OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 6 July 2010[1]

I — Introduction

1. This case is based on a reference made by the Budapesti II. és III. Kerületi Bíróság (Court of Districts II and III of Budapest, 'the referring court') under Article 234 EC[2] for a preliminary ruling on a number of questions concerning the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.[3]

2. The reference for a preliminary ruling has as its origin a dispute between the VB Pénzügyi Lízing Zrt. ('the claimant in the main proceedings') and Mr Ferenc Schneider ('the defendant in the main proceedings') concerning the repayment of a loan. It raises the question inter alia of what role the Court of Justice is to play in ensuring that the level of protection afforded to consumers' rights is uniformly applied in all the Member States of the European Union in accordance with Directive 93/13. That question must be answered in the light of the Court's previous case-law, in particular Case C-243/08 *Pannon*.[4]

II — Legislative framework

A — *Community law*

1. Statute of the Court of Justice

3. Article 23 of the Protocol on the Statute of the Court of Justice provides as follows:

'In the cases governed by Article 35(1) of the EU Treaty, by Article 234 of the EC Treaty

1 — Original language: German.

2 — Under the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007 (OJ 2007 C 306, p. 1), the preliminary ruling procedure is now governed by Article 267 of the Treaty on the Functioning of the European Union.

3 — OJ 1993 L 95, p. 29.

4 — Case C-243/08 *Pannon* [2009] ECR I-4713.

and by Article 150 of the EAEC Treaty, the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court shall be notified to the Court by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Court to the parties, to the Member States and to the Commission, and also to the Council or to the European Central Bank if the act the validity or interpretation of which is in dispute originates from one of them, and to the European Parliament and the Council if the act the validity or interpretation of which is in dispute was adopted jointly by those two institutions.

Within two months of this notification, the parties, the Member States, the Commission and, where appropriate, the European Parliament, the Council and the European Central Bank, shall be entitled to submit statements of case or written observations to the Court.

In the cases governed by Article 234 of the EC Treaty, the decision of the national court or tribunal shall, moreover, be notified by the Registrar of the Court to the States, other than the Member States, which are parties to the Agreement on the European Economic Area and also to the EFTA Surveillance Authority referred to in that Agreement, which may, within two months of notification, where one of the fields of application of that Agreement is concerned, submit statements of case or written observations to the Court.

…'

4. On the entry into force of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community on 1 December 2009, Article 23 of the Statute of the Court of Justice was also amended. [5] However, those amendments merely provided a number of clarifications in relation to the preliminary ruling procedure now governed by Article 267 TFEU.

2. Directive 93/13

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

6. Article 3(1) of the Directive provides:

'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.'

5 — OJ 2008 C 115, p. 210.

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

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

8. Article 7(1) provides:

'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.'

B — *National law*

9. The order for reference shows that the Hungarian legislature transposed Directive 93/13 in several stages. The provisions currently in force result from the amendments introduced by Law III of 2006, which include — inter alia — Articles 205/A, 205/B and 209 to 209/B of the Civil Code ('the CC').

10. Under Article 205/A(1) of the CC, contractual clauses which are predetermined unilaterally by one of the parties with a view to the conclusion of a number of contracts, without the participation of the other party, and have not been individually negotiated by the parties are to be regarded as standard contractual terms.

11. Under Article 205A(2) of the CC, the party which uses standard contractual terms assumes the burden of proof that the contractual terms were individually negotiated between the parties. That rule is also to be applied by analogy in the case where the parties are in dispute as to whether they negotiated individually the contractual terms predetermined unilaterally by the party which concluded the contract with the consumer.

12. Under Article 205/A(3) of the CC, for the purposes of classification as standard contractual terms, the scope and form of the terms, the way in which they are included in the contract or whether they are stipulated in the contract itself or in a separate document have no bearing.

13. Under Article 205/B(1) of the CC, the standard contractual terms form part of the contract only if the party relying on them has given the other party the opportunity

to acquaint himself with their content and the other party has expressly accepted them or has acted in a way which amounts to acceptance.

14. Under Article 205/B(2) of the CC, the other party must be specifically informed of standard contractual terms that deviate substantially from usual contractual practice or from contract law or which differ from a provision applied previously between the parties. Such terms form part of the contract only if the other party has expressly accepted them after being specifically informed about them.

15. Under Article 205/C of the CC, if standard contractual terms deviate from the other terms of the contract, the latter are to form part of the contract.

16. Under Article 209(1) of the CC, standard contractual terms and terms in a consumer contract which have not been individually negotiated are to be regarded as unfair if, contrary to the requirements of good faith, they establish the parties' rights and obligations arising under the contract unilaterally and unjustifiably, to the detriment of the contracting party which did not stipulate those terms.

17. Under Article 209(2) of the CC, for the purposes of determining whether a term is unfair, account is to be taken of all the circumstances attendant upon the signature of the contract, the nature of the service agreed upon and the relationship between the term in question and the other terms of the contract or other contracts.

18. Under Article 209(5) of the CC, a contractual term cannot be regarded as unfair if it has been laid down by a rule of law or has been drafted in conformity with a rule of law.

19. Under Article 209/A(1) of the CC, unfair terms which form part of the contract as standard contractual terms may be challenged by the injured party.

20. Under Article 209/A(2) of the CC, unfair terms in a consumer contract which, as standard contractual terms, form part of the contract and have been predetermined unilaterally and without individual negotiation by the party concluding a contract with the consumer are null and void. Nullity may be invoked only in favour of the consumer.

21. For the purposes of the preliminary ruling procedure, the Hungarian legislature amended the Code of Civil Procedure by Law XXX of 2003. Following that amendment,

Article 155/A(2) of the Code of Civil Procedure requires Hungarian courts, when submitting references for a preliminary ruling to the Court of Justice of the European Union, to send them at the same time to the Ministry of Justice for information purposes.

III — Facts, main proceedings and questions referred

22. The main proceedings have as their origin a dispute concerning the repayment of a loan which the defendant in the main proceedings intended to use to finance the purchase of a motor vehicle. The claimant concluded the loan contract in the course of its economic activities, while the defendant did so, on 14 April 2006, as a consumer. When the defendant stopped discharging his payment obligations under the loan contract, the claimant terminated that contract and sought payment of the outstanding amounts from the defendant.

23. The claimant in the main proceedings applied for an order for payment, though not to the Ráckevei Városi Bíróság (Ráckeve local Court), the court exercising general jurisdiction by virtue of the defendant's usual place of residence. It relied instead on a term in the contract which confers exclusive jurisdiction in respect of any litigation arising under the contract on the referring court. The claimant's registered office does not fall within the jurisdiction of the referring court, although it is situated close to the seat of that court both geographically and in terms of transport links.

24. The court made the order for payment and the defendant lodged an appeal against it, contesting the claimant's claim. However, the defendant did not raise a defence in relation to the substance of the matter; nor did he indicate in his appeal to what extent or on what grounds he considered the claimant's claim to be unfounded.

25. Before setting a date for the hearing, the referring court held that the defendant's place of residence did not fall within its territorial jurisdiction but that the claimant had made its application for the payment order to the court close to its registered office, in accordance with the standard terms of the contract, which raised doubts on the part of the referring court in relation to those provisions.

26. It therefore stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Pursuant to Article 23 of the Protocol on the Statute of the Court of Justice annexed to the Treaty on European Union, the Treaty establishing the European Community and the Treaty establishing the European Atomic Energy Community, is the possibility precluded for the national courts to inform the Ministry of Justice of their own Member State that a reference for a preliminary ruling has been made at the same time as making that reference?

2. Do the powers of the Court of Justice under Article 234 EC include that of interpreting the concept of 'unfair term' referred to in Article 3(1) of Directive 93/13/EEC of 5 April 1993 and the terms listed in the Annex to that directive?

3. If the answer to the first question is in the affirmative, can a reference for a preliminary ruling seeking such an interpretation — in the interest of the uniform application in all Member States of the level of protection of consumer rights guaranteed by Directive 93/13 — ask what aspects the national court may or must take into account should the general criteria laid down in the Directive apply to a particular individual term?

4. If the national court itself observes, where the parties to the dispute have made no application to that effect, that a contractual term is potentially unfair, may it undertake, of its own motion, an examination with a view to establishing the factual and legal elements necessary to that examination where the national procedural rules permit that only if the parties so request?'

IV — Proceedings before the Court of Justice

27. The order for reference of 27 March 2008 was received at the Court Registry on 7 April 2008. It sets out the three questions originally referred.

28. By order of 15 September 2008, received on 22 September 2008, the referring court added a fourth question to its order for reference. However, by order of 29 January 2009, the referring court withdrew it.

29. By order of 2 July 2009, received on 3 July 2009, the referring court informed the Court that, in the light of *Pannon GSM*, it did not consider an answer to Questions 1 and 2 originally referred by order of 27 March 2008 to be necessary and was withdrawing them. However, the court hearing the substance of the case maintained its request for an answer to the third question originally referred. The referring court added three further questions to that request.

30. The final version of the questions referred is reproduced above.

31. Written observations were submitted by the Governments of the Republic of Hungary, Ireland, the Kingdom of the Netherlands and the United Kingdom and by the Commission within the period laid down in Article 23 of the Statute of the Court of Justice.

32. As none of the parties applied for the oral procedure to be opened, it was possible to prepare the Opinion in this case after the general meeting of the Court on 9 March 2010.

V — Main arguments of the parties

A — *The first question*

33. The *Hungarian Government* points out that the national procedural provisions in question would give rise to problems only if they imposed limits on the preliminary ruling procedure laid down in Article 234 EC.

34. It points out that, as references for a preliminary ruling made by national courts may have a bearing both on the application of Hungarian law and on the assessment of Community law, it has a fundamental interest in being informed of each reference and its subject-matter as soon as possible. Although the general rules of Community law governing the preliminary ruling procedure make no provision in this regard, they cannot be construed as prohibiting a Member State from providing for a mechanism enabling it to be notified of the order for reference as soon as possible, particularly since it will receive the order from the Registrar of the Court of Justice anyway.

35. The Hungarian Government concludes from this that it is not incompatible with

Community law for a Member State to be informed of a reference for a preliminary ruling earlier than the other interested parties.

36. The *Commission* points out that Article 23 of the Statute of the Court of Justice does not prohibit the national court in question from informing other authorities, such as the justice ministry, of references for a preliminary ruling. Nor can such a prohibition be inferred from the provision requiring the Court to forward the order of the national court to the Member States.

