Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 2 June 2016[1]

Case C-119/15

Biuro podróży 'Partner' Sp. z o.o., Sp. komandytowa w Dąbrowie Górniczej
v
Prezes Urzędu Ochrony Konkurencji i Konsumentów

(Request for a preliminary ruling from the Sąd Apelacyjny w Warszawie VI Wydział Cywilny (Court of Appeal, Warsaw, Civil Division, Poland))

(Reference for a preliminary ruling — Consumer protection — Directive 93/13/EEC — Directive 2009/22/EC — Erga omnes effect of a judicial decision finding a term contained in standard conditions of business to be unfair once that term has been entered in a public register — Financial penalty imposed on a seller or supplier having used such a term or an equivalent term in its standard conditions of business, even though that seller or supplier was not a party to the proceedings to establish the unfairness of that term — Article 47 of the Charter of Fundamental Rights of the European Union — Right to a hearing)

I – **Introduction**

1. A judicial decision finding a term contained in a consumer contract to be unfair may obviously have binding force as a legal precedent. However, may the Member States confer on that decision an *erga omnes* effect such as to make it binding on sellers or suppliers that were not parties to those proceedings? That is the question which has been put to the Court in this case.

2. This request for a preliminary ruling has been made in the course of proceedings brought by an undertaking against the Polish competition and consumer protection authorities in connection with a fine imposed on that undertaking on the ground that, in its contracts with consumers, it uses terms in its standard conditions of business which are regarded as being equivalent to terms which have already been declared unfair and entered as such in a public register, in circumstances where that undertaking was not a party to the proceedings culminating in the finding that the terms entered in the register were unfair.

3. Principally, the referring court wishes to ascertain from the Court, in essence, whether Article 6(1) and Article 7 of Council Directive 93/13/EEC,[2] in conjunction with Articles 1 and 2 of Directive 2009/22/EC,[3] preclude legislation such as that at issue in the case pending before it.

1 — Original language: French.

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

3 — Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ 2009 L 110, p. 30).

4. Against that background, the Court is asked, for the first time, to determine the limits of the procedural autonomy enjoyed by the Member States under Directive 93/13 and the appropriate balance between the effective protection of consumers from unfair terms, on the one hand, and the right to a hearing enjoyed by a seller or supplier under Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), on the other.

II – **Legal context**

A – *EU law*

1. Directive 93/13

5. Article 3 of Directive 93/13 provides:

'1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

…

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

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

6. As regards the assessment of whether a contractual term is unfair, Article 4(1) of that directive provides:

'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.'

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

'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.'

8. Article 7 of Directive 93/13 provides:

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

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

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

9. Article 8 of Directive 93/13 provides that Member States may adopt or retain provisions which are more stringent than those contained in that directive, in so far as they are compatible with the Treaty.

10. Article 8(a)(1) of Directive 93/13 reads as follows:[4]

'1. Where a Member State adopts provisions in accordance with Article 8, it shall inform the Commission thereof, as well as of any subsequent changes, in particular where those provisions:

…

— contain lists of contractual terms which shall be considered as unfair.'

2. Directive 2009/22

11. In the version of Directive 2009/22 in force at the time of the facts in the main proceedings, Article 1, entitled 'Scope', provides:

'1. The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to actions for an injunction referred to in Article 2 aimed at the protection of the collective interests of consumers included in the Directives listed in Annex I, with a view to ensuring the smooth functioning of the internal market.

2. For the purposes of this Directive, an infringement means any act contrary to the Directives listed in Annex I as transposed into the internal legal order of the Member States which harms the collective interests referred to in paragraph 1.'

12. Directive 93/13 is mentioned in point 5 of Annex 1 to Directive 2009/22, entitled 'List of Directives referred to in Article 1'.

13. Article 2(1) of Directive 2009/22, entitled 'Actions for an injunction', provides:

'1. Member States shall designate the courts or administrative authorities competent to rule on proceedings commenced by qualified entities within the meaning of Article 3 seeking:

(a) an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement;

4 — Article 8(a) was not yet in force at the time of the facts in the main proceedings. That article was thus introduced by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/[EC] of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64). According to Article 28(2) of Directive 2011/83, the latter is to apply to contracts concluded after 13 June 2014.

(b) where appropriate, measures such as the publication of the decision, in full or in part, in such form as deemed adequate and/or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement;

(c) in so far as the legal system of the Member State concerned so permits, an order against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision within a time limit specified by the courts or administrative authorities, of a fixed amount for each day's delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decisions.'

B – *Polish law*

1. The Law on competition and consumer protection

14. Article 24(1) and (2)(1) of the Ustawa o ochronie konkurencji i konsumentów (Law on competition and consumer protection) of 16 February 2007 (Dz. U. No 50, item 331), in the version applicable to the case in the main proceedings, provides: [5]

'1. Practices harming the collective interests of consumers shall be prohibited.

2. A practice harmful to the collective interests of consumers shall mean any unlawful conduct of a seller or supplier detrimental to such interests, in particular:

(1) the use of terms in standard conditions of business which have been entered in the register of terms in standard conditions of business which have been declared unlawful, referred to in Article 479^{45} of the Law of 17 November 1964 establishing the Code of Civil Procedure (Dz. U., No 43, item 296, as amended).'

15. Article 26(1) of the Law on competition and consumer protection provides:

'1. Where the [President of the Office of Competition and Consumer Protection] finds that there has been an infringement of the prohibition referred to in Article 24, he shall issue a decision declaring that the practice in question is harmful to the collective interests of consumers and ordering its cessation …'

16. Article 106(1)(4) of the Law on competition and consumer protection provides:

'1. The [President of the Office of Competition and Consumer Protection] may impose on the seller or supplier, by means of a decision, a fine of up to 10% of the turnover generated in the financial year preceding the year in which the fine is imposed, where that seller or supplier, even if unintentionally:

…

(4) has employed a practice harmful to the collective interests of consumers, within the meaning of Article 24.'

5 — It is clear from the order for reference that Article 24(2)(1) of the Law on competition and consumer protection brings Polish law into line with Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ 1998 L 166, p. 51), which was repealed and replaced by Directive 2009/22 as of 29 December 2009.

2. The Code of Civil Procedure

17. Articles 479^{42}(1), 479^{43} and 479^{45}(1) to (3) of the Ustawa — Kodeks postępowania cywilnego (Law governing the Code of Civil Procedure) of 17 November 1964 (Dz. U. 2014, item 101), in the version applicable to the case in the main proceedings ('the Code of Civil Procedure') provide: [6]

'Article 479^{42}

1. If the application is granted, the court shall, in the operative part of its judgment, reproduce the content of the terms contained in the standard conditions of business which have been declared unlawful and shall prohibit the use of those terms.

Article 479^{43}

The final judgment shall produce its effects in relation to third parties once the term contained in the standard conditions of business which has been declared unlawful has been entered in the register referred to in Article 479^{45}(2).

Article 479^{45}

1. The court shall forward to the [President of the Office of Competition and Consumer Protection] a copy of the final judgment granting the application.

2. The [President of the Office of Competition and Consumer Protection] shall maintain, on the basis of the judgments referred to in (1), the register of terms contained in general conditions of business which have been declared unlawful.

3. The register referred to in paragraph (2) shall be public.'

III – **The facts and the dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court of Justice**

18. By decision of 22 November 2011, the President of the Urząd Ochrony Konkurencji i Konsumentów (Office of Competition and Consumer Protection, Poland, 'the UOKiK') imposed a fine of PLN 21 127 (Polish zlotys) (approximately EUR 4 940) on the company HK Zakład Usługowo Handlowy 'Partner' Sp. z o.o. ('HK Partner'), which is engaged in the business, inter alia, of providing tourism services. That decision was adopted under Article 24(1) and Article 24(2)(1) as well as Article 106(1)(4) of the Law on competition and consumer protection, on the ground that, in connection with the sale of travel arrangements, HK Partner had used terms in its standard conditions of business which were regarded as being equivalent to terms previously declared unlawful and then entered in the public register of unfair terms referred to in Article 479^{45}(2) of the Code of Civil Procedure ('the register of unfair terms'). [7]

6 — It is clear from the order for reference that Article 479^{42}(1), Article 479^{43} and Article 479^{45}(1) to (3) of the Code of Civil Procedure were introduced into Polish law in order to transpose Directive 93/13.

