



Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 19 December 2019¹

Case C-511/17

Györgyné Lintner
v
UniCredit Bank Hungary Zrt.

(Request for a preliminary ruling from the Fővárosi Törvényszék (Budapest High Court, Hungary))

(Reference for a preliminary ruling — Consumer protection — Unfair terms — Directive 93/13/EEC — Article 4(1) — Contractual terms to be taken into account in the assessment of unfairness — Articles 6(1) and 7(1) — Scope of examination by the national court of its own motion whether terms contained in consumer contract are unfair)

I. Introduction

1. This case is based on a reference for a preliminary ruling submitted by the Fővárosi Törvényszék (Budapest High Court, Hungary) concerning the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.² It is part of a series of cases which have come before the Court relating to the Hungarian framework on consumer credit agreements denominated in a foreign currency.³

2. Yet, this case raises fundamental questions concerning the national court's duty to examine of its own motion (*ex officio*) unfair terms in consumer contracts in accordance with the Court's case-law interpreting Directive 93/13. These are, namely, first, whether a national court's *ex officio* examination of unfair terms must extend to all of the terms of the contract, even if the terms are not related to the subject matter of the action, and second, to what extent may a national court be called upon to take *ex officio* investigative measures in order to obtain the necessary legal and factual elements to carry out this examination?

3. This case therefore presents the Court with a valuable opportunity to develop and refine its case-law on Directive 93/13, and in particular to clarify the extent of the national court's duty to undertake *ex officio* investigative measures following from the landmark judgment of 9 November 2010, *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:659).

¹ Original language: English.

² OJ 1993 L 95, p. 29.

³ See, in particular, judgments of 31 May 2018, *Sziber* (C-483/16, EU:C:2018:367); of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750); and of 14 March 2019, *Dunai* (C-118/17, EU:C:2019:207); see also Opinions of Advocate General Wahl in *Sziber* (C-483/16, EU:C:2018:9); of Advocate General Tanchev in *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:303); and of Advocate General Wahl in *Dunai* (C-118/17, EU:C:2018:921).

II. Legal framework

A. *EU law*

4. Article 4(1) of Directive 93/13 states:

‘Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.’

5. Article 6(1) of Directive 93/13 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.’

6. Article 7(1) of Directive 93/13 further 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. *Hungarian law*

7. Paragraph 3(2) of Law No III of 1952 on the Code of Civil Procedure (A polgári perrendtartásról szóló 1952. évi III. törvény, ‘the Civil Procedure Code’), as it applied at the material time, provides:

‘The court – in the absence of any statutory provision to the contrary – shall be bound by the submissions and legal statements made by the parties. The court shall consider applications and statements made by the parties in the light of their content, rather than their formal designation.’

8. According to Paragraph 23(1)(k) of the Civil Procedure Code:

‘The county courts have jurisdiction to hear [...] cases seeking a declaration of invalidity of unfair contract terms’.

9. Paragraph 73/A(1)(b) of the Civil Procedure Code states:

‘Legal representation is mandatory: [...] in cases which come under the jurisdiction of a county court as a court of first instance, at every stage of the proceedings, and also in the context of an appeal [...].’

10. Paragraph 213(1) of the Civil Procedure Code provides:

‘The judgment shall relate to all that has been requested in the application in the context of the case, or in the cases joined pursuant to Paragraph 149.’

11. Paragraph 215 of the Civil Procedure Code further provides:

‘The decision of a court may not go beyond what has been requested in the application or in the defence; this rule shall also apply to claims which are ancillary to the main claim (interest, costs etc.).’

III. Facts, main proceedings and questions referred

12. According to the order for reference, on 13 December 2007, Mrs Györgyné Lintner, acting as a consumer, concluded with the financial institution UniCredit Bank Hungary Zrt. ('UniCredit Bank Hungary') a loan contract denominated in Swiss francs, but granted and repayable in Hungarian forints, and secured by a mortgage ('the contract').⁴

13. Considering that the contract contained certain terms which could be considered unfair, on 18 July 2012, Mrs Lintner brought an action against UniCredit Bank Hungary before the Fővárosi Törvényszék (Budapest High Court, Hungary). In her application, Mrs Lintner asked the referring court to declare invalid clauses 7.2.2, 7.3 and 7.4 of the contract giving UniCredit Bank Hungary the right to make unilateral amendments to the contract, and to declare that those clauses were not binding on her from the date on which the contract was concluded. In support of her action, she relied, *inter alia*, on Directive 93/13.

14. By judgment of 29 August 2013, the referring court dismissed that action. Mrs Lintner brought an appeal against that judgment.