37. In its submission, forwarding the order for reference — which, under Article 234 EC, sets the preliminary ruling procedure in motion — to the Ministry of Justice does not render the exercise of rights conferred by Community law practically impossible or excessively difficult. The preliminary ruling procedure is not subject to any legal principle prohibiting a potential party to judicial proceedings from being informed of those proceedings or of a stage in them.

38. The Commission takes the view that the only conceivable risk of influence being exerted on the national court arises where that court does not make a reference for a preliminary ruling until after it has informed the national authorities. However, in the main proceedings, the obligation laid down in national law does not contain any factor additional to the provisions of Community law which is capable of influencing the national court's decision, which means that the right to bring proceedings for a preliminary ruling is not restricted.

B — *The second question*

39. The *Hungarian Government* states that, in order to be able to conclude that a contractual term is unfair, it is necessary to take into account all the particular circumstances relating to the subject-matter of the contract and its conclusion. The national court must examine the contractual term at issue and establish whether that term exhibits the characteristics of an unfair term within the meaning of Article 3(1) of Directive 93/13.

40. The *Commission* takes the view that the interpretative jurisdiction of the Court of Justice also extends to the concept of 'unfair terms' contained in Directive 93/13. However, the Court is not empowered to determine whether a particular contractual term may be regarded as such in a specific case, jurisdiction to do so being reserved for the national court seised of the main proceedings.

C — *The third question*

41. In the view of the *Hungarian Government*, for the purposes of interpreting the concept of unfair terms and the kinds of term specified in the Annex to Directive 93/13, the Court of Justice is empowered to provide the national court with certain criteria by way of guidance on interpretation so as to enable it to assess the unfairness of a particular contractual term.

42. The *Commission* regards the fact that the Court of Justice provides the national courts with guidance on the application of Community law as an essential part of the interpretation of provisions of Community law. Accordingly, it submits, the Court of Justice also has jurisdiction to give such guidance on matters relating to the application of Directive 93/13.

D — *The fourth question*

43. The *Irish Government* takes the view that, if the Court had intended in *Pannon* to impose a strict obligation on national courts to examine of their own motion the unfairness of a contractual term, it would have expressed that obligation unambiguously. However, the Court made it clear that the obligation incumbent on the national court, as defined in paragraphs 32 and 35 of *Pannon*, comes into play 'where it has available to it the legal and factual elements necessary for that task'. The Irish Government therefore considers that, in *Pannon*, the Court struck a balance between the interests of consumer protection, on the one hand, and observance of the fundamental principles on which national legal systems are based, on the other.

44. In the view of the Irish Government, an affirmative answer to that question would have the effect of requiring national courts to investigate of their own motion the legal and factual elements necessary to determine whether a contractual term may be unfair. Such an approach would also require national courts to undertake inquiries even where this is contrary to national rules of procedure. However, the Irish Government points out in this connection that *Pannon* respects the 'passive role' of national civil courts in proceedings between private persons.

45. The *Hungarian Government* submits that Article 6(1) of Directive 93/13 is a mandatory provision of public policy. It follows from this that, when assessing the unfairness of contractual terms, the national court must apply the same rules of procedure as in the case of national public policy provisions, in accordance with the Community-law principle of equivalence. In so far as national law provides for the power of or the obligation on the courts to undertake an examination

of their own motion when applying provisions of public policy, the same must apply to the assessment of unfair terms in consumer contracts.

46. Directive 93/13 does not impose on national courts any obligation to establish the circumstances of the case, that is to say to assess of their own motion the unfairness of contractual terms in each particular case. In accordance with the principle of the procedural autonomy of the Member States, it is the provisions of national law which determine the extent of a court's obligation to undertake an examination of its own motion.

47. Moreover, in so far as national law provides for an obligation on courts to undertake an examination of their own motion in the field of contract law, the same must apply in the case of an unfair term within the meaning of Directive 93/13. However, in so far as national law gives priority to the rights of the parties by allowing the national court to undertake an examination only upon application, that provision must also apply to the assessment of the unfairness of a contractual term under the Directive. If the national court takes the view that the assessment of a contractual term calls for additional evidence, it has an obligation to inform the parties of the facts requiring examination so that they can submit their views accordingly.

48. The *Netherlands Government* points out that the fourth question probably relates to the situation where the defendant has not entered an appearance before the court and the national court has delivered a judgment by default. It considers that, in the case of a judgment by default, an obligation on the court to undertake of its own motion and in every case an examination of contractual terms in order to determine whether or not they are unfair would place a disproportionate burden both on the court and on the national judicial system. In order to discharge such an obligation, the national court would have to obtain the terms of the contract and, of its own motion, undertake a comprehensive examination of the contract, including the standard terms of business, even in cases where the consumer remains completely inactive. At the same time, the other party would have to be given the opportunity to submit observations on the possibility of a declaration as to the nullity of a term or of the contract as a whole.

49. The fact that national procedural law limits the possibility for the national court of embarking on an examination of its own motion does not mean that such an examination may not take place under any circumstances. If a clause conferring jurisdiction is capable of being regarded as unfair, it must be examined by the national court in order to ensure effective legal protection for the consumer.

50. Furthermore, the national court will still always have to examine of its own motion whether a jurisdiction clause in a contract constitutes an unfair term within the meaning of Article 6 of Directive 93/13, even in the

event of a default judgment. A jurisdiction clause that makes it impossible or excessively difficult for the consumer to challenge a claim would impair the effective legal protection sought by the Directive. Consequently, the national court must always assess the contractual term in question of its own motion.

51. In the view of the *United Kingdom Government*, an interpretation of paragraph 35 of *Pannon* to the effect that the national court has a general obligation to undertake an examination would have serious consequences that would even call into question the procedural autonomy of the Member States' legal systems. In cases where the legal and factual elements necessary to assess the unfairness of a contractual term are not presented to the court or the consumer chooses not to pursue a complaint as to the unfairness of a contractual term, a general obligation on the national court to undertake an examination would be inconsistent with the system of legal protection introduced by Directive 93/13.

52. Where an unfair (or potentially unfair) term has been recognised as such by a party or by the court and where that term, in conjunction with a rule of national procedural law, has the effect of preventing the consumer from proceeding with the case, the national court has an obligation not to apply the term, for example by raising the matter of its own motion before the deterrent effect materialises. A general obligation to undertake an examination would adversely affect the right of the consumer to have access to justice, as it would lead to increased court costs and fees and would preclude the possibility of simple, cheap and expedited means of enforcement.

53. In the view of the *United Kingdom Government*, the judicial systems of the Member States could not conceivably treat all actions for the recovery of claims for sums of money as if they were contested claims. In that event, it would be necessary to appoint a judge to examine the contractual documentation and the factual background to each claim. Furthermore, both parties would have to be asked to submit the contract itself and all related documentation to enable the national court to assess all the factual circumstances attendant upon the conclusion of the contract.

54. If the Court came to the conclusion that national courts must take all measures necessary to ensure that the legal and factual elements required to assess the unfairness of a contractual term are available, this might infringe the provisions of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure. [6]

6 — OJ 2006 L 399, p. 1.

55. The *Commission* submits that the provision contained in Article 6(1) of Directive 93/13 applies to a situation in which a particular contractual term is unfair, and determines the legal consequences of such unfairness, namely that the term is not binding. Nevertheless, the question referred does not relate to a situation in which a contractual term is unfair but rather to a situation in which a national court merely suspects that a contractual term may be unfair but is not able to establish that that is the case. However, Directive 93/13 makes no provision in this regard.

56. The Court has not yet ruled on whether the national court has an obligation to examine of its own motion whether a contractual term is unfair where it does not have available to it the legal and factual elements necessary for such an assessment. In fact, Community law does not contain a single provision authorising the national court to investigate of its own motion the legal and factual elements necessary to enable it, if appropriate, to establish the unfairness of a contractual term, where those elements are not available.

57. In the view of the Commission, Community law would assign to the national court a task similar to that of an investigating judge if it required that court to undertake an examination of its own motion as soon as it suspected that a particular contractual term might be unfair. Such intervention would require the adoption of detailed provisions in the area of national procedural law. For example, it would have to be made clear in which cases or at what degree of suspicion the national court is required to undertake such an examination. In addition, the instruments of procedural law available to it in such circumstances would have to be established. Such a development of the powers of the national court might bring about considerable changes in the organisation of the judicial systems in the Member States.

58. Nevertheless, the national court still has an obligation, when reviewing its own jurisdiction, to examine of its own motion the unfairness of a contractual term in so far as it has available to it the factual and legal elements necessary for doing so, and to set aside application of the unfair term in so far as the consumer does not object.

VI — Legal assessment

A — *Introductory remarks*

59. This case provides the Court with a further opportunity to develop its case-law on unfair terms in consumer contracts within the meaning of Directive 93/13. It should

be pointed out at the outset that this case is concerned neither with the assessment nor the definition of the typical characteristics of such a contractual term, but rather with the clarification of certain jurisdictional and institutional aspects of the complex cooperative relationship between the Court of Justice and the national courts, which, in the area of consumer protection, is particularly characterised by a strict division of duties. [7] In particular, it is necessary to clarify the powers of the national court, which, as the functional Community court, has the task of applying Community law to the main proceedings in accordance with the interpretative guidance provided by the Court of Justice.

60. The first three questions relate essentially to the preliminary ruling procedure provided for in Article 234 EC, now, since the entry into force of the Lisbon amending treaty, Article 267 TFEU, [8] including its more detailed configuration by the procedural provisions in the Statute of the Court of Justice, and lay particular emphasis on the assessment of the unfairness of contractual terms in accordance with Directive 93/13. To be distinguished from these in terms of subject-matter is the fourth question, which has to do more with the powers of the national court. For the sake of clarity, the questions should also be examined in this order.

B — *The first question*

1. General

61. The fundamental provisions on jurisdiction in the European Union are contained in the EC and Euratom Treaties and to a lesser extent in the EU Treaty. The annexed Protocol on the Statute of the Court of Justice in turn contains a set of framework provisions to which the EU courts must each give full effect by establishing their own rules of procedure. The Statute of the Court of Justice, the

7 — See Case C-244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraph 14. In that case, the Court held that Article 234 EC is based on cooperation which entails a division of duties between the national courts and the Court of Justice in the interest of the proper application and uniform interpretation of Community law throughout all the Member States. See also to this effect Everling, U., *Das Vorabentscheidungsverfahren vor dem Gerichtshof der Europäischen Gemeinschaften*, Baden-Baden 1986, p. 21, and Wägenbaur, B., *Kommentar zur Satzung und Verfahrensordnungen EuGH/EuG*, Munich 2008, Article 23 of the Statute of the European Court of Justice, paragraph 2, p. 27.