7 — I note that the adjective 'unfair' does not appear in the Polish legislation, which instead uses the word 'unlawful' (see points 14 to 17 of this Opinion). I shall take the liberty of assuming, however, that the two terms have the same meaning, given that the Polish legislation has been brought into line with EU law. The contested contractual terms used by HK Partner relate to the liability of the participant, that is to say the consumer, for damage arising through his own fault or the fault of persons under his charge, the exclusion of liability on the part of HK Partner in the event of the occurrence of certain events, and the non-refund of the value of services which the participant does not use. By way of example, one of the contested terms reads as follows: '[HK Partner] shall not refund the value of services which the participant does not use for reasons attributable to him'.

19. HK Partner brought an action against the decision of the President of the UOKiK of 22 November 2011 before the Sąd Okręgowy w Warszawie — Sąd Ochrony Konkurencji i Konsumentów (Regional Court, Warsaw — Competition and Consumer Protection Court, 'the SOKiK') seeking to have that decision annulled and, in the alternative, to have the financial penalty reduced. In the course of the proceedings before the SOKiK, HK Partner underwent a demerger as a result of which the applicant, the company Biuro podróży 'Partner' Sp. z o.o. ('Biuro podróży Partner'), took over all of the rights and obligations attaching to HK Partner in connection with its tourism business. By judgment of 19 November 2013, the SOKiK dismissed the action, having concurred with the assessment of the President of the UOKiK to the effect that the terms used by HK Partner were equivalent to the terms contained in the register of unfair terms.

20. Biuro podróży Partner lodged with the Sąd Apelacyjny w Warszawie VI Wydział Cywilny (Court of Appeal, Warsaw, Civil Division, Poland, 'Warsaw Court of Appeal') an appeal seeking to have the decision of the President of the UOKiK of 22 November 2011 annulled or, in the alternative, to have the judgment of the SOKiK of 19 November 2013 set aside and the case referred back to that court for reconsideration.

21. Habouring doubts as to the interpretation of EU law, the Sąd Apelacyjny w Warszawie VI Wydzial Cywilny (Warsaw Court of Appeal, Civil Division) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In the light of Article 6(1) and Article 7 of [Directive 93/13], in conjunction with Articles 1 and 2 of [Directive 2009/22], can the use of standard contract terms with content identical to that of terms which have been declared unlawful by a judicial decision having the force of law and which have been entered in the register of unlawful standard contract terms be regarded, in relation to another undertaking which was not a party to the proceedings culminating in the entry in the register of unlawful standard contract terms, as an unlawful act which, under national law, constitutes a practice which harms the collective interests of consumers and for that reason forms the basis for imposing a fine in national administrative proceedings?

(2) In the light of the third paragraph of Article 267 TFEU, is a court of second instance, against the judgment of which on appeal it is possible to bring an appeal on a point of law, as provided for in the Code of Civil Procedure of the Republic of Poland, a court or tribunal against whose decisions there is no judicial remedy under national law, or is the Sąd Najwyższy (Supreme Court, Poland), which has jurisdiction to hear appeals on a point of law, such a court?'

22. Taking into account the Court's clear case-law relating to the interpretation of the third paragraph of Article 267 TFEU,[8] the second question referred for a preliminary ruling does not raise any new points of law. Consequently, submissions need to be made only in respect of the first question referred, which is alone new.

23. Written observations have been lodged by the Polish Government and the European Commission. The Polish Government and the Commission took part in the hearing, which was held on 9 March 2016.

8 — See, in particular, the judgments of 4 June 2002 in *Lyckeskog* (C-99/00, EU:C:2002:329, paragraphs 16 to 19) and 16 December 2008 in *Cartesio* (C-210/06, EU:C:2008:723, paragraphs 75 to 79).

IV – **Legal analysis**

A – *Preliminary observations*

1. The Polish system for protecting consumers from unfair terms

24. It is appropriate to begin by giving some account of the Polish system for protecting consumers against unfair terms, under which unfair terms are subject to three forms of review, namely individual review, *in abstracto* review and administrative review. [9]

25. An individual review is carried out in the course of disputes, heard by the ordinary courts, between consumers and sellers or suppliers in connection with the unfairness of terms in specific contracts. The judicial decision relating to an individual review is binding only on the parties to the proceedings.

26. An *in abstracto* review, on the other hand, is carried out by a specialist court, namely the SOKiK, and is subject to a specific procedure regulated, inter alia, by Article 479^{42}(1), Article 479^{43} and Article 479^{45}(1) to (3) of the Code of Civil Procedure. [10] The purpose of an *in abstracto* review, which relates only to terms contained in standard conditions of business, is to eliminate unfair terms. The SOKiK's assessment is based on the wording of the contested term and thus does not take into account the way in which that term is used in particular contracts. [11] Cases may be brought before the SOKiK, inter alia, by any consumer, whether or not bound by a contract, by non-governmental organisations working to safeguard the interests of consumers and by the President of the UOKiK. [12]

27. When ruling on the unfairness of a term contained in standard conditions of business in the course of an *in abstracto* review, the SOKiK reproduces the wording of the contested term in the operative part of the judgment, in accordance with Article 479^{42}(1) of the Code of Civil Procedure, and prohibits its use. The final judgment granting the application is then published and the term declared unfair is entered in the register of unfair terms held by the President of the UOKiK. According to the Polish Government, once a clause has been entered in the register, it cannot be corrected or removed from the register.

28. The Polish Government states that administrative verifications are closely linked to *in abstracto* verifications, since they implement the judgments of the SOKiK. Thus, in an administrative verification, the President of the UOKiK determines whether the contested term is identical or equivalent to a contractual term on the register of unfair terms, having regard, in particular, to the content of the contested term and its effects on the consumer. In order to be equivalent, the two terms under comparison need not be identical from the point of view of their content. It is sufficient for the President of the UOKiK to find that the contested term applies to the same situation as that

9 — The following account of the Polish system is based on information supplied by the referring court, and supplemented by the Polish Government, which does not appear to be in dispute. On the Polish system, see Trzaskowski, R., *Skutki uznania postanowienia wzorca umowy za niedozwolone i jego wpisu do rejestru w sferze przeciwdziałania praktykom naruszającym zbiorowe interesy konsumentów (art. 24 ust. 2 pkt 1 u.o.k.i.k.) w świetle orzecznictwa Sądu Ochrony Konkurencji i Konsumentów*, Prawo w działaniu sprawy cywilne, 20/2014, p. 123. It appears that the Polish system for consumer protection was amended by the Ustawa o zmianie ustawy o ochronie konkurencji i konsumentów oraz niektórych innych ustaw (Law amending the Law on competition and consumer protection and certain other laws) of 5 August 2015 (Dz. U. 2015, Item 1634). However, that amendment did not enter into force until 17 April 2016 and proceedings initiated prior to that date are to be conducted in accordance with the pre-existing rules (Article 8 of that Law).

10 — See point 17 of this Opinion.

11 — The Polish Government states that, in an *in abstracto* review, the SOKiK establishes the 'normative content' of the term in question.

12 — In accordance with Article 479^{38}(1) and (2) of the Code of Civil Procedure, an *in abstracto* review may also be initiated by regional consumer ombudsmen and, in certain circumstances, by a foreign organisation included on the list of organisations qualified to bring an action for a declaration as to the unlawfulness of terms contained in standard conditions of business, which list is published in the *Official Journal of the European Union*.

covered by the term on the register. The seller or supplier whose terms are the subject of an administrative verification does not generally have the opportunity to challenge the unfairness of the contested term in the particular circumstances at issue but only its equivalence to terms already on the register.

