest in escaping the obligations of a contract which, when the balance has been adjusted, would be less advantageous to him.

21 — Emphasis added.

81. In the light of the foregoing assessments, I take the view that Article 6(1) does preclude national legislation, such as the Hungarian legislation, which lays down that, when there is an unfair term, the remainder of the contract is still binding only if the parties would have concluded it without that term.

IV — Conclusion

82. On the basis of the foregoing considerations, I therefore propose that the Court should declare that it does not have jurisdiction to rule on the questions referred for a preliminary ruling by the Szombathelyi Városi Bíróság.

In the alternative, I propose that the Court should reply as follows to the questions referred by that court:

- (1) Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts precludes national legislation under which a national court may rule that an unfair term is without effect as regards the consumer only where the latter has expressly contested it.
- (2) Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts precludes national legislation, such as the Hungarian legislation, which lays down that, when there is an unfair term, the remainder of the contract is still binding only if the parties would have concluded it without that term.