8 — The entry into force of the amending treaty has no bearing on the legal assessment of this case. As the reference for a preliminary ruling was made before 1 December 2009, the old numbering based on the Treaty of Nice will be used hereafter.

interpretation of which the referring court seeks in its first question, forms part of primary law, as Articles 245 and 311 EC show. The Court can therefore infer jurisdiction to interpret the provisions of the Statute, including Article 23, directly from Article 234(1)(a) EC. [9]

2. Limits of Community law

(a) Article 23 of the Statute of the Court of Justice

62. With regard to the issue of the compatibility of a rule such as Article 155/A(2) of the Hungarian Code of Civil Procedure with Article 23 of the Statute, it should be noted that, as with any provision of Community law, in the context of the relationship between the Statute and the law of the Member States, Community law takes precedence, which means that a national procedural rule which requires national courts, when submitting references for a preliminary ruling to the Court of Justice, to send them at the same time to the Ministry of Justice for information purposes can be regarded as compatible with Community law only if neither Article 23 of the Statute nor the other provisions of Community law can be construed as containing any legal prescription to the contrary.

63. A prohibition of such a rule certainly cannot be inferred directly from Article 23 of the Statute itself. Neither the wording nor the meaning and purpose of that provision, which is to provide the governments of the Member States and the other interested parties, through notification of the order for reference, with the opportunity to submit observations on the questions referred, [10] militates against direct communication of the order for reference to the government of the Member State concerned, as both provisions, although not identical, have as their purpose to provide information to a Member State. Ultimately, they perform the same procedural function.

64. The question is whether there are any other provisions that might preclude that rule.

9 — See to this effect Lenaerts, K./Arts, A./Maselis, I., *Procedural Law of the European Union*, 2nd ed., p. 188, paragraph 6-003, p. 175, who point out that the annexes and protocols appended to the Treaties have the same legal effect as the Treaties themselves.

10 — See Case C-42/07 *Liga Portuguesa de Futebol Profissional* [2009] ECR I-7633, paragraph 40. In that case, the Court held that the information that must be provided to it in connection with a reference for a preliminary ruling does not serve only to enable the Court to provide answers which will be of use to the national court; it must also enable the Governments of the Member States, and other interested parties, to submit observations in accordance with Article 23 of the Statute of the Court of Justice.

(b) Principles of equivalence and effectiveness

65. It should first be recalled that the procedural law of the Member States is not, in principle, subject to any harmonisation. Indeed, the Community has no general law-making power in this area. Accordingly, Community law recognises the autonomy of national procedural law. [11] This is also true in the context of preliminary ruling proceedings under Article 234 EC, and it is therefore for the national court alone, if appropriate, to stay the proceedings in question and make a reference to the Court of Justice, for example. Article 234 EC confers on national courts the right to judge whether a decision on a point of Community law is necessary for their judgments. Consequently, preliminary ruling proceedings continue before the Court of Justice as long as the request of the national court has neither been withdrawn nor become devoid of object. [12] Whether, to what extent and under what conditions a national court's decision to make a reference may be contested is determined by national law alone. [13] Ultimately, therefore, the national court retains urisdiction in respect of all factual and legal aspects of the national proceedings. It must determine whether the order for reference is made in accordance with the rules of national law governing the organisation of the courts and their procedure. [14]

66. Specific indications as to the conditions under which and the form in which a reference for a preliminary ruling is to be made to the Court of Justice are given only disparately in the European Union's written law of procedure and case-law. [15]

67. An important limitation on the principle of the administrative autonomy of the Member States can be found first of all in the general principles of Community law relating, for example, to the assertion of subjective rights conferred by the Community legal order. Thus, the Court has repeatedly held that, in the absence of Community rules governing the matter, it is for the domestic legal

11 — See Case C-2/08 *Fallimento Olimpiclub* [2009] ECR I-7501, paragraph 24. The Court of Justice sometimes uses the expression 'principle of procedural autonomy' in its case-law.

12 — See Case 127/73 *BRT-I* [1974] ECR 51, paragraphs 7 to 9.

13 — See Order of 16 June 1970 in Case 31/68 *Chanel* v *Cepeha* [1970] ECR 404.

14 — See Case C-65/81 *Reina* [1982] ECR 33 paragraph 7; Case C-10/92 *Balocchi* [1993] ECR I-5105, paragraph 16; Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 248; and Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 19.

15 — See Case C-42/07 *Liga Portuguesa de Futebol Profissional* (cited in footnote 10 above, paragraph 40). In that case, the Court referred to its settled case-law to the effect that it is firstly necessary that the national court should define the factual and legislative context of the questions which it is asking or, at the very least, explain the factual circumstances on which those questions are based. Secondly, the order for reference must set out the precise reasons why the national court is unsure as to the interpretation of Community law and why it considered it necessary to refer questions to the Court for a preliminary ruling. In consequence, it is essential that the national court provide at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and of the link which it establishes between those provisions and the national legislation applicable to the dispute in the main proceedings.

system of each Member State to lay down the detailed procedural rules ensuring the protection of rights which citizens derive from Community law. However, such rules must not be less favourable than those governing similar domestic actions (principle of equivalence) nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). [16]

68. The relatively brief comments made by the referring court on the considerations underlying this reference do not make it possible to determine to what extent Article 23 of the Statute might preclude a rule such as that in Article 155/A(2) of the Hungarian Code of Civil Procedure. It is certainly not clear to what extent the rule at issue might adversely affect the function of the preliminary ruling procedure to protect individual rights. [17] Nevertheless, the referring court obviously does not completely rule this out. In view of the need to give the referring court a helpful answer to the questions which it has referred, [18] it is now appropriate to examine the compatibility of that rule with the aforementioned principles.

69. In the submission of the Hungarian Government, [19] the rule at issue is a rule of procedure which imposes on the referring court an obligation to provide information. It justifies the rule by reference to the need to be informed as early as possible of references for a preliminary ruling made by national courts, particularly as such references may have direct effects both on national law and on the assessment of Community law by those same courts. In the view of the

16 — See to this effect Joined Cases C-430/93 and C-431/93 *van Schijndel und van Veen* [1995] ECR I-4705, paragraph 17; Joined Cases C-279/96 to C-281/96 *Ansaldo Energia and Others* [1998] ECR I-5025, paragraphs 16 and 27; Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 18; Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 31; Case C-472/99 *Clean Car Autoservice* [2001] ECR I-9687, paragraph 28; Case C-129/00 *Commission* v *Italy* [2003] ECR I-14637, paragraph 25; Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-8559, paragraph 57; Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 24; Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 28; and Case C-40/08 *Asturcom* [2009] ECR I-9579, paragraph 38.

17 — After all, it should be borne in mind here that, in addition to serving the objective function of ensuring the uniform application of Community law in the Member States, the preliminary ruling procedure is also important for the protection of individual rights. Natural or legal persons, on whom Article 230(4) EC confers only a limited right of action against Community legislative acts, have the possibility, as parties to judicial proceedings in a Member State, of claiming before the national court that the Community acts relevant to the outcome of their proceedings are invalid or of obtaining an interpretation of Community law favourable to them by means of the preliminary ruling procedure before the Court of Justice (see in this regard Schwarze, J., in *EU-Kommentar* [ed. Jürgen Schwarze], 2nd ed., Baden-Baden 2009, Article 234 EC, paragraph 4, p. 1810).

18 — In Case 244/78 *Union Laitière Normande* [1979] ECR 2663, paragraph 5, the Court held that, while Article 234 EC does not permit the Court of Justice to evaluate the grounds for making the reference, the need to afford a helpful interpretation of Community law makes it essential to define the legal context in which the interpretation requested should be placed. In the opinion of Lenaerts, K./Arts, A./Maselis, I., loc. cit. (footnote 9), p. 188, paragraph 6-021, there is nothing to prevent the Court of Justice from setting out its understanding of the facts in the main proceedings and certain aspects of national law as a starting point for providing a helpful interpretation of the applicable provisions and principles of Community law.

19 — See paragraph 55 of the Hungarian Government's observations.

Hungarian Government, the State concerned has an 'overriding interest' in law in prompt notification. In the light of the fact that the second sentence of Article 23(1) of the Statute, in conjunction with Article 104(1) of the Rules of Procedure, already provides for the obligation on the part of the Registrar of the Court of Justice to send the order for reference of the national court inter alia to the Member States (including the Member State in which the referring court has its seat), the only conceivable advantage of that rule of procedure, viewed objectively, lies in the time gained by the government of the Member State concerned for the purposes of preparing statements of case and written observations within the meaning of Article 23(2) of the Statute with a view to possible participation in the written procedure before the Court.

70. Although there is no evidence of similar rules in comparable national procedures, which makes a legal examination in the light of the principle of equivalence more difficult, it seems questionable from the outset to what extent such a provision might be construed as being 'less favourable' by a hypothetical holder of subjective Community rights who wishes to enforce them before the courts, for example. If the requirement of equivalence is not to be examined from a purely formal perspective, consideration must, logically, also be given to the practical effects of the national rule in question.

71. With regard to the question of the compatibility of the rule at issue with the principle of effectiveness, it is apparent that the rule in question is not in any event capable of making a reference to the Court of Justice practically impossible or excessively difficult, particularly since, as I have already said, its effect is merely to impose an obligation to provide information. Compliance with it cannot therefore in any way be construed as a condition for making a reference to the Court of Justice. Moreover, the provision in question gives no indication as to what legal consequences would follow from any infringement of that obligation to provide information. Since that obligation certainly has no effect on a hypothetical holder of subjective Community rights, but concerns only the relationship between the national court and the government, it must be assumed that it is not contrary to the principle of effectiveness.