29. Where the President of the UOKiK finds that there has been an infringement of the prohibition laid down in Article 24(2)(1) of the Law on competition and consumer protection, [13] he issues a decision ordering the cessation of the practice harmful to the collective interests of consumers and, where appropriate, imposing a fine on the seller or supplier in accordance with Article 106(1)(4) of that Law.

30. The decisions of the President of the UOKiK are subject to judicial review by the SOKiK as court of first instance and by the Sąd Apelacyjny w Warszawie VI Wydział Cywilny (Warsaw Court of Appeal, Civil Division) as court of second instance. [14] It is clear from the order for reference that the purpose of the judicial review is to examine not the unfairness of the contested term but only its equivalence to other terms included in the register of unfair terms.

2. The substance of the first question referred for a preliminary ruling

31. It is clear from the order for reference that the interpretation of Article 24(2)(1) of the Law on competition and consumer protection and Article 479^{43} of the Code of Civil Procedure [15] is the subject of doubts which have given rise to different points of view in both case-law and legal literature. According to the referring court, there are two conflicting propositions on this issue.

32. According to the first proposition, supported by the President of the UOKiK in the case in the main proceedings, and based on a literal reading of Article 479^{43} of the Code of Civil Procedure, decisions given by the SOKiK in the course of an *in abstracto* review have an *erga omnes* effect in relation to all sellers or suppliers once they are entered in the register of unfair terms [16] ('the first interpretative proposition').

33. According to the second proposition, as described by the referring court and the Polish Government, a decision by the SOKiK finding a term contained in standard conditions of business to be unlawful applies only to the specific term forming the subject of the proceedings and is binding only on the parties to the dispute.

34. The referring court considers that a proper interpretation of the provisions of national law at issue calls for account to be taken of the requirements of EU law and thus warrants the request for a preliminary ruling. More specifically, that court asks whether Article 6(1) and Article 7 of Directive 93/13 and Articles 1 and 2 of Directive 2009/22 preclude the applicable Polish legislation as interpreted according to the first interpretative proposition and, in particular, whether such an interpretation would be consistent with the seller's or supplier's fundamental right to a hearing.

13 — According to its wording, Article 24(2)(1) of the Law on competition and consumer protection relates to 'the use of terms contained in standard conditions of business which have been entered in the register'. According to the Polish Government, however, it follows from the case-law of the Sąd Najwyższy (Supreme Court) and the SOKiK that the use of 'equivalent' terms is also considered to be harmful to the collective interests of consumers within the meaning of that article.

14 — An appeal on a point of law may then be brought before the Sąd Najwyższy (Supreme Court).

15 — The referring court mentions Article 479^{43} (2) in this regard. It seems clear to me, however, that this is a typographical error, since the aforementioned paragraph 2 does not feature in the account of the relevant national law supplied by the referring court or in the observations submitted by the Polish Government and the Commission.

16 — In that regard, the referring court draws a distinction between the 'subjective' and 'objective' effects of a judgment finding a contractual term to be unfair, the former referring to the fact that the effects of the judgment extend to persons who were not parties to the proceedings before the SOKiK, and the latter to the fact that the judgment produces its effects in relation to both identical and equivalent terms.

35. While, in proceedings brought on the basis of Article 267 TFEU, the Court has no jurisdiction to rule on the interpretation of provisions of national law, including the choice between two modes of interpretation, or on the compatibility of national rules with EU law, this being a matter exclusively for the referring court, it does have jurisdiction, when giving a preliminary ruling, to provide the national court with all the guidance as to the interpretation of EU law necessary to enable that court to rule on the compatibility of national rules with EU law. [17]

36. I would recall, in that regard, that it falls to the referring court to do whatever lies within its jurisdiction to interpret the national rules applicable in the main proceedings, to the fullest extent possible, in the light of the wording and the purpose of EU law, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that Directive 93/13 is fully effective and achieving an outcome consistent with the objective pursued by it. [18]

37. Notwithstanding the wording of the first question referred for a preliminary ruling, I take the view that that question must be examined in the light of Directive 93/13 in its entirety, taking into account also the requirements arising from the Charter, in particular Article 47 thereof, relating to the right to a hearing. I would recall here that, in order to provide a satisfactory answer to a national court which has referred a question to it, the Court may deem it necessary to consider rules of EU law to which the national court has not referred in the text of its question. [19]

38. To my mind, the question referred for a preliminary ruling must therefore be understood as seeking to ascertain whether Directive 93/13, when read in conjunction with Articles 1 and 2 of Directive 2009/22 and Article 47 of the Charter, must be interpreted as meaning that it precludes national legislation providing for the imposition of a fine on a seller or supplier which, in its contracts with consumers, uses terms contained in its standard conditions of business which are regarded as equivalent to terms already declared unfair and entered as such in a public register, in circumstances where that seller or supplier was not a party to the proceedings culminating in the finding that the terms on the register are unfair.

17 — See judgments of 16 July 2015 in *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, paragraph 62 and the case-law cited) and 26 November 2014 in *Mascolo and Others* (C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraphs 81 and 83 and the case-law cited).

18 — See, to that effect, judgment of 14 June 2012 in *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 72 and the case-law cited). In the light of the case-law of the Sąd Najwyższy (Supreme Court), it seems to me that the referring court has some discretion in the interpretation of the relevant national provisions.

19 — See judgment of 14 June 2007 in *Medipac-Kazantzidis* (C-6/05, EU:C:2007:337, paragraph 34 and the case-law cited).

B – *Interpretation of Directive 93/13*

1. General remarks

39. The system of protection established by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier as regards both his bargaining power and his level of knowledge.[20] In that regard, Articles 6 and 7 of that directive require the Member States to ensure 'adequate and effective means' to prevent the continued use of unfair terms in consumer contracts[21] and to lay down that unfair clauses are not binding on the consumer, and aim, in the Court's words 'to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them'.[22]

40. There is little doubt that a scheme such as that provided for in the Polish legislation is appropriate for the purposes of ensuring a high level of consumer protection.[23] By conferring an *erga omnes* effect on decisions given in the course of an *in abstracto* review and allowing substantial fines[24] to be imposed on sellers or suppliers, such a scheme effectively and swiftly counters the use of terms which have been declared unfair as well as equivalent terms having a similar negative effect on the consumer. Furthermore, such a scheme ensures that the legislation is not circumvented by means of slight editorial and stylistic modifications to terms which have already been banned.[25]

41. As the Polish Government notes, Directive 93/13 does not prescribe a particular model which the Member States must use in order to prevent the continued use of unfair terms. Nor does it specify the legal effect attaching to a finding that a contractual term is unfair, since the directive is founded on the principle of the procedural autonomy of the Member States. Article 6(1) of that directive thus refers to the provisions under the national laws of the Member States,[26] and Article 8 of that directive even

20 — See judgments of 14 April 2016 in *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252, paragraph 22) and 29 October 2015 in *BBVA* (C-8/14, EU:C:2015:731, paragraphs 17 and 19 and the case-law cited). On that basis, the Court held that the national court is required to assess of its own motion the unfairness of a contractual term falling within the scope of that directive where it has available to it the legal and factual elements necessary for that task. See judgments of 21 April 2016 in *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraph 62), 4 June 2009 in *Pannon GSM* (C-243/08, EU:C:2009:350, paragraph 35), 9 November 2010 in *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:659, paragraph 56) and 14 March 2013 in *Aziz* (C-415/11, EU:C:2013:164, paragraph 46). With respect to the extent of the national court's obligation in that regard, see judgments of 14 June 2012 in *Banco Español de Crédito* (C-618/10, EU:C:2012:349), 18 February 2016 in *Finanmadrid EFC* (C-49/14, EU:C:2016:98) and 30 May 2013 in *Jőrös* (C-397/11, EU:C:2013:340), as well as the Opinions of Advocate General Sharpston in *Radlinger and Radlingerová* (C-377/14, EU:C:2015:769) and Advocate General Szpunar in *Banco Primus* (C-421/14, EU:C:2016:69).