15. By order of 1 April 2014, the Fővárosi Ítéltábla (Budapest Regional Court of Appeal, Hungary) set aside that judgment, and ordered the referring court to reopen the procedure and to adopt a new decision.

16. As indicated in the order for reference, the Fővárosi Ítéltábla (Budapest Regional Court of Appeal) stated, *inter alia*, in that order that the effective application of Directive 93/13 is possible only if the national court examines of its own motion the whole contract at issue, and if it finds, on that occasion, that certain conditions are unfair, it must ask the consumer whether she wishes to invoke the unfair nature of other terms. In that regard, it referred to clauses 1, 2, 4, 10.4 and 11.2 of the contract, along with clause 1.8 of the general terms and conditions whose stipulations form part of the contract, as well as clauses III.13.4, III.18.1(1), (4) and (5) and III.18.2(j) of the general conditions applicable to contracts concluded with individuals. It instructed the referring court to request Mrs Lintner to state whether she wished to invoke the unfairness of those terms or other terms of the contract, and whether she acknowledged that the contract was binding on her once the terms in question were disappplied.

17. It appears from the case file submitted to the Court that, by addendum to the initial action dated 5 July 2014, Mrs Lintner's representative asked the referring court to declare all of the terms identified in the order of 1 April 2014 invalid, in addition to those terms indicated in the initial action.

18. By order of 26 October 2015, the referring court invited Mrs Lintner to make a request for the application of the legal consequences of invalidity of the contract in accordance with national legislation concerning foreign currency loan contracts which had been adopted in 2014. That legislation includes in particular Laws DH1⁵ and DH2⁶, which contain provisions governing the

⁴ It should be noted that the definitions of 'consumer' and 'seller or supplier' are found, respectively, in Article 2(b) and (c) of Directive 93/13. Subject to verification by the national court, it is presumed from the order for reference that the situation in the main proceedings falls within the scope of Directive 93/13.

⁵ A Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvény (Law XXXVIII of 2014 regulating specific matters relating to the decision of the Kúria (Supreme Court, Hungary) to safeguard the uniformity of the law concerning loan contracts concluded by financial institutions with consumers, 'Law DH1').

⁶ A Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. törvényben rögzített elszámolás szabályairól és egyes egyéb rendelkezésekről szóló 2014. évi XL. törvény (Law XL of 2014 on the rules relating to the settlement of accounts referred to by Law XXXVIII of 2014, regulating specific matters relating to the decision of the Kúria (Supreme Court, Hungary) to safeguard the uniformity of the law concerning loan contracts concluded by financial institutions with consumers and other provisions, 'Law DH2').

determination of unfairness and the consequences to be drawn from it with regard to terms contained in such contracts relating to the power to make unilateral amendments to the contract in favour of the lender ('the power to make unilateral amendments') and the difference between the buying and selling rates of the currency concerned ('the difference in exchange rates').⁷

19. According to the order for reference, since no action was taken on that request, the referring court closed the proceedings by order of 7 December 2015. Mrs Lintner brought an appeal against that order.

20. By order of 29 March 2016, the Fővárosi Ítéltábla (Budapest Regional Court of Appeal) confirmed the referring court's order of 7 December 2015 in respect of the unfair nature of the clauses relating to the power to make unilateral amendments and the difference in exchange rates, as referred to in Laws DH1 and DH2. However, it set aside that order as to the remainder, and ordered the referring court to reopen the proceedings and to adopt a new decision. It considered that, although the clauses referred to in Laws DH1 and DH2 could no longer be the subject of a judicial decision,⁸ Mrs Lintner continued to pursue her claim in so far as she sought a declaration as to the unfair nature of the clauses identified in its order of 1 April 2014. It therefore held that the referring court must, in the context of the proceedings being reheard, rule on the substance of the remainder of Mrs Lintner's claims.

21. On that basis, the referring court indicated in the order for reference that it is called upon to examine *ex officio* contractual terms which Mrs Lintner, as the applicant in the main proceedings acting through her representative, did not dispute at first instance. Nor did she state facts in the grounds of her action from which it could be inferred that she also sought a declaration that the terms identified by the Fővárosi Ítéltábla (Budapest Regional Court of Appeal) in its order of 1 April 2014 were unfair.

22. Having regard to the Court's case-law,⁹ the referring court did not consider it to be clear, as a matter of the proper interpretation of Directive 93/13, to what extent a national court is required to examine of its own motion whether each clause of the contract is unfair, and to what extent the court is bound in that examination by the applicant's claims, taking into account that, under Hungarian law, cases such as the present one seeking a declaration of invalidity of unfair contract terms can proceed only through a lawyer.