72. The rule at issue is therefore in conformity with the principles of equivalence and effectiveness.

(c) Principle of Community cooperation in good faith under Article 10 EC

73. The principle of Community cooperation in good faith contained in Article 10 EC may also have been infringed. That principle lays down certain obligations on national courts to cooperate with the European Union, principally an obligation to provide legal assistance and to engage in judicial dialogue with the Court of Justice. [20] This applies in particular in the context of the preliminary ruling procedure, which the Court of Justice regards as an instrument of judicial cooperation. It is therefore recognised in the case-law of the Court that an infringement of the obligation to make a reference under Article 234(3) EC by national courts adjudicating at last instance constitutes an infringement of Community law. [21] An objectively arbitrary failure to make a reference to the Court constitutes an infringement of Article 10 EC in conjunction with Article 234 EC, which is open to penalty, on the one hand, by the Commission and other Member States in the form of an action for failure to fulfil obligations under Article 226 EC [22] or Article 258 TFEU and, on the other hand, by the individual in the form of an action for damages under Community law brought against the State before the national courts. [23]

74. In so far as there is no obligation to make a reference, which must be assumed to be the case in the main proceedings in the absence of any information to the contrary from the referring court, there could only conceivably be an infringement of Article 10 EC in conjunction with Article 234 EC, in my opinion, if certain provisions of national procedural law affected the decisions of national courts in such a way as to prevent those courts from exercising their right to make a reference for a preliminary ruling to the Court of Justice. An infringement would lie in the fact that that the relationship of cooperation between the Court of Justice and the national courts is impaired to the detriment of a uniform interpretation and application of Community

20 — See to this effect Kahl, W., in *EUV/EGV-Kommentar* (ed. Christian Calliess/Matthias Ruffert), 3rd ed., Munich 2007, Article 10, paragraph 47, p. 450.

21 — See Case C-224/01 *Köbler* [2003] ECR I-10239.

22 — See *Commission* v *Italy* (cited in footnote 16 above, paragraph 33 et seq.), although without reference to Article 10 EC.

23 — See *Köbler* (cited in footnote 21 above). On the possibility of an action for failure to fulfil obligations and State liability under Community law, see Lenaerts, K./Art, D./Maselis, I., loc. cit. (footnote 9), paragraph 2-053 et seq., p. 77 et seq.

law in all the Member States of the European Union. [24]

75. It is after all essential for the uniform interpretation and effective application of Community law that the lower courts of all the Member States should be able to communicate directly with the Court of Justice. Moreover, this is the instrument that turns all national courts into courts of Community law. The reference for a preliminary ruling enables the national court, independently of other national authorities or judicial bodies, to engage in the exchange of argument and debate at the level of Community law. The view expressed by Advocate General Poiares Maduro in his Opinion in *Cartesio* (C-210/06) to the effect that Community law gives any court in any Member State the right to refer questions for a preliminary ruling to the Court of Justice and that that right cannot be qualified by national law [25] must therefore be expressly endorsed. The Court was therefore right to find in *Rheinmühlen* [26] that a provision of national law that precludes the implementation of the procedure provided for in Article 234 EC must be disapplied.

76. However, as I have already said, [27] the national rule at issue is not formulated as a condition for making a reference to the Court of Justice but merely establishes an obligation on national courts to provide information to the competent government authority. Moreover, such a rule of procedural law does not make the decision of the national courts to request a preliminary ruling from the Court of Justice subject to the will of the executive. Consequently, it is difficult to see how the obligation to comply with that procedure adversely affects the readiness of national courts to make a reference to the Court of Justice.

77. As the right of national courts to make a reference for a preliminary ruling to the Court of Justice is not restricted by the rule at issue, that rule cannot be regarded as constituting an infringement of the principle of Community cooperation in good faith laid down in Article 10 EC.

24 — The Court has repeatedly held that the system established by Article 234 EC with a view to ensuring that Community law is interpreted uniformly in the Member States instituted direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties (see Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 41 and Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 90. As Everling, U., loc. cit. (footnote 7), p. 16, states, it is immediately apparent that the authorities and courts of the various Member States would make quite different decisions in this regard if there were no provision for the uniform interpretation of Community law. That task falls to the Court of Justice in the preliminary ruling procedure. The Court has emphasised from the outset that the uniform interpretation and application of Community law is one of the fundamental principles of Community law and that it cannot be called into question by any national provision, however framed. The Court makes reference in this regard to *Rheinmühlen*.

25 — See the Opinion of Advocate General Poiares Maduro in Case C-210/06 *Cartesio* [2008] ECR I-9641, point 21. See also, to similar effect, Classen, C. D., *Europarecht* (ed. Reiner Schulze/Manfred Zuleeg), paragraph 76, p. 204, who states that the right to make a reference cannot be limited by national procedural law.

26 — See Case 166/73 *Rheinmühlen* [1974] ECR 33, paragraphs 2 and 3, and Case *van Schijndel and van Veen* (cited in footnote 16 above, paragraph 18).

27 — See point 71 of this Opinion.

(d) Principle of procedural equality of arms

78. A national rule such as that at issue might also be examined in relation to its compatibility with the principle of procedural equality of arms, particularly since the fact that the Hungarian Government receives advance notice of a reference for a preliminary ruling puts it in a more favourable position from the point of view of procedure than other participants in the proceedings inasmuch as it has more time to prepare statements of case or written observations within the meaning of the second paragraph of Article 23 of the Statute.

79. The principle of procedural equality of arms is recognised as a procedural safeguard in the case-law of the Court of Justice. [28] According to legal literature, it originates in the general legal principle of fair legal process [29] by which the courts of the European Union are bound and which is itself the expression both of the principle of the rule of law and of the general principle of equality. It ensures the formal equality of the legal status of the parties in the proceedings and the material equality of the treatment afforded to them by the court in the sense of equality of opportunity in the proceedings. That principle of procedure confers on the parties, primarily, the right to submit any material relevant to the judicial decision and to pursue independently any procedural means of defence necessary to counter the case of the opposing party.

80. However, it should be noted that that principle is closely linked to the principle of *inter partes* proceedings. [30] The starting point for such a procedure is the opposing interests of the parties, which interests demand a balance of rights and obligations and equality of opportunity in relation to procedural conduct. In *inter partes* proceedings such as actions for failure to fulfil obligations, actions for annulment and actions for failure to act, a claimant brings a claim, based on Community law, against a defendant who, in turn, raises a defence against the claim. The claimant and the defendant are *parties* to the dispute. *Ex parte* proceedings, on the other hand, perform an objective function of legal protection and review. They do not have parties, only *participants*. [31] The most important example of *ex parte* proceedings is the preliminary ruling procedure under Article 234

28 — See Case C-13/99 P *TEAM* v *Commission* [2000] ECR I-4671, paragraph 35 et seq., and Case C-64/98 P *Petrides* [1999] ECR I-5187, paragraph 31. See Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraph 93.

29 — See to this effect Sachs, B., *Die Ex-Officio-Prüfung durch die Gemeinschaftsgerichte*, Tübingen 2008, p. 208. The principle that the courts of the European Union are bound by the general legal principle of fair legal process was first recognised by the Court of Justice in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 21.

30 — See also Sachs, B., (footnote 29). See *Petrides* (cited in footnote 28 above, paragraph 31).

31 — See Koenig, C./Pechstein, M./Sander, C., *EU-/EG-Prozessrecht*, 2nd ed.., Tübingen 2002, paragraph 123, p. 65.

EC, which serves to guarantee the uniform application of Community law.[32] However, unlike the direct actions mentioned above and the proceedings for an opinion under Article 300(6) EC or Art. 218(11) TFEU, that procedure is not independent; it is an *interim procedure* forming part of a case pending before a court of a Member State. It disposes only of individual questions concerning the interpretation or validity of Community law which are relevant to the decision in the main proceedings. The arguments which the Member States, as participants in the proceedings, put forward in the statements of case or written observations which they submit in the written procedure before the Court of Justice are not therefore to be regarded as the pleadings of parties. They are rather, as the Commission correctly states, comparable to the submissions of an *amicus curiae* in so far as they are intended exclusively to support the Court of Justice in reaching a decision.[33]

81. The foregoing clarifications make for a better understanding of the meaning and purpose of the second paragraph of Article 23 of the Statute. The establishment of a two-month time-limit is therefore designed not so much to maintain equality of arms but rather to serve the interests of an efficient administration of justice. It is intended, on the one hand, to ensure that the participants in the proceedings have adequate time to prepare and submit their observations. On the other hand, it is intended to ensure that the proceedings are expedited.

82. In the light of the foregoing, the principle of procedural equality of arms is not applicable to the situation in this case. Consequently, none of the participants in the proceedings can claim to be in a more unfavourable position from the point of view of the procedure than the Hungarian Government solely

32 — See to this effect Koenig, C./Pechstein, M./Sander, C., (footnote 31)., p. 65, Wägenbaur, B., loc. cit. (footnote. 7), Article 23 of the Statute of the Court of Justice, paragraph 2, p. 27, and Everling, U., loc. cit. (footnote 7), p. 56. In its case-law, the Court describes the preliminary ruling procedure as a 'non-contentious procedure' which is in the nature of a step in the action before the national court and is wholly independent of any initiative by the parties, who are merely invited to state their case within the legal limits laid down by the national court (see the Order of the President of the Court in Case C-186/01 R *Dory* [2001] ECR I-07823, paragraph 9, as well as the case-law cited there). In this way, the Court distinguishes the preliminary ruling procedure from the actual 'contentious procedure' before the national referring court. It is because of the essential difference between the contentious procedure and the step in the action provided for in Article 234 EC that it refuses, for example, to apply provisions applicable only to the contentious procedure.

33 — It can be inferred by converse reasoning that Advocate General Geelhoed clearly takes the same view in his Opinion in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, point 42. The Advocate General states that the purpose of the intervention is not that the intervener should support the Community judicature by submitting written statements of case or written or oral observations in the manner of an *amicus curiae*, as is the case under Article 20(2) of the Statute and Article 104(4) of the Rules of Procedure. The reference to Article 104(4) of the Rules of Procedure supports the conclusion that a participant in the proceedings who submits statements of case or observations in a preliminary ruling procedure is acting as an *amicus curiae*. The same opinion is clearly held by Everling, U., loc. cit. (footnote 7), p. 57, who refers to the Commission's supporting role in proceedings before the Court of Justice. He also points out that the Member States avail themselves of the possibility of submitting observations primarily where their particular interests, such as the application of national rules of law or issues involving their citizens, are affected in a specific case or where the position of the Member States in the Community system is affected generally.

because, under national law, that government receives advance notice of a reference for a preliminary ruling made by a court of that Member State.