21 — See also the fourth and twenty-first recitals of Directive 93/13.

22 — See judgments of 29 October 2015 in *BBVA* (C-8/14, EU:C:2015:731, paragraph 18 and the case-law cited), 21 February 2013 in *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraph 20 and the case-law cited) and 14 March 2013 in *Aziz* (C-415/11, EU:C:2013:164, paragraph 45 and the case-law cited). The Court has also held that Article 6 of Directive 93/13 must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy. See, in that regard, judgments of 6 October 2009 in *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615, paragraph 52) and 30 May 2013 in *Asbeek Brusse and de Man Garabito* (C-488/11, EU:C:2013:341 paragraph 44).

23 — The objective of ensuring a high level of consumer protection is also enshrined in Article 169(1) TFEU and Article 38 of the Charter.

24 — Article 106(1)(4) of the Law on competition and consumer protection provides that fines imposed may amount to up to 10% of the turnover of the seller or supplier concerned. See point 16 of this Opinion.

25 — The Polish Government points out the fact that one of the biggest difficulties when it comes to preventing the continued use of unfair terms is the ease with which they are proliferated and reproduced by other sellers and suppliers and the fact that they are reused after 'cosmetic tweaking'.

26 — See, in that regard, judgment of 21 February 2013 in *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraph 26). The Member States' procedural rules must, however, satisfy two conditions: they must be no less favourable than those governing similar domestic actions (principle of equivalence); and they must not make it impossible or excessively difficult in practice to exercise the rights conferred on consumers by EU law (principle of effectiveness). See judgments of 21 February 2013 in *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraph 25) and 29 October 2015 in *BBVA* (C-8/14, EU:C:2015:731, paragraph 24 and the case-law cited).

authorises the adoption or retention of national provisions which are more stringent than those provided for in that directive.[27] It does not follow from the foregoing, however, that the Member States have absolute freedom to adopt more stringent provisions applicable to unfair terms. As is clear from Article 8 of Directive 93/13, those provisions must be compatible with the treaties.

42. Contrary to the Polish Government's contention, I take the view that a scheme such as that advocated by those in favour of the first interpretative proposition does not comply with the requirements arising from Directive 93/13 when read in the light of the Charter. This conclusion is based on the submissions set out below in response to the arguments raised by the Polish Government and the Commission.

2. The specific and individual assessment of unfairness

a) Article 4(1) of Directive 93/13

43. It is clear from Article 4(1) of Directive 93/13 that the unfairness of a term used in consumer contracts must 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'.[28]

44. Thus, for the purposes of assessing unfairness, a contractual term cannot be isolated from its context. It follows that such an assessment is not absolute but relative, inasmuch as it is dependent on the particular facts attending the conclusion of the contract,[29] including the cumulative effect of all of the terms of the contract.[30]

45. It is also clear from its settled case-law that the Court should not rule on the application of the general criteria used by the EU legislature in order to define the concept of unfair terms to a particular term, which must be considered in the light of the particular circumstances of the case in question, this being an assessment which falls to the national court.[31]

27 — See also judgment of 26 April 2012 in *Invitel* (C-472/10, EU:C:2012:242, paragraph 40), in which the Court points out that the penalty of invalidity of an unfair term provided for in Article 6(1) of Directive 93/13 does not exclude other types of adequate and effective penalties provided for by national legislation.

28 — See also the fifteenth recital of Directive 93/13, which states that it is 'necessary to fix in a general way the criteria for assessing the unfair character of contract terms', as well as the sixteenth, eighteenth and nineteenth recitals, which refer to the factors that may be taken into consideration in this regard, namely, inter alia, the requirement of good faith, the strength of the bargaining positions of the parties, the nature of goods or services, the main subject matter of the contract and the quality/price ratio.

29 — See judgments of 21 February 2013 in *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraph 41), 1 April 2004 in *Freiburger Kommunalbauten* (C-237/02, EU:C:2004:209, paragraphs 21 and 22) and 14 March 2013 in *Aziz* (C-415/11, EU:C:2013:164, paragraph 66).

30 — See judgment of 21 April 2016 in *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraph 95).

31 — See judgments of 1 April 2004 in *Freiburger Kommunalbauten* (C-237/02, EU:C:2004:209, paragraph 22) and 4 June 2009 in *Pannon GSM* (C-243/08, EU:C:2009:350, paragraph 42). While, in the judgment of 27 June 2000 in *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 24), the Court held that a term, drafted in advance by the seller, the purpose of which is to confer jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller had his principal place of business, satisfies all the criteria necessary for it to be judged unfair for the purposes of Directive 93/13, it is clear from subsequent case-law that the situation in that case was exceptional. See the judgment of 1 April 2004 in *Freiburger Kommunalbauten* (C-237/02, EU:C:2004:209, paragraphs 22 and 23), in which the Court noted that *Océano Grupo Editorial and Salvat Editores* concerned 'a term which was solely to the benefit of the seller and contained no benefit in return for the consumer. Whatever the nature of the contract, it thereby undermined the effectiveness of the legal protection of the rights which [Directive 93/13] affords to the consumer. It was thus possible to hold that the term was unfair without having to consider all the circumstances in which the contract was concluded and without having to assess the advantages and disadvantages that that term would have under the national law applicable to the contract'.

46. A contractual term may thus be regarded as unfair in some circumstances but not in others,[32] depending, in particular, on the price paid by the consumer.[33] The assessment of unfairness might also change over time as a result of an amendment of the law applicable to the contract.[34]

47. There are of course some contractual terms which are manifestly unfair, in which case the assessment incumbent upon the national court under Article 4(1) of Directive 93/13 is easier, although no less specific. Such terms will also frequently be contrary to the mandatory rules of national consumer or contract law.

48. A national judicial decision finding that a contractual term is generically unfair or does not comply with mandatory rules would of course, inasmuch as it constitutes a precedent, have significant indirect effects on other sellers or suppliers using identical or similar terms in their contracts with consumers, since such sellers or suppliers would of course have to expect a similar assessment if their contracts were the subject of a judicial review. The fact remains, however, that the assessment of unfairness varies from one contract to another depending on the particular circumstances and the law applicable to the contract and the term in question.

49. Consequently, a scheme providing as a general rule that a finding as to the unfairness of terms contained in standard conditions of business which is reached in the course of *in abstracto* judicial proceedings must be definitive, is, to my mind, difficult if not impossible to reconcile with Article 4(1) of Directive 93/13, which requires that the assessment of unfairness be specific and made on the basis of the particular circumstances involved.

b) The list of unfair terms contained in Annex 1 to Directive 93/13

50. The annex to Directive 93/13 contains a list which Article 3(3) of the directive describes as an 'indicative and non-exhaustive list of the terms which may be regarded as unfair'.[35]

32 — See, in a similar vein, point 72, footnote 46, of the Opinion of Advocate General Szpunar in *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:15), in which it is stated that 'a contractual term may not be unfair in the abstract, but may be unfair under certain circumstances, or it may be potentially unfair and yet, having been negotiated individually in a given situation, it will be binding on the consumer in question'.

33 — I would observe, for example, that a term which, like that in the present case, stipulates that a travel agency will not refund the value of any services which the participant does not use for reasons attributable to him, may be considered unfair in certain circumstances, not least if the consumer is paying a high price for the services provided. If, on the other hand, the consumer has obtained a significant discount on the market value of the services in question, the outcome of the assessment as to whether such a term is unfair may well be different. It is clear from the nineteenth recital of Directive 93/13 that, even though the quality/price ratio does not itself form part of the assessment of unfairness, in accordance with Article 4(2) of that directive, it may be taken into account in assessing the unfairness of other terms.

34 — See, to that effect, judgment of 1 April 2004 in *Freiburger Kommunalbauten* (C-237/02, EU:C:2004:209, paragraph 21). See also point 30 of the Opinion of Advocate General Geelhoed in *Freiburger Kommunalbauten* (C-237/02, EU:C:2003:504), in which it is stated that 'the same type of terms may even have different legal effects in different national legal systems'.

35 — The seventeenth recital of Directive 93/13 states that 'the scope of [the] terms [in that list] may be the subject of amplification or more restrictive editing by the Member States in their national laws'. See also the judgments of 26 April 2012 in *Invitel* (C-472/10, EU:C:2012:242, paragraph 25 and the case-law cited) and 14 March 2013 in *Aziz* (C-415/11, EU:C:2013:164, paragraph 70).

51. The Commission had initially proposed that the legislature draw up a genuine 'blacklist' of terms regarded as being unfair in all circumstances, then a 'grey' list of terms presumed to be unfair. However, those approaches were not supported by the Council of the European Union, which opted for a purely indicative list.[36] The Court has confirmed that 'a term appearing in the list need not necessarily be considered unfair and, conversely, a term that does not appear in the list may nonetheless be regarded as unfair'.[37]

52. To my mind, the legislature's choice as to the nature of the list clearly demonstrates just how difficult it is to identify terms which will be unfair in all circumstances, even when it comes to terms such as those contained in that list which are considered to be particularly problematic from the point of view of the imbalance they create to the detriment of the consumer.[38] This is also apparent from the flexibility offered by the wording of the list.[39]

c) The possibility of adopting national lists of unfair terms under Article 8 of Directive 93/13

53. Where, pursuant to Article 8 of Directive 93/13, a Member State 'adopts provisions … [containing] lists of contractual terms which shall be considered as unfair', it must, pursuant to Article 8a(1) of that directive, inform the Commission thereof.[40] Unlike the indicative list in the annex to that directive, the national lists adopted under Article 8 may be binding, whether they are 'black' or 'grey'.[41]

54. To my mind, however, the expression 'adopts provisions', contained in Article 8a(1) of Directive 93/13, implies that such a national list must be established by way of legislation, that is to say by statute or by administrative rules adopted under statute. The mechanism introduced by Article 8 and Article 8a(1) of that directive thus requires the legislature to give a precise account of the terms

36 — See Article 2(2) and the twelfth recital of the Commission's Proposal of 24 July 1990 for a Council Directive on unfair terms in consumer contracts, presented by the Commission on 24 July 1990 [COM(90) 322 final), the Re-examined proposal of 26 January 1993 on Amendment No 4 [COM(93) 11 final], the Common Position of the Council of 22 September 1992 and the Commission's Communication of 22 October 1992 to the European Parliament on the Common Position of the Council (SEC(92) 1944 final — SYN 285), published in the Journal of Consumer Policy, 1992, 15, pp. 473 to 491. In the explanatory memorandum to its Re-examined proposal, the Commission states that the adoption of a 'blacklist' is 'somewhat ill-suited to the present wording of the Annex, chiefly because of the discretionary terms contained in many of its clauses'.

37 — See judgments of 1 April 2004 in *Freiburger Kommunalbauten* (C-237/02, EU:C:2004:209, paragraph 20) and 7 May 2002 in *Commission* v *Sweden* (C-478/99, EU:C:2002:281, paragraph 20). In the latter, concerning the transposition of Directive 93/13 into Swedish law, the Court held in paragraph 21 that 'the list contained in the annex to the directive does not seek to give consumers rights going beyond those that result from Articles 3 to 7 of the directive. It in no way alters the result sought by the directive, which, as such, is binding on Member States'. See also the judgment of 26 April 2012 in *Invitel* (C-472/10, EU:C:2012:242, paragraph 26), where the Court added that, 'if the content of the annex does not suffice in itself to establish automatically the unfair nature of a contested term, it is nevertheless an essential element on which the competent court may base its assessment as to the unfair nature of that term'.

38 — That list includes, inter alia, terms which have the object or effect of excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier, excluding or limiting the legal rights of consumers in the event of non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, enabling the seller or supplier to alter the terms of the contract unilaterally and excluding or hindering the consumer's right to take legal action or exercise any other legal remedy.

39 — That list also contains expressions such as 'inappropriately', 'disproportionately high sum', 'reasonable notice', 'serious grounds', 'unreasonably early deadline', 'without a valid reason' and 'too high', and thus makes it possible, not to say necessary, to carry out a specific assessment in each case. See the annex to Directive 93/13, point 1(b), (e), (g), (h) and (j) to (l).

40 — I would recall that the obligation to inform the Commission, laid down in Article 8a of Directive 93/13, applies only to contracts concluded after 13 June 2014. See footnote 4 to this Opinion. The initial proposal for Directive 2011/83, by the Commission, provided for the full repeal of Directive 93/13 [COM(2008) 614 final], and, in Articles 34 and 35 of that proposal, for the introduction of both a 'blacklist' of unfair terms considered unfair in all circumstances and a 'grey list' containing terms which would be considered unfair unless shown to be otherwise by the seller or supplier. The Commission's approach was not supported by the Council, however. See, in particular, the amendments proposed in the 'Item A' note drafted by the General Secretariat of the Council on 10 December 2010 [2008/0196(COD)] and the European Parliament's legislative resolution of 23 June 2011 (OJ 2012 C 390, p. 145) replacing the amendments adopted by the European Parliament on 24 March 2011 (OJ 2012 C 247, p. 55).

41 — At the hearing, the Commission stated that some Member States have availed themselves of the possibility provided for in Directive 93/13 by adopting national 'black' or 'grey' lists.

which are prohibited or presumed to be unfair, striking a careful balance between the different and sometimes competing interests involved, and to notify those terms to the Commission. It is worth noting that the legislative process, which may involve external stakeholders, lends itself by definition to the adoption of general and abstract rules.

55. In practice, a scheme such as that advocated by the supporters of the first interpretative proposition empowers the national courts, rather than the legislature, to draw up, on a case-by-case basis, a 'black list' that can be used to penalise the use of identical or equivalent terms. In that scenario, the terms declared to be unfair are added to the register of unfair terms on an ongoing basis, that register being effectively drawn up by sellers and suppliers. It is clear from the foregoing that such a scheme is not comparable to the adoption of national lists as authorised by Article 8 of Directive 93/13.

56. Furthermore, such a scheme strikes me as being difficult to reconcile with the principle of the legality of criminal offences and penalties, which is enshrined in Article 49 of the Charter and requires that legislation define clearly offences and the penalties which they attract. [42]

57. In the light of the large and growing number of entries in the register of unfair terms, [43] that scheme also raises doubts in relation to the principle of legal certainty, which is one of the general principles of EU law, [44] since sellers and suppliers will inevitably struggle to identify the legal context within which they are operating and to anticipate the consequences this brings with it. Those doubts are particularly serious when it comes to the possibility of penalising the use of terms which are only 'equivalent' to terms in the register. [45]

3. The seller's or supplier's right to a hearing

58. Closely linked to the foregoing considerations relating to the specific assessment of the unfairness of a contractual term is the question of the seller's or supplier's right to refute the unfairness of the terms which it uses in its contracts with consumers.

59. It follows from an *a contrario* reading of Article (3)(1) of Directive 93/13 that a contractual term is not regarded as unfair if it has been individually negotiated. [46] In that regard, the third subparagraph of Article 3(2) of that directive provides that the burden of proving that a standard term has been individually negotiated is to be incumbent upon the seller or supplier making a claim to that effect. I infer from this that Directive 93/13 confers on the seller or supplier, at the very least, the right to show that the contested term was individually negotiated and that, for that reason, it is not unfair within the meaning of that directive in that particular case.

42 — See judgment of 31 March 2011 in *Aurubis Balgaria* (C-546/09, EU:C:2011:199, paragraph 42 and the case-law cited), on the charging of interest on arrears on an additional debt by way of value added tax (VAT).

43 — According to the Commission, there are already more than 6 300 terms in the register, 300 of which were entered between July 2015 and the middle of March 2016.