(e) Systematic comparison with the provisions governing the urgent procedure

83. Moreover, as the provisions of the Rules of Procedure concerning the urgent procedure show, there may be urgent reasons which may even make it necessary to give priority notice to a particular Member State. Thus, Article 104b(2) of the Rules of Procedure provides that a reference for a preliminary ruling that raises one or more questions in the areas covered by Title VI of the Treaty on European Union or Title IV of Part Three of the EC Treaty (where the national court or tribunal has requested the application of the urgent procedure or where the President has requested the designated Chamber to consider whether it is necessary to deal with the reference under that procedure) is to be notified forthwith by the Registrar to the Member State from which the reference is made. [34] In the interests of expediting the procedure, in view of the need to translate the documents in the proceedings the other participants referred to in Article 23 of the Statute are not notified at this stage. That provision must be construed as an implicit recognition by the Community legislature of the need to give priority to informing the Member State concerned. In the light of that assessment by the Community legislature, the Republic of Hungary cannot be criticised for having introduced rules of its own to ensure that its government is informed as soon as possible of a reference for a preliminary ruling made by one of its courts.

3. Conclusion

84. It follows from the foregoing that neither Article 23 of the Statute nor the other provisions of Community law contain any legal provisions that preclude a national rule of procedure which requires national courts, when submitting references for a preliminary ruling to the Court of Justice, to send them at the same time to the Ministry of Justice for information purposes.

34 — Wägenbaur, B., loc. cit. (footnote 7), Article 104b of the Rules of Procedure of the European Court of Justice, paragraph 9, p. 245, takes the view that, for reasons of urgency, such a reference for a preliminary ruling is sent immediately to the parties primarily concerned and only subsequently to the other participants referred to in Article 23 of the Statute, that is to say before the Court has even decided whether the reference in question should be subjected to the urgent procedure. The same applies to the decision on whether or not the reference for a preliminary ruling should be subjected to the urgent procedure.

C — *The second and third questions*

1. General

85. The second question relates essentially to the interpretation of Article 234 EC. By it, the referring court seeks to ascertain whether the interpretative jurisdiction of the Court of Justice also extends to the definition of 'unfair terms' within the meaning of Article 3(1) of Directive 93/13 and of the terms listed in the Annex to that directive. The third question, which concerns the power of the Court to issue guidance on interpretation, is raised expressly in the event that the second question is answered in the affirmative and is closely connected with it in terms of subject-matter. A joint answer to both questions would therefore seem to be appropriate.

86. The way in which the questions are framed is indicative of some uncertainty on the part of the referring court as to the role of the Court of Justice and the national courts in the interpretation and application of Directive 93/13. I therefore consider it essential for the purposes of a better understanding of the relationship of cooperation that defines the preliminary ruling procedure to start by giving a brief explanation of the general interpretative powers of the Court of Justice before going on to address the questions raised by the referring court.

2. Scope of the interpretative jurisdiction of the Court of Justice

87. On the first point, it should be noted that, in principle, all provisions of Community law are capable of being the subject of a request for interpretation. This is confirmed by the first paragraph of Article 220 EC, which assigns to the Court of Justice the task, within its jurisdiction, of ensuring that, in the interpretation of the Treaty, 'the law' in general is observed. Article 234(b) EC in turn makes it clear that the interpretative jurisdiction of the Court extends inter alia to 'acts of the institutions of the Community', which means all secondary law, including the legislative acts referred to in Article 249 EC. The Court is therefore empowered to interpret a legislative act such as Directive 93/13. That power also extends to the legal concepts contained in it, which, according to case-law, must in principle be given an autonomous interpretation throughout the Community in so far as no reference is made to the legal systems of the Member States. [35]

35 — See inter alia Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; Case C-357/98 *Yiadom* [2000] ECR I-9265, paragraph 26; Case C-245/00 *SENA* [2003] ECR I-1251, paragraph 23; Case C-55/02 *Commission* v *Portugal* [2004] ECR I-9387, paragraph 45; Case C-188/03 *Junk* [2005] ECR I-885, paragraphs 27 to 30; and Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 31.

88. In the case of the concept of 'unfair terms' within the meaning of Article 3 of the Directive, Directive 93/13 makes no reference to national legal concepts. However, as the Court has rightly held, by referring to the concepts of good faith and a significant imbalance in the parties' rights and obligations arising under the contract, that provision *only abstractly* defines the factors that make a term that has not been individually negotiated unfair. [36] In spite of the Community legislature's attempt to provide clarification by referring in Article 3(3) to the list of terms contained in the Annex to that directive, the fact remains that the concept of unfairness is *expressed only in general terms*. [37] 'Unfair terms' is therefore a vague legal concept that requires further legislative definition.

89. However, the fact that a legal concept requires further definition — as the Court confirmed in *SENA* [38] in connection with the concept of 'equitable remuneration' within the meaning of Article 8(2) of Directive 92/100 [39] and as I recently explained at length in my Opinion in Case C-467/08 (*SGAE*), pending before the Court, taking as my example the legal concept of 'fair compensation' for copies for private use in Article 5(2)(b) of Directive 2001/29 [40] — does not automatically mean that it cannot be classified as an autonomous concept of Community law that must be interpreted uniformly in all the Member States. Particular regard is to be had instead to the meaning and the purpose of a given provision since these point to the presumed will of the Community legislature. Mention must be made in this connection to the objective of legislative harmonisation, as pursued also by Directive 93/13, [41] which necessarily requires the development of autonomous concepts of Community law, including uniform terminology, if the legislative objective is to be at-

36 — See Case C-478/99 *Commission* v *Sweden* [2002] ECR I-4147, paragraph 17, and Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3403, paragraph 20.

37 — See also Pfeiffer, in *Das Recht der Europäischen Union* (ed. Grabitz/Hilf), Volume IV, Commentary on Richtlinie 93/13, Preliminary Remarks, A5, paragraph 28, p. 14, and Basedow, J., 'Der Europäische Gerichtshof und die Klauselrichtlinie 93/13: Der verweigerte Dialog', *Festschrift für Günter Hirsch zum 65. Geburtstag*, 2008, p. 58.

38 — *SENA* (cited in footnote 35 above).

39 — In *SENA*, the Court was called upon to interpret the concept of 'equitable remuneration' within the meaning of Article 8(2) of Directive 92/100 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61). In its judgment, the Court referred first to the abovementioned case-law on the autonomous interpretation of Community-law concepts and went on to point out that Directive 92/100 gave no definition of that concept. In so doing, the Court clearly started from the assumption that the Community legislature had consciously refrained from establishing a detailed and binding method for calculating such remuneration. Consequently, it expressly recognised the power of the Member States to lay down their own specific methods for determining what constitutes 'equitable remuneration' by 'determining what are the most relevant criteria for ensuring, within the limits imposed by Community law, and particularly the Directive, adherence to that Community concept' and confined itself to calling upon the Member States to ensure, in the light of the objectives of Directive 92/100 as specified in its preamble, the greatest possible adherence within the Community to the concept of 'equitable remuneration'. It is important to emphasise in this regard that the fact that that concept needed to be clarified by criteria to be established in national law did not prevent the Court from declaring that the concept of 'equitable remuneration' within the meaning of Article 8(2) of Directive 92/100 must be interpreted uniformly in all the Member States and implemented by each Member State. The Court was therefore ultimately able, even in the particular circumstances giving rise to that case, to affirm that the concept in question was a concept of Community law and that it required an autonomous interpretation throughout the Community.

40 — Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

41 — See the enabling legal basis in Article 95 EC and, for example, the first, second, third and tenth recitals of Directive 93/13.

tained. The task of giving specific expression to the Community concept of 'unfair terms' by providing an interpretation that is binding on all the courts in the European Union falls within the jurisdiction of the Court of Justice, which has jurisdiction of last instance in this regard. [42]

90. On the basis of the foregoing considerations, the further question whether the interpretative jurisdiction of the Court of Justice also extends to the terms listed in the Annex to that directive can be given an unqualified affirmative answer. The correctness of that view is confirmed by *Océano Grupo*, [43] in which the Court, when interpreting Article 3 of the Directive, took into account the category of terms listed in subparagraph (q) of paragraph 1 of the Annex. [44] The same follows from *Pannon*, [45] in which the Court expressly held that, in that case, in exercising the jurisdiction conferred on it by Article 234 EC, it interpreted the 'general criteria' used by the Community legislature in order to define the concept of 'unfair terms' (by which it specifically means the category of terms listed in subparagraph (q) of paragraph 1 of the Annex).

3. Division of jurisdiction between the Court of Justice and the national courts in the context of reviewing unfair terms

(a) The difference between the interpretation and the application of Community law

91. The foregoing leads to a further aspect of the question that requires discussion. If the

42 — See to this effect Röthel, A., 'Missbräuchlichkeitskontrolle nach der Klauselrichtlinie: Aufgabenteilung im supranationalen Konkretisierungskatalog', *Zeitschrift für Europäisches Privatrecht*, 2005, p. 422, who points out that the overwhelming consensus among legal commentators is that the task of giving specific expression to standard terms and terms requiring further legislative definition also falls within the jurisdiction of last instance of the Court of Justice. The Court has the power of authoritative final specification and therefore the prerogative of specification. By way of arguments, the author refers to the purpose of the preliminary ruling procedure and the objective of legislative harmonisation, Community law being otherwise unable to achieve the legislative harmonisation it pursues. Leible, S., loc. cit. (footnote 44), p. 426, also points out that, according to the overwhelming consensus of legal commentators, the concept of unfairness within the meaning of Article 3(1) of Directive 93/13 should be interpreted autonomously within the European Union. To consider otherwise would be to disregard the 'effet utile' of secondary law and the effect of legislative harmonisation sought by directives. See to similar effect Müller-Graff, P.-C., 'Gemeinsames Privatrecht in der Europäischen Gemeinschaft', in *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, 2nd ed., Baden-Baden 1999, p. 56 et seq., who takes the view that the Court of Justice performs the function of a civil court when interpreting matters of private law. In discharging that duty, the Court of Justice, because of the existence of legal concepts which are vague and therefore require interpretation, is regularly faced with the challenge of giving specific expression to and, to this extent, also developing Community law within the framework of the purpose pursued by the provision of the directive in question. The author cites as an example the concept of unfairness in Article 3(1) of Directive 93/13.

43 — Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, '*Océano Grupo*'.

44 — See *Océano Grupo* (cited in footnote 43 above, paragraph 22). On the interpretative jurisdiction of the Court of Justice, see obviously also Leible, S., 'Gerichtsstandsklauseln und EG-Klauselrichtlinie', *Recht der Internationalen Wirtschaft*, 6/2001, p. 425.