44 — See judgment of 8 December 2011 in *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811, paragraph 100). With regard to Directive 93/13, see judgment of 7 May 2002, *Commission* v *Sweden* (C-478/99, EU:C:2002:281, paragraph 18).

45 — It is not clear from the order for reference whether the *erga omnes* effect provided for in Article 479[43] of the Code of Civil Procedure would be applied *retroactively*, that is to say to contracts concluded prior to the judicial decision finding the term in question to be unfair. If that were the case, my concerns in connection with the principle of legal certainty would obviously be all the more serious.

46 — See also the twelfth recital of Directive 93/13. The Commission had initially proposed that the directive be applicable both to standard terms and individually negotiated terms. See the Commission Proposal of 24 July 1990 [COM(90) 322 final] and the Parliament's legislative resolution of 20 November 1991, Amendment No 9 (OJ 1991 C 326 p. 108).

60. In my view, the seller's or supplier's right under the third subparagraph of Article 3(2) of Directive 93/13 to furnish arguments and evidence in order to discharge the burden of proof forms part of the more general and more extensive right arising from Article 47 of the Charter, in the light of which the provisions of Directive 93/13 must be read. [47]

61. Article 47 of the Charter guarantees for everyone, [48] in circumstances falling within the scope of the Charter, [49] the right to a hearing, in the course of both administrative and judicial proceedings. [50] According to the Court, that right includes the opportunity for every person to make known his views effectively before the adoption of any decision liable to affect his interests adversely so as to enable the competent authority effectively to take into account all relevant information. [51] The foregoing obviously holds good in the case of a decision imposing a financial penalty on a seller or supplier.

62. In a judicial review such as that contemplated in the legislation at issue, the seller's or supplier's right to a hearing would serve two distinct functions. First, it would enable the seller or supplier to prove that the particular circumstances attending the conclusion of the contract in question were different from those already assessed as part of previous proceedings establishing the unfairness of an identical or equivalent term. Secondly, the right to a hearing enables the seller or supplier to rely on pleas in law, whether factual or legal, which, for whatever reason, were not relied on during the previous *in abstracto* proceedings and to correct errors committed in the course of those proceedings. [52]

63. I conclude from this that, in the context of Directive 93/13, the seller's or supplier's right to a hearing cannot be confined to the question of whether the contested term was individually negotiated but must include all elements relevant to the assessment of the unfairness of that term under Article 4(1) of that directive. [53] Thus, the seller or supplier should also be able to prove that, in the particular circumstances, the contested term does not create a significant imbalance to the detriment of the consumer, by showing, in particular, that the harmful effect of that term is offset by other terms in the same contract or by the reduced price paid by the consumer. [54]

64. On the basis of the information submitted by the referring court and the Polish Government, I am of the view that a scheme such as that which follows from the first interpretative proposition does not take sufficient account of the seller's or supplier's right to a hearing, since the latter has no opportunity, either in the course of the administrative review or in the course of the judicial review before the SOKiK and the Sąd Apelacyjny w Warszawie VI Wydział Cywilny (Warsaw Court of

47 — I would recall that the Member States are also required to respect the treaty, including the fundamental rights guaranteed by the Charter, where they adopt provisions which are more stringent than those provided for in Directive 93/13, as is clear, moreover, from Article 8 of that directive.

48 — The term 'everyone' shows that the law applies to both natural and legal persons. See, in particular, judgment of 22 December 2010 in *DEB* (C-279/09, EU:C:2010:811, paragraph 59) and order of 13 June 2012 in *GREP* (C-156/12, not published, EU:C:2012:342, paragraph 38).

49 — I would observe that, in the light of Article 51(1) of the Charter, there is no doubt that the latter applies to the present case.

50 — It is clear from the Court's settled case-law that the right to a hearing is affirmed not only in Articles 47 and 48 of the Charter, which ensure respect of both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 thereof, which guarantees the right to good administration. See judgment of 22 November 2012 in *M.* (C-277/11, EU:C:2012:744, paragraphs 81 and 82 and the case-law cited). While Article 41 of the Charter is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union, the right to good administration, on the other hand, is part and parcel of the rights of the defence, which is a general principle of EU law. See the judgment of 11 December 2014 in *Boudjlida* (C-249/13, EU:C:2014:2431, paragraphs 32 to 34 and 40 and the case-law cited).

51 — See, to that effect, judgments of 11 December 2014 in *Boudjlid*a (C-249/13, EU:C:2014:2431, paragraphs 36 and 37 and the case-law cited) and 17 March 2016 in *Bensada Benallal* (C-161/15, EU:C:2016:175, paragraph 33). Closely related to the right to a hearing, the principle of *audi alteram partem* is also a fundamental principle of EU law. See the judgment of 21 February 2013 in *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraphs 29 and 30 and the case-law cited).

52 — See, to that effect, the judgment of 11 December 2014 in *Boudjlid*a (C-249/13, EU:C:2014:2431, paragraph 37).

53 — According to the wording of the third subparagraph of Article 3(2) of Directive 93/13, however, the particular rule to the effect that the burden of proof is to be incumbent upon the seller or supplier applies only to proving that the term was individually negotiated.

54 — See footnote 33 to this Opinion, concerning the nineteenth recital of Directive 93/13.

Appeal, Civil Division), to raise the argument that, in the particular circumstances in question, the contested term is not unfair or to adduce the evidence to prove it.[55] As the referring court states, the purpose of those procedures is to review not the unfairness of the contested term *per se* but only its equivalence to terms already in the register of unfair terms.

65. Although it is not inconceivable, as the Polish Government submits, that, when examining the equivalence between a contested term and one in the register of unfair terms, the national courts will take account of the factors mentioned in Article 4(1) of Directive 93/13,[56] the fact remains that that assessment is in any event intended only to determine whether the two terms are identical or equivalent[57] and the seller or supplier is not able to call into question the unfairness of the contested term *per se* by referring to the particular circumstances in question, including the fact that the term was individually negotiated, or to new arguments that were not put forward in the *in abstracto* review. Under such a scheme, the right enjoyed by the seller or supplier pursuant to Article 47 of the Charter is thus significantly restricted.[58]

66. At the same time, the jurisdiction of the court carrying out the judicial review is extremely limited, which in itself raises questions in relation to Article 47 of the Charter, which requires 'an effective remedy'.[59] Moreover, such a scheme would also adversely affect the consumer's right to waive the non-application of an unfair term.[60]

67. It is true that, in accordance with Article 52(1) of the Charter, the right to a hearing may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued and have due regard for the principle of proportionality.[61] In that regard, the Polish Government submits, rightly to my mind, that the national legislation seeks to put a swift and effective stop to the use of unlawful terms in the various situations that may arise on the market and to avoid a multiplicity of judicial procedures concerning the equivalence of terms contained in the general conditions of business used by different sellers or suppliers.[62]

68. Valid as they most certainly are, those considerations cannot in my view justify the particularly serious restriction of the seller's or supplier's right to a hearing that arises from Article 479[43] of the Code of Civil Procedure and Article 24(2)(1) of the Law on competition and consumer protection, as interpreted in accordance with the first interpretative proposition, taking into account also the not insignificant level of the fines that can be imposed on the seller or supplier under Article 106(1)(4) of that law.[63]

55 — See, to that effect, point 60 of the Opinion of Advocate General Trstenjak in *Invite*l (C-472/10, EU:C:2011:806). That case is dealt with in more detail in points 77 to 83 of this Opinion.

56 — The Polish Government mentions, by way of example, that, in one particular case, the Sąd Apelacyjny w Warszawie VI Wydział Cywilny (Warsaw Court of Appeal, Civil Division) called into question the equivalence between contested terms and terms on the register even though, from the point of view of their wording, those terms were very similar.

57 — See point 30 of this Opinion.

58 — The Polish Government maintains that the assessment carried out in the course of an *in abstracto* review is precisely that — abstract — and, therefore, independent of any individual circumstances, and that, even if every seller or supplier using the contested term could exercise his right to a hearing during the *in abstracto* review prior to the term's entry in the register, this would have no bearing on the outcome of those proceedings. I should make the point here that my concerns with respect to the seller's or supplier's right to a hearing relate not to the *in abstracto* review but rather to the subsequent administrative and judicial review of the commercial practices of other sellers or suppliers.

59 — See also judgment of 15 May 1986 in *Johnston* (222/84, EU:C:1986:206, paragraph 19), in which the Court held that the right to obtain an effective remedy in a competent court constitutes a principle of EU law.

60 — See, in that regard, judgment of 14 April 2016 in *Sales Sinués and Drame Ba* (C-381/14 et C-385/14, EU:C:2016:252, paragraph 40).

61 — See, to that effect, judgment of 11 December 2014 in *Boudjlida* (C-249/13, EU:C:2014:2431, paragraph 43 and the case-law cited).

62 — See also point 40, including footnote 25, of this Opinion.

63 — See footnote 24 to this Opinion.

69. The definitive nature of the entry of terms in the register of unfair terms lends further weight to the conclusion that the national legislation in question, as interpreted in accordance with the first interpretative proposition, is not consistent with the principle of proportionality. [64]

70. As the Commission states, there would appear to be alternative measures that would secure effective protection against unfair terms for consumers while at the same time guaranteeing the seller's or supplier's right to a hearing. Thus, the Member States cannot be prevented from implementing measures which establish a presumption as to the unfairness of certain terms contained in standard conditions of business [65] the use of which is liable to be penalised unless the seller or supplier can show, in administrative or judicial proceedings, that those terms are not unfair in the particular circumstances involved, by proving, in particular, that they were individually negotiated.

71. Furthermore, the fact that it does not have an *erga omnes* effect does not mean that a finding as to the unfairness of a term contained in standard conditions of business would not act as a deterrent, in so far as other sellers or suppliers would tend to stop using similar terms. [66]

C – *Collective actions for an injunction*

1. Article 7(2) and (3) of Directive 93/13

72. As the Commission states, Article 7(2) and (3) of Directive 93/13 authorises collective actions for an injunction which do go beyond the contractual relationship in the sense that they are independent of any individual dispute and may be brought by persons and organisations having a legitimate interest in protecting consumers. [67] As the expression 'without prejudice to Article 7' in Article 4(1) of that directive indicates, the actions referred to in Article 7(2) of that directive are supplementary to individual actions. [68]

73. Article 7(2) of that directive provides for an *in abstracto* review, of a deterrent and dissuasive nature, [69] aimed at determining 'whether contractual terms drawn up for general use are unfair', while Article 7(3) of the same directive allows the actions referred to in Article 7(2) thereof to be directed separately or jointly against a number of sellers or suppliers from the same sector or their associations.

64 — At the hearing, the Polish Government confirmed that a term entered in the register of unfair terms cannot be corrected or removed.

65 — In that regard, the Commission notes that the Polish scheme, on the other hand, may have an effect equivalent to an irrebuttable presumption. In my view, this is not an entirely appropriate description of the situation given that, by extending the legal effect of decisions given in *in abstracto* reviews, Article 479[43] of the Code of Civil Procedure amounts in effect to an outright ban on the use of terms which are identical or equivalent to those in the register (rather than simply to a presumption as to their unlawfulness).

66 — See, to that effect, the report from the Commission to the European Parliament and the Council of 6 November 2012 concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest [COM(2012) 635 final, part 3.1], which states that, 'for several interested parties, the very possibility of being able to bring injunctive actions has an inherent deterrent effect in negotiations with those who infringe the legislation. In some cases, on the other hand, when an injunctive action is successful and declares that a practice of a trader is illegal, other traders tend to refrain from using similar practices, even if they are not legally bound by the ruling'.

67 — See judgments of 14 April 2016 in *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252, paragraph 29) and 26 April 2012 in *Invitel* (C-472/10, EU:C:2012:242, paragraph 37 and the case-law cited), where the Court held that collective actions may be brought 'even though the terms which it is sought to have prohibited have not been used in specific contracts'.

68 — See, in a similar vein, point 56 of the Opinion of Advocate General Szpunar in Joined Cases *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:15).

69 — See the judgment of 26 April 2012 in *Invitel* (C-472/10, EU:C:2012:242, paragraph 37).

74. It is clear from the Court's case-law that, in the context of Directive 93/13, individual and collective actions have 'different purposes and legal effects'.[70] Furthermore, the twenty-third recital of Directive 93/13 states that collective actions do not entail 'prior verification of the general conditions obtaining in individual economic sectors'. I infer from this that the *ex ante* review carried out in a collective action cannot prejudge the *ex post* review carried out in an individual action involving other parties,[71] which means, in practice, that the effects of decisions adopted at the conclusion of collective actions cannot be extended to sellers or suppliers that were not parties to those proceedings.[72]

75. That conclusion is supported by the additional provision contained in Article 7(3) of Directive 93/13. Thus, there would be no sense, in my view, in allowing multi-party proceedings to be brought under that paragraph if the decisions given in the collective actions referred to in Article 7(2) of the same directive were already binding upon all sellers or suppliers. The drafting history of that directive also militates in favour of the interpretation to the effect that decisions adopted in the collective actions for an injunction referred to in Article 7(2) and (3) are binding only on the parties to that particular collective action.[73]

76. It is true that, in the case of terms contained in standard conditions of business, which are rarely the subject of individual negotiation, the assessments to be carried out by the national courts in a collective action and an individual action respectively will often be similar, if not identical, even though the parties to the actions are not the same. Consequently, the decision given in a collective action would set a strong precedent for the assessment to be carried out in a subsequent individual action relating to an identical or equivalent term and may even create a presumption as to the unfairness of that term. The fact remains, however, that a seller or supplier that was not a party to the collective proceedings should not be deprived of the right, under the third subparagraph of Article 3(2) of Directive 93/13 and Article 47 of the Charter, to refute such a presumption in an individual action.

70 — See the judgment of 14 April 2016 in *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:252, paragraph 30). While collective actions are independent of any individual dispute, the consumer has the right, in an individual action, 'to have all the circumstances of his situation taken into account' (paragraph 40 of the judgment).

71 — See, to that effect, points 56 and 72 of the Opinion of Advocate General Szpunar in Joined Cases *Sales Sinués and Drame Ba* (C-381/14 and C-385/14, EU:C:2016:15), who states, in point 56, that 'collective actions for injunctions … may not replace individual actions or preclude them' and, in point 72, that 'a consumer who decides to act in his individual capacity should not be directly affected by a judgment delivered in collective proceedings, even though the court hearing his individual action will obviously take that judgment into account'.

72 — Indeed, as the Commission stated at the hearing, legislation such as that at issue in the main proceedings, which provides that judicial decisions finding a contractual term to be unfair have an *erga omnes* effect, does not appear to exist in other Member States. See also the *EC Consumer Law Compendium*, compiled for the Commission by an international group of researchers between 2008 and 2012. (http://www.eu-consumer-law.org/index_fr.cfm). It follows from Part 2 C, Chapter VI, Point 3(c), concerning the transposition into national law of Directive 93/13, edited by M. Ebers, that judicial or administrative decisions in a collective action are, in the vast majority of Member States, binding only on the seller or supplier who is party to the case. See also footnote 84.

73 — The initial Commission Proposal of 24 July 1990 did not contain any provision corresponding to Article 7(3) of the adopted Directive 93/13 [COM(90) 322 final]. That paragraph was inserted in the Commission's Amended Proposal of 4 March 1992, Article 8(3) of which provided as follows: 'The measures referred to in the foregoing paragraph may be directed jointly against a number of persons using, preparing to use or recommending the use of the same general contractual terms or identical terms; *the decision reached by the competent authorities shall be binding on all the persons concerned*' (my emphasis) [COM(92) 66 final]. During the legislative procedure, the wording of that paragraph was modified without the slightest indication that it was the legislature's intention to extend the effect of decisions given under Article 7(2) and (3) of Directive 93/13.