45 — See *Pannon* (cited in footnote 4 above, paragraph 42).

second question is construed not merely literally but rather as an invitation to the Court of Justice to explain the division of tasks between it and the national courts in the context of reviewing unfair terms, the referring court should be pointed first of all in the direction of the general rule [46] to the effect that, in proceedings under Article 234 EC, the allocation of jurisdiction between the Court of Justice and the national courts is such that the former is competent to interpret and the latter to apply Community law. Consequently, the Court of Justice is not empowered to apply the rules of Community law to individual cases and, therefore, does not have jurisdiction to classify provisions of national law under such a rule. The Court of Justice does, however, retain the right to provide the national court with such guidance on the interpretation of Community law as might be useful to it in the assessment of the effects of those provisions.

92. As I explained recently in my Opinion in Case C-484/08 (*Caja de Ahorros y Monte de Piedad de Madrid*), in my view, the consequence of that division of tasks in the context of the review of unfair terms in consumer contracts, which is inherent in the procedure under Article 234 EC, is that the Court of Justice cannot comment directly on the verifiability [47] and certainly not on the compatibility of a specific contractual term with Directive 93/13; it can only give a ruling on how the Directive is to be interpreted in relation to a specific term. [48] It falls in turn to the national court, by reference to Directive 93/13 and the relevant national implementing provisions, to examine, in accordance with the guidance on interpretation provided by the Court of Justice, whether the term in question can be

46 — See Joined Cases 28/62 to 30/62 *Da Costa* [1963] English Special Edition p. 31 and Case C-366/96 *Cordelle* [1998] ECR I-583, paragraph 9. See also to this effect Craig, P./De Búrca, G., *EU Law*, 4th ed., Oxford 2008, p. 493, who take the view that the Court of Justice has the power to interpret the Treaty under Article 234 EC but not expressly to apply it to the main proceedings. The distinction between interpretation and application marks the division of jurisdiction between the Court of Justice and the national courts. Thus, the Court of Justice interprets the Treaty and the national courts apply that interpretation to the specific case. According to Schima, B., *Kommentar zu EUI- und EG-Vertrag* (ed. H. Mayer), Part 12, Vienna 2003, Art. 234 EC, paragraph 40, p. 12, it is for the national courts to apply a provision of Community law to a specific dispute. However, the author concedes that it is not always easy to separate the application of a provision from its interpretation. See also to similar effect Aubry, H./Poillot, E./Sauphanor-Brouillard, N., 'Panorama Droit de la consommation', *Recueil Dalloz*, 13/2010, p. 798, who point out that the jurisdiction of the Court of Justice in the context of preliminary ruling proceedings under Article 267 TFEU extends only to interpretation but not to application, although it is not always easy to adhere to that rule in practice.

47 — See also Nassall, W., 'Die Anwendung der EU-Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen', *Juristenzeitung*, 14/1995, p. 690.

48 — See my Opinion in Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid* [2010] ECR I-4785, point 69. See to this effect Schlosser, P., in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, 13th ed., Berlin 1998, Einleitung zum AGBG, paragraph 33, p. 18, according to which references cannot be made to the Court of Justice in order to determine whether certain terms in more specifically defined types of contract are unfair. See also to similar effect Whittaker, S., 'Clauses abusives et garanties des consommateurs: la proposition de directive relative aux droits des consommateurs et la portée de l'harmonisation complète', *Recueil Dalloz*, 17/2009, p. 1153, with reference to the case-law of the Court of Justice, above all *Freiburger Kommunalbauten* and *Pannon*.

classified as unfair within the meaning of Article 3(1) of the Directive.

(b) The case-law since *Freiburger Kommunalbauten*

93. The essential features of that division of jurisdiction, as the general rule on jurisdiction in respect of the interpretation and application of Community law shows, have long been defined in the Court's case-law. For the purposes of the review of unfair terms in consumer contracts under Directive 93/13, however, they can be regarded as having been established only since *Freiburger Kommunalbauten*. [49] [50] It is appropriate therefore to highlight briefly the key points of that judgment.

94. In that judgment, the Court held that, in exercising the jurisdiction to interpret Community law which is conferred on it by Article 234 EC, the Court may interpret the general criteria used by the Community legislature to define the concept of unfair terms, but it may not rule on the application of those general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question. [51]

95. The Court thus highlighted the special role of the national courts in combating unfair terms and therefore assigned to them the task of determining specifically in each case whether a contractual term satisfies the requirements for it to be regarded as unfair under Article 3(1) of the Directive. [52] The circumstances of the specific case which the national courts must take into account when reviewing the term in question include, in the view of the Court, which referred in this regard to Article 4 of Directive 93/13, the nature of the goods or services for which the contract was concluded, and all the circumstances attending the conclusion of the contract. Moreover,

49 — *Freiburger Kommunalbauten* (cited in footnote 36 above).

50 — Röthel, A., loc. Cit. (footnote 42), p. 424, expresses the view that *Freiburger Kommunalbauten* marked a clear change of direction on the part of the Court of Justice, which, in the context of combating unfair terms in consumer contracts, now operates on the basis of a pragmatic division of tasks between it and the national courts. Pfeiffer, T., 'Prüfung missbräuchlicher Klauseln von Amts wegen (Gerichtsstand) — Günstigkeitsprinzip nach Wahl des Verbrauchers', *Neue Juristische Wochenschrift*, 32/2009, p. 2369, considers that, in *Freiburger Kommunalbauten*, the Court sought to stabilise its wavering case-law on the division of tasks between it and the national courts in the context of reviewing contractual terms. Aubry, H./Poillot, E./Sauphanor-Brouillard, N., loc. cit. (footnote 46), p. 798, regard *Freiburger Kommunalbauten* as confirming the aforementioned division of tasks in the interpretation and application of Community law.

51 — *Freiburger Kommunalbauten* (cited in footnote 36 above).

52 — Ibid., paragraph 25.

the consequences of the term under the law applicable to the contract must also be taken into account. This requires that consideration be given to the national law. [53]

96. In this regard, the Court followed the Opinion of Advocate General Geelhoed, who had essentially advocated a decentralised review of unfair terms at the level of the Member States, with the Court's interpretative monopoly being maintained. In his Opinion, the Advocate General had, on the one hand, referred to the *need for a clear demarcation of powers* as between the Community and the Member States in the area of consumer protection and, on the other hand, called for the *economical use of legal remedies*. In relation to the latter, the Advocate General had rightly given an implicit warning of the danger that the procedure under Article 234 EC might be overloaded if the task of assessing the unfairness of a specific contractual term fell within the jurisdiction of the Court of Justice. Given that the concept of 'unfair terms' is general in nature and that terms of this type appear in consumer contracts in a wide variety of guises as regards form and content, the Advocate General feared that they might give rise to continual references for preliminary rulings. Those arguments merit endorsement, as it cannot be the task of the Court of Justice to assess itself the unfairness of every contractual term put before it. In view of the many issues of fact and national law that have to be taken into account in individual cases, [54] the proximity of the *iudex a quo* to the subject-matter of the dispute in the main proceedings proves to be an advantage which

53 — Ibid., paragraph 21.

54 — As long as there is no uniform European civil law, the Court of Justice continues to be dependent on the information provided by the national courts on the points of national law arising in a given domestic case for the purposes of interpreting the concept of unfairness under Article 3(1) of Directive 93/13 in relation to a specific term. That said, in principle, the Court could conceivably also draw, in the alternative, on codification models developed by European academics, such as the Draft Common Frame of Reference (DCFR), in order to find appropriate solutions to disputes at civil law. See to this effect Heinig, J., 'Die AGB-Kontrolle von Gerichtsstandsklauseln — zum Urteil Pannon des EuGH', *Europäische Zeitschrift für Wirtschaftsrecht*, 24/2009, p. 886 et seq., who refers to the continuing development of European private law and to the formulation of common European rules of contract law in the DCFR or in a future Common Reference Framework capable of providing the Court with the criteria necessary to carry out a more robust review of contractual terms at European level. A more sceptical view is provided by Freitag, R., 'Anmerkung zum Urteil Freiburger Kommunalbauten', *Entscheidungen zum Wirtschaftsrecht*, 2004, p. 398, who also considers it to be conceivable in principle that, drawing on the *acquis communautaire* in matters of civil law and a comparison of the legal systems of the Member States, the Court might, on a case-by-case basis, develop a 'common European legal denominator' applicable autonomously in Community law. However, since, in principle, Directive 93/13 covers all areas of civil law, the Court would in that event be forced into the role of a substitute civil legislature, which would create problems in relation to the horizontal distribution of powers in the Community and legal certainty.

the judicature of the European Union should utilise for the protection of the consumer. [55]

97. Finally, the Advocate General also put forward as a further argument the *relevance of national law* in combating unfair terms. Unfair terms are particularly common in private-law relationships, which continue to be governed largely by national law. As a result, the same category of term could conceivably have different legal consequences in different legal systems. In view of the fact that the assessment of the unfairness of a contractual term in a specific case is dictated primarily by national law [56] and the interpretation and the application of national law are the responsibility of the national court alone, this argument too must be endorsed.

98. Confirmation of the principles described above can be found in *Mostaza Claro* [57] and, recently, *Pannon*, [58] the latter containing a further clarification in so far as, in that judgment, the Court held that it is for the national court to assess the unfairness of a contractual term in the light of the abstract findings given by the Court of Justice in its judgment. [59] However, this simply means that the national court must take into account the guidance on interpretation provided by the Community court when exercising its powers of review. [60]

99. It should be emphasised in this connection, however, that the guidelines on assessment given in those judgments cannot in any way be regarded as definitive. They are just some of the 'general criteria' within the meaning of the case-law which the Court can provide to the national court under its monopoly on the interpretation of Community law. The

55 — Basedow, J., loc. cit. (footnote 37), p. 61, rightly points out that justice policy considerations should be discussed openly. The author takes the view that the Court of Justice cannot rule on the unfairness of contractual terms in every individual case. On the other hand, it must retain the possibility of giving rulings which provide guidance on the interpretation even of the general provision in Article 3 of Directive 93/13. According to Heinig, J., loc. cit. (footnote 54), p. 886, the unfairness of a term may depend on many individual circumstances which, for reasons of efficiency and in the current state of European private law, it is appropriate to ask the national courts to consider. Freitag, R., ibid., p. 398, points out that the unfairness of preformulated contractual terms can be assessed only against a statutory reference criterion. As long as there is no uniform European codification of civil law, that statutory reference is constituted by the relevant national law, but this falls outside the scope of review by the Court of Justice. Whittaker, S., loc. cit.(footnote 48), p. 1154, considers the national court to be the proper forum for determining the unfairness of a contractual term, as it is better able to assess the national context in which that term is used.