2. The scope of the judgment in *Invitel*

77. As the Polish Government and the Commission have highlighted, the Court, in the judgment in *Invitel*, held that Article 6(1) of Directive 93/13, read in conjunction with Article 7(1) and (2) thereof, does not preclude the effect of decisions establishing the unfairness of a term contained in standard conditions of business in the course of an action for an injunction under Article 7 of that directive from being extended 'to all consumers who concluded with the seller or supplier concerned a contract to which the same [standard conditions of business] apply, including … those consumers who were not party to the injunction proceedings'.[74]

78. That result is hardly surprising. If anything, it is the corollary of the nature and purpose of collective actions for an injunction. Where a contractual term has been declared invalid and prohibited in an action for an injunction, there is obviously a need to ensure that the seller or supplier concerned does not use the same general conditions of business, including the term declared unfair, in any of its contracts. The actions for an injunction provided for in Article 7(2) and (3) of Directive 93/13 would otherwise be deprived of any useful effect.

79. In paragraph 40 of the judgment in *Invitel*, the Court rightly stated that the application of a penalty of invalidity of an unfair term with regard to all consumers who have concluded with the seller or supplier concerned a consumer contract to which the same standard conditions of business apply 'ensures that those consumers will not be bound by that term',[75] the Court thereby referring to Article 6(1) of Directive 93/13, which, in the Court's words, requires the Member States, 'to draw all the consequences' that follow under national law from a finding that a term contained in standard conditions of business is unfair, so as to ensure that the consumer is not bound by that term.[76].

80. There is little doubt, in my view, that that case-law is not transposable to the situation in the present case.

81. When giving the reasons for its conclusion in the judgment in *Invitel*,[77] the Court thus expressly referred to points 57 to 61 of the Opinion of the Advocate General, who, for her part, expressed 'serious doubts' about an *erga omnes* effect in relation to sellers or suppliers that were not parties to the proceedings to establish the unfairness of the contested term, which concerns I share wholeheartedly.[78]

82. Furthermore, the question before the Court in the case which gave rise to that judgment, namely the extension of the penalty of invalidity of an unfair term with regard to consumers who have concluded with the seller or supplier concerned a consumer contract to which the same standard conditions of business apply, was manifestly different from that raised by the referring court in the present case, which concerns the imposition of financial penalties on sellers or suppliers that were not parties to the *in abstracto* review.

74 — Judgment of 26 April 2012 in *Invitel* (C-472/10, EU:C:2012:242, paragraph 44).

75 — Judgment of 26 April 2012 (C-472/10, EU:C:2012:242).

76 — Judgment of 26 April 2012 in *Invitel* (C-472/10, EU:C:2012:242, paragraph 42).

77 — Judgment of 26 April 2012 (C-472/10, EU:C:2012:242, paragraph 39).

78 — See, in particular, point 60 of the Opinion of Advocate General Trstenjak in *Invitel* (C-472/10, EU:C:2011:806), in which it is stated: 'an *erga omnes* effect adversely affecting persons not party to the proceedings would be difficult to reconcile with the principles of a fair trial, particularly as such persons would be denied an opportunity to express their views on the accusation of using unfair terms in contracts before a judgment affecting them was delivered. The right to be heard … would not be adequately safeguarded if an *erga omnes* effect applied indiscriminately to persons not party to the proceedings and the national provisions in question would thus not be appropriate within the meaning of Article 7 of the directive'.

83. A broad interpretation of the scope of the judgment in *Invitel*,[79] to the effect that it covers legislation providing for an *erga omnes* effect in relation to sellers or suppliers not parties to the proceedings, does not therefore strike me as justifiable and would in any event be inconsistent with the fundamental rights of the seller or supplier.[80]

3. Interpretation of Directive 2009/22

84. The interpretation of Directive 93/13 which I advocate is not capable of being called into question in the light of Articles 1 and 2 of Directive 2009/22, to which the national court refers in its first question.

85. Directive 2009/22, concerning collective actions for injunctions for the protection of consumers' interests, has as its objective to give full effect to a number of directives, including Directive 93/13, and, in particular, to combat infringements within the European Union.[81]

86. In that regard, Article 2(1)(a) to (c) of Directive 2009/22 requires the Member States to designate the courts or administrative authorities competent to rule on collective proceedings commenced by qualified entities within the meaning of Article 3 of that directive, seeking an order requiring the cessation of any act contrary to Directive 93/13, the publication of the decision or a corrective statement and an order against the losing defendant for payments into the public purse or to any beneficiary designated in national legislation, in the event of failure to comply with the decision.

87. As regards the relationship between Directive 2009/22 and Directive 93/13, the former is supplementary to Article 7(2) and (3) of Directive 93/13, which also concerns actions for an injunction.[82]

88. I can see nothing, either in the wording of Directive 2009/22 or in its drafting history,[83] to indicate that the Member States are authorised to confer on decisions given in the actions referred to in that directive an *erga omnes* effect in relation to sellers and suppliers that were not parties to the injunction proceedings. If that were the case, Directive 2009/22 would go beyond the regime established by Directive 93/13, which the former directive is intended to supplement, a presumption which it is impossible to make in the absence of any express wish to that effect on the part of the EU legislature.

89. A change to EU law such as to allow the Member States to extend the effects of decisions declaring a contractual term to be unfair to 'similar contracts' has, however, been considered under the auspices of the Commission.[84] This simply confirms that such a solution is not possible as EU law currently stands, that is to say in the context of Directives 93/13 and 2009/22.

79 — Judgment of 26 April 2012 (C-472/10, EU:C:2012:242).

80 — As regards the right of the seller or supplier to be heard, see points 58 to 71 of this Opinion.

81 — That is to say, infringements that produce effects in a Member State other than that in which they originate. See, in particular, recitals 3 to 7 of Directive 2009/22 and the *Green Paper on access of consumers to justice and the settlement of consumer disputes in the single market* [COM(93) 576 final], chapter III.B.2. According to Article 1(1) of Directive 2009/22, the actions for an injunction referred to in Article 2 of that directive are aimed at protecting the collective interests of consumers included in the EU acts listed in Annex 1 to that directive, point 5 of which refers to Directive 93/13.

82 — Note 1 of Annex 1 to Directive 2009/22 thus mentions that Directive 93/13 contains 'specific provisions concerning injunctions'. As regards Article 7(2) and (3) of Directive 93/13, see points 72 to 76 of this Opinion.

83 — Directive 2009/22 is of a piece with Directive 98/27, which was based on the *Green Paper on access of consumers to justice and the settlement of consumer disputes in the single market* [COM(93) 576 final].

84 — See the Report from the Commission of 6 November 2012 to the European Parliament and the Council concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests [COM(2012) 635 final, part 5.1(b)(2)], which, with respect to 'possible changes in the legal framework', states that, 'when a contract term is declared illegal, the effect of this decision should be extended to all similar present and future contracts'. However, it is clear from Part 4.4 of that same report that, in the vast majority of Member States, injunctions have a *relative* effect, that is to say that they are binding only in the case concerned and on parties to the action. See also the Report of the Commission of 18 November 2008 on the application of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumer interests [COM(2008)756 final, parts 25 to 27].

V – **Conclusion**

90. In the light of the foregoing, I propose that the Court's answer to the first question referred for a preliminary ruling by the Sąd Apelacyjny w Warszawie VI Wydział Cywilny (Court of Appeal, Warsaw, Civil Division, Poland) should be as follows:

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, in conjunction with Articles (1) and (2) of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests and Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it precludes national legislation providing for the imposition of a fine on a seller or supplier which, in its contracts with consumers, uses terms contained in standard conditions of business which are regarded as being equivalent to terms which have already been declared unfair and entered as such in a public register, in circumstances where that seller or supplier was not a party to the proceedings culminating in the finding that the terms in the register are unfair.