56 — See to this effect Bernadskaya, E., 'L'office du juge et les clauses abusives: faculté ou obligation?', *Revue Lamy droit d'affaires*, 42/2009, p. 71, who states that it is for the national court to assess contractual terms in consumer contracts in specific cases in accordance with the rules of national law.

57 — *Mostaza Claro* (cited in footnote 16 above, paragraphs 22 and 23).

58 — *Pannon* (cited in footnote 4 above, paragraph 42).

59 — Ibid., paragraph 43.

60 — A preliminary ruling from the Court of Justice has the force, formally and materially, of *res judicata* and binds the referring court and all the national courts involved in the main proceedings, including the higher courts. See Case 29/68 *Milchkontor* [1969] ECR 165, paragraph 3. See to this effect Schwarze, J., loc. cit. (footnote 17), paragraph 63, p. 1826.

specification of what constitutes unfairness under Article 3(1) of the Directive at the level of Community law must ultimately be construed as an ongoing process the end point of which it is for the Court to determine. It must be the task of the Court gradually to give specific expression to the abstract criteria for reviewing whether a term may be classified as unfair and, with increasing experience, to establish a profile for reviewing the unfairness of terms at the level of Community law. As an expression of the work-sharing relationship between the Court of Justice and the national courts, the preliminary ruling procedure is the appropriate means of achieving effective and procedurally economic results. [61]

4. Conclusion

100. In the light of the foregoing considerations, the answer to the second question must be that the Court of Justice also has jurisdiction under Article 234 EC to interpret the concept of 'unfair terms' within the meaning of Article 3(1) of Directive 93/13 as well as the terms listed in the Annex to that directive.

101. The answer to the third question must be that a reference for a preliminary ruling which seeks such an interpretation may, in the interests of the uniform application in all the Member States of the level of protection afforded to consumers' rights by Directive 93/13, ask what aspects the national court may or must take into account if the general criteria laid down in the Directive are applied to a particular individual term of a contract.

D — *The fourth question*

1. Subject-matter of the question

102. By its fourth question, the referring court essentially seeks clarification of paragraphs 34 and 35 of *Pannon*, [62] in which the Court held as follows:

'In those circumstances, the specific characteristics of the procedure for determining jurisdiction, which takes place under national law between the seller or supplier and the consumer, cannot constitute a factor which

61 — See to this effect Röthel, A., loc. cit., (footnote 42), p. 427. In the author's view, the development of the Community system of civil law depends more than any other area of law on communication and cooperation. In this respect, the preliminary ruling procedure affords fundamental opportunities for the creation of a supranational system of private law and the ongoing direction of the integration process. The author considers the Court's judgment in *Freiburger Kommunalbauten* to be a step in the right direction. The division of tasks between the Court and the national courts which it outlines promises effective as well as procedurally economic results which will be widely accepted.

62 — *Pannon* (cited in footnote 4).

is liable to affect the legal protection from which the consumer must benefit under the provisions of the Directive.

The reply, therefore, to the second question is that the national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task. Where it considers such a term to be unfair, it must not apply it, except if the consumer opposes that non-application. That duty is also incumbent on the national court when it is ascertaining its own territorial jurisdiction.'

103. In its order for reference, the referring court states [63] that the judgment does not make clear the chronological order which must be followed. Either the national court may not examine of its own motion the unfairness of a contractual term until it has available to it the legal and factual elements necessary for that task, or an examination of its own motion also means that the court has an obligation, when examining the unfairness of a particular contractual term, to establish and bring up to date of its own motion the legal and factual elements necessary for that task.

63 — See p. 2 of the order for reference of 2 July 2009.

2. The relevant findings of the Court in *Pannon* in the light of the previous case-law concerning the obligation on the national court to undertake an examination of its own motion

104. Before I comment on the question actually referred, it is appropriate, in order to clarify the subject-matter of the question, to give a brief summary of the findings of the Court in *Pannon* that are relevant to this case in the light of the previous case-law.

105. It has been the settled case-law of the Court since *Océano Grupo* [64] 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', including 'when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts'. However, that wording left open the question whether the Court had accepted the proposition of a national court examining unfair terms of its own motion as an obligation or merely as a possibility. *Pannon* helped to provide an important clarification in so far as the Court has now held that the task of the national court is 'not limited to a mere power to rule on the possible unfairness of a contractual term', but also consists of an *obligation* to do so. [65] That obligation applies to all unfair terms and,

64 — *Océano Grupo* (cited in footnote 43 above, paragraphs 28 and 29) and Case C-473/00 *Cofidis* [2002] ECR I-10875, paragraphs 32 and 33); and *Mostaza Claro* (cited in footnote 16 above, paragraphs 27 and 28).

65 — *Pannon* (cited in footnote 4 above).

therefore, also to clauses conferring jurisdiction. The Court assumed the existence of an obligation to undertake an examination as long ago as *Cofidis* [66] and did so even more clearly in *Mostaza Claro*. [67] In *Pannon*, the Court added that the obligation on the national court to undertake an examination of its own motion applies only where the contractual term becomes ineffective under Article 6(1) of Directive 93/13 *ipso iure* and that the consumer does not need to make an application to that effect. [68]

106. A further innovation introduced by *Pannon* consists in the clarification that the national court has the possibility of applying the term in question if the consumer, after having been informed of it by that court, does not intend to assert its unfair status. [69] The advantage of that approach is that it refrains from imposing protection on the consumer but is based rather on the idea of protecting consumers by providing them with information. [70]

66 — *Cofidis* (cited in footnote 64 above).

67 — *Mostaza Claro* (cited in footnote 16 above).

68 — *Pannon* (cited in footnote 4 above, paragraph 24).

69 — Ibid., paragraph 33.

70 — See also Heinig, J., loc. cit. (footnote 54), p. 886. Osztovits, A./Nemessányi, Z., 'Missbräuchliche Zuständigkeitsklauseln in der ungarischen Rechtsprechung im Licht der Urteile des EuGH', *Zeitschrift für Europarecht, internationales Privatrecht & Rechtsvergleichung*, 2010, p. 25, who state that, in *Pannon*, the Court answered the hitherto unresolved theoretical question whether the national court may also declare a term null and void where the consumer, after being informed of the term, expressly wishes to adhere to it. The authors take the view that, in that decision, the principle of 'pacta sunt servanda' seems to have prevailed over the 'non-binding nature' of unfair contractual terms, although, according to *Mostaza Claro*, the provisions of the Directive come under the heading of public policy.

3. Legal observations

107. However, as the Commission rightly observes, the question referred is not concerned with the situation where a contractual term is in fact unfair, but only with the situation where the national court is made aware of the *possible* unfairness of a contractual term; in other words, it only suspects unfairness but is not able to establish it with certainty. As Directive 93/13 makes no provision in this regard, national procedural law would in principle be applicable, in accordance with the principle of the procedural autonomy of the Member States. [71]

108. On the other hand, the principle of the procedural autonomy of the Member States must not have the effect of hindering the protection of the consumer required by Articles 6 and 7 of Directive 93/13. [72] The Court's findings in paragraph 34 of *Pannon* to the effect that 'the specific characteristics of the procedure for determining jurisdiction, which takes place under national law between the seller or

71 — See point 65 of this Opinion.

72 — The Court has held that 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 of the Directive, 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 (see *Océano Grupo*, cited in footnote 43 above, paragraph 28; *Cofidis*, cited in footnote 64 above, paragraph 32; and *Mostaza Claro*, cited in footnote 16 above, paragraph 27.

supplier and the consumer [are not] a factor which is liable to affect the legal protection from which the consumer must benefit under the provisions of the Directive' must also be construed to that effect. Ad hoc intrusions into the procedural regulatory autonomy of the Member States are therefore required in certain cases in order to achieve the aims of the Directive. [73] The question is whether such intrusion by the Community into the procedural regulatory autonomy of the Member States is discernible in *Pannon* and, if not, whether such intrusion is required.

109. It is true that, in paragraph 35 of *Pannon*, the Court held that the national court is required to examine, of its own motion, the unfairness of a contractual term '*where* it has available to it the legal and factual elements necessary for that task'. The Court adopted that wording again, most recently in *Asturcom*. [74] However, in my view, that sentence must be understood as meaning that the obligation to undertake an examination arises only where the pleas in law and arguments of the parties or the other circumstances of the case contain evidence indicating to the court that a term may be unfair. [75] Only in that event must it pursue of its own motion its misgivings with respect to the validity of the term, without there being any requirement for one of the parties to raise a specific complaint as to its unfairness. [76] On the other hand, that judgment does not show that the national

73 — That the principle of the procedural autonomy of the Member States is not inviolable and that intrusions may be justified is demonstrated by Heinig, J., loc. cit. (footnote 54), p. 885, who takes the view that the obligation to examine agreements conferring jurisdiction in standard business terms does not constitute an impermissible intrusion into the procedural regulatory autonomy of the Member States. As the author rightly explains, the powers of the European Union in consumer law are not confined to matters of substance but may also extend to matters of procedure. On the other hand, agreements conferring jurisdiction may themselves make it more difficult to enforce material consumer rights, as *Océano Grupo* and *Pannon* show. The fact that Directive 93/13 also covers matters of procedure is demonstrated by subparagraph (q) of paragraph 1 of the Annex, under which terms may be declared unfair if they make it more difficult for the consumer to take legal action.

74 — Cited in footnote 16 above, paragraph 53.

75 — A comparison of the various language versions shows that the subordinate clause in question signifies either a chronological sequence or a condition. Notwithstanding the minor differences between them, all the versions indicate that the examination of unfairness must take place only *after* the legal and factual elements necessary for that task have been obtained. Danish: '*så snart* den råder over de oplysninger om de retlige eller faktiske omstændigheder, som denne prøvelse kræver'; German: '*sobald* es über die hierzu erforderlichen rechtlichen und tatsächlichen Grundlagen verfügt'; French: '*dès qu'*il dispose des éléments de droit et de fait nécessaires à cet effet'; English: '*where* it has available to it the legal and factual elements necessary for that task'; Italian: '*a partire dal momento in cui* dispone degli elementi di diritto e di fatto necessari a tal fine'; Portuguese: '*desde que* disponha dos elementos de direito e de facto necessários para o efeito'; Slovenian: '*če* razpolaga s potrebnimi dejanskimi in pravnimi elementi'; Spanish: '*tan pronto como* disponga de los elementos de hecho y de Derecho necesarios para ello'; Dutch: '*zodra* hij over de daartoe noodzakelijke gegevens, feitelijk en rechtens, beschikt'; Hungarian: '*amennyiben* rendelkezésére állnak az e tekintetben szükséges ténybeli és jogi elemek'.

76 — See also to this effect Mayer, C., 'Missbräuchliche Gerichtsstandsvereinbarungen in Verbraucherverträgen: Anmerkung zu EuGH, Urteil vom 4.6.2009, C-243/08 — Pannon GSM Zrt../Erzsébet Sustikné Györfi', *Zeitschrift für Gemeinschaftsprivatrecht*, 2009, p. 221. Poissonnier, G., 'La CJCE franchit une nouvelle étape vers une réelle protection du consommateur', *Recueil Dalloz*, 34/2009, p. 2314, clearly seems to take the same view when he writes that, in *Pannon*, the Court linked the obligation on the national court to examine the unfairness of a contractual term of its own motion to the condition that the court must have available to it the legal and factual elements necessary for that task. See also, not so clearly but possibly to the same effect, the opinion of Aubry, H./Poillot, E./Sauphanor-Brouillard, N., loc. cit. (footnote 46), p. 798, who consider the Court's ruling to be 'logical from the viewpoint of procedural law'.

court has the same obligation where it does not have such evidence available to it.

110. In other words, there is no provision in Community law which requires the national court to undertake an investigation of its own motion for the purpose of obtaining the legal and factual elements necessary to assess the unfairness of a contractual term where it does not have such elements available to it. The powers of the national court are determined rather by national procedural law. It should be pointed out in this connection that, in the laws of the Member States, civil law is characterised by the *principle that it is for the parties to take the initiative*, under which the parties are responsible for submitting all relevant facts on which the court must then base its decision. The same is obviously also true of the Hungarian law of civil procedure, as the fourth question certainly makes it clear that the taking of evidence can be ordered only upon application by the parties. Under the Hungarian Code of Civil Procedure, evidence must therefore in principle be designated by the parties to the dispute. [77]

111. The Court of Justice unmistakably recognised the limits which that particular feature of national civil procedure imposes on examination by the national court of its own motion in *van Schijndel and van Veen* [78] when it held that 'Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim'. It follows from this that the principle of party presentation imposes on the power of the national court to undertake an examination in civil proceedings limits which Community law must tolerate. [79]

77 — See also to this effect Osztovits, A./Nemessányi, Z., loc. cit. (footnote 70), p. 25, who refer to Article 164 of the Hungarian Code of Civil Procedure.

78 — Cited in footnote 16 above.

79 — See to this effect Poissonnier, G., loc. cit. (footnote 76), p. 2314, who regards the principle of party presentation in civil proceedings as imposing a limit on the national court's obligation to undertake an examination.

112. Notwithstanding the foregoing, it is questionable from the outset whether it is absolutely necessary at all to impose on the national court a comprehensive obligation to undertake an examination in order to achieve the aim of reviewing unfair terms pursued by Directive 93/13. A contractual term which, if reviewed, would have to be classified as unfair because it confers jurisdiction in respect of litigation arising from the contract on the court in the territorial jurisdiction of which the seller or supplier has his registered office [80] could be examined by the national court as part of an examination, of its own motion, of its own jurisdiction, in which event the court would not be dependent on detailed submissions from the parties. Indeed, this is confirmed by the procedural position in the main proceedings. The documents before the Court show that the referring court noticed before setting the date for the oral hearing that the defendant's place of residence was not situated within its territorial jurisdiction but that the claimant had made its application for the order for payment, on the basis of the standard contractual terms, to the court close to its registered office, which prompted doubts on the part of the referring court in relation to the contractual provision in question. In this way, the referring court effectively indicates its suspicion as to the existence of an unfair jurisdiction clause.

80 — See *Océano Grupo* (cited in footnote 43 above, paragraphs 21 to 24). The Court held that, where a jurisdiction clause is included, without being individually negotiated, in a contract between a consumer and a seller or supplier and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, it must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. In the Court's view, a term of this kind obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile. This may make it difficult for him to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence. In the Court's view, such a term thus falls within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action, a category referred to in subparagraph (q) of paragraph 1 of the Annex to the Directive. By contrast, the term enables the seller or supplier to deal with all the litigation relating to his trade, business or profession in the court in the jurisdiction of which he has his principal place of business. This makes it easier for the seller or supplier to arrange to enter an appearance and makes it less onerous for him to do so. Poissonnier, G., loc. cit. (footnote 76), p. 2313, concurs. According to Osztovits, A./Nemessányi, Z., loc. cit. (footnote 70), p. 23, that case-law has not been reflected in Hungarian legal practice for many years. In fact, it has been customary up to now for the seller or supplier to adopt in his standard terms of business a jurisidiction clause under which the parties agree to submit to the exclusive jurisdiction of the court in the territorial jurisdiction of which the seller or supplier has his principal place of business or — as is more often the case — to the court which is situated closest to the principal place of business of the seller or supplier.

113. However, even in cases involving not jurisdiction agreements but substantive contractual obligations, the national court should have available to it at least a copy of the consumer contract as the most important item of evidence in relation to the claims raised. In those circumstances, the national court would already have the 'factual and legal elements necessary' — within the meaning of *Pannon* — to enable it to examine the unfairness of a contractual term of its own motion. It would thus be in a position to discharge its obligation to examine the unfairness of a contractual term of its own motion. In many

cases, the national court is therefore unlikely to encounter any particular practical difficulties. This does not rule out the possibility that there may, in practice, be contractual terms the fairness of which is discernible only after thorough examination. However, as I have already explained, in the absence of a legal obligation to that effect under Community law, such an examination may be undertaken only in accordance with national procedural law.

114. The aforementioned principles of equivalence and effectiveness [81] do not require recognition of an obligation on the national court to undertake an examination. As far as safeguarding equivalence in the case in question is concerned, it would seem that the national court does not have any more powers in proceedings relating only to national law than in proceedings intended to ensure protection of the rights accruing to citizens under Directive 93/13. There is in this regard no indication of any infringement of the principle of equivalence. Nor is there any evidence of how the exercise of the rights conferred by Directive 93/13 has been made practically impossible or excessively difficult. Indeed, the foregoing submissions [82] themselves show that the absence of an obligation on the national court under the law of the Member State to undertake an examination does not necessarily prevent the national court, when examining its jurisdiction of its own motion or through the pleas in law and arguments of the parties, from acquiring knowledge of the factual and legal elements necessary to be able to assess the unfairness of a contractual term. Nor does it prevent it, to the extent necessary, from discussing with the parties the factual and legal elements of the subject-matter and issues of the dispute, and putting questions to them in this regard, as part of its material direction of the course of the proceedings. [83] In so far as such an obligation to direct the course of the proceedings is provided for in national law, it falls to the national court in that connection to ensure that the parties make full and timely statements in relation to all the material facts, and, in particular, supplement insufficient information given in respect of the facts alleged, designate the evidence adduced and make appropriate applications. [84] It follows from this that the absence of an obligation on the national court to undertake an examination cannot be regarded as infringing the principles of equivalence and effectiveness.

81 — See point 67 of this Opinion.

82 — See point 112 of this Opinion.

83 — Herb, A., *Europäisches Gemeinschaftsrecht und nationaler Zivilprozess*, Tübingen 2007, p. 232, regards the obligation to direct the material course of the proceedings as an appropriate means of taking into account the consumer's interest in taking legal action.

84 — As Poissonnier, G., loc. cit. (footnote 76), p. 2315, rightly states, nowadays, the civil court can no longer be content with 'performing the role of a referee who counts the blows and leaves the parties to control the proceedings'. As administrator and regulator, the court plays an active role in civil proceedings. In consumer protection law, the court must act as a counterbalance, its role as such being to ensure that the rules are observed. This does not mean that it must take sides. Rather, it must act in the service of the law. Consumer protection law performs the dual function of protecting the consumer and promoting ethical market behaviour. That twin objective has changed and enriched the court's role. It must ensure that the legislation serves its purpose and is effectively applied.

115. It is true that the general Community-law principle of effective legal protection requires the Member States to make available to citizens of the European Union legal remedies enabling them to enforce before the courts the rights conferred on them by Community law. To a holder of rights the ability to enforce those rights before the courts is of fundamental importance since it determines the practical value of the legal status accorded to him. This does not mean, however, that Community law requires the principle of the active role of the parties in civil proceedings to be abandoned in favour of the *principle of court-directed and court-investigated proceedings*. Such a requirement would far exceed the aim of effective legal protection and would therefore infringe the Community-law principle of proportionality. [85] The principle of effective legal protection requires only that the Member States take appropriate measures to protect the individual from loss of the rights conferred on him by Community law through ignorance of what steps to take and how to take them in legal proceedings. The Member States have discretion as to the choice of means for ensuring the observance of that principle. The availability — and, in large-scale and complex judicial proceedings, the requirement — of legal representation (in conjunction with the grant of legal aid), the duty of the court to guide, question and clarify and its aforementioned obligation to direct the course of the proceedings [86] arguably represent adequate means of protecting the parties which, at the same time, intrude less into the procedural autonomy of the Member States.

4. Conclusion

116. The answer to the fourth question must therefore be that Directive 93/13 is to be interpreted as meaning that it does not require a national court which observes that a term in a contract may be unfair to undertake, of its own motion, an examination to establish the legal and factual elements necessary for that assessment, where national procedural law permits such an examination only on application by the parties and the parties have not made an application to that effect.

85 — See to this effect Herb, A., loc. cit. (footnote 83), p. 231 et seq.

86 — See point 114 of this Opinion.

VII — Conclusion

117. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Budapesti II. és III. Kerületi Bíróság as follows:

1. Neither Article 23 of the Statute of the Court of Justice nor the other provisions of Community law contain any legal provisions that preclude a national rule of procedure which requires national courts, when submitting references for a preliminary ruling to the Court of Justice, to send them at the same time to the Ministry of Justice for information purposes.

2. The Court of Justice also has jurisdiction under Article 234 EC to interpret the concept of 'unfair terms' within the meaning of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts as well as the terms listed in the Annex to that directive.

3. A reference for a preliminary ruling which seeks such an interpretation may, in the interests of the uniform application in all the Member States of the level of protection afforded to consumers' rights under Directive 93/13, ask what aspects the national court may or must take into account if the general criteria laid down in the Directive are applied to a particular individual term of a contract.

4. Directive 93/13 is to be interpreted as meaning that it does not require a national court which observes that a term in a contract may be unfair to undertake, of its own motion, an examination to establish the legal and factual elements necessary for that assessment, where national procedural law permits such an examination only on application by the parties and the parties have not made any application to that effect.