23. It was in those circumstances that the Fővárosi Törvényszék (Budapest High Court) decided to stay the main proceedings, and to refer the following questions to the Court of Justice for a preliminary ruling:

- '(1) Must Article 6(1) of [Directive 93/13] — having regard also to the national legislation requiring legal representation — be interpreted as meaning that it is necessary to examine each of the clauses of a contract individually in the light of whether it may be regarded as unfair, irrespective of whether an examination of all the terms of the contract is actually necessary in order to rule on the claim made in the action?
- (2) If not, is it necessary, contrary to the suggestion in question 1, to interpret Article 6(1) of [Directive 93/13] as meaning that, in order to find that the clause on which the claim is based is unfair, all the other terms of the contract must also be examined?

⁷ See, in that regard, the judgments of 31 May 2018, *Sziber* (C-483/16, EU:C:2018:367); of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750); and of 14 March 2019, *Dunai* (C-118/17, EU:C:2019:207).

⁸ Although this was not detailed in the order for reference, it may be surmised that, as indicated in the observations of the Hungarian Government, Law DH1 qualified as abusive *ex lege* the clauses relating to the power to make unilateral amendments and the difference in exchange rates, such that judicial assessment of those terms was no longer necessary. See note 7 of this Opinion.

⁹ The referring court refers to the judgments of 4 June 2009, *Pannon* (C-243/08, EU:C:2009:350), and of 21 February 2013, *Banif Plus Bank* (C-472/11, EU:C:2013:88).

- (3) If the answer to question 2 is affirmative, does this mean that it is in order to be able to establish that the clause at issue is unfair that it is necessary to examine the entire contract, that is to say, that it is not necessary to examine each part of the contract individually for unfairness, independently of the clause disputed in the action?’

IV. Procedure before the Court

24. In the order for reference, the Fővárosi Törvényszék (Budapest High Court) observed that the Fővárosi Ítéltábla (Budapest Regional Court of Appeal) submitted a reference for a preliminary ruling in Case C-51/17, *OTP Bank and OTP Faktoring*, of which the fifth question is relevant to the questions referred in the present case. The referring court thereby requested the Court to join the two cases.

25. By decision of the President of the Court, the present case was suspended until the delivery of the judgment of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750).

26. That judgment having been drawn to the referring court’s attention, the Court asked it whether it wished to maintain its reference for a preliminary ruling. The referring court replied in the affirmative on 16 October 2018.

27. Written observations were submitted to the Court by UniCredit Bank Hungary, the Hungarian Government and the European Commission. Those parties also took part in the hearing which was held on 19 September 2019.

V. Summary of the observations of the parties

28. UniCredit Bank Hungary submits that the answer to the three questions referred, taken together, should be that Articles 6(1) and 7(1) of Directive 93/13 do not require the national courts to examine *ex officio* the unfairness of contractual terms which have not been contested by the consumer and which do not relate to the contractual terms covered by the action. Similar to the Court’s answer to the fifth question referred in *OTP Bank and OTP Faktoring*,¹⁰ a national court must examine *ex officio* unfair terms only if it has the necessary legal and factual elements for that purpose and if the clause concerned is relevant to the decision to be given on the application and has a material and logical relationship with it. In so far as, on the basis of the case file, the court identifies possible unfairness not covered by the conclusions of the application but related to them, it must ensure that the unfair term does not bind the consumer, but the *ex officio* examination should not extend to the entire contract in the absence of a request to that effect and consist in searching for terms which could be qualified as unfair.

29. According to UniCredit Bank Hungary, that position is consistent with the principles of equivalence and effectiveness, since the court is not empowered on the basis of national law to examine *ex officio* terms which are not necessary to decide on the application, and the consumer is not prevented from challenging the unfairness of a term not examined in the dispute in question in later proceedings.¹¹ Moreover, the Court has never ruled in favour of an obligation to carry out an unlimited *ex officio* examination,¹² and as it stressed at the hearing, an obligation to examine *ex officio* all the contractual terms would render uncertain the object of the dispute, and would mean that the court’s decision acquires the authority of *res judicata* for the entire contract, such that another court could not depart from it or examine the contract.

¹⁰ UniCredit Hungary Bank refers to the judgment of 20 September 2018 (C-51/17, EU:C:2018:303, paragraphs 90 and 91).

¹¹ UniCredit Bank Hungary refers to the judgment of 26 January 2017, *Bank Primus* (C-421/14, EU:C:2016:69, paragraph 52).

¹² UniCredit Bank Hungary refers in particular to the judgments of 9 November 2010, *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:659); of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349); of 21 February 2013, *Banif Plus Bank* (C-472/11, EU:C:2013:88); and of 30 May 2013, *Jörös* (C-397/11, EU:C:2013:340).

30. The Hungarian Government submits that the first question should be answered in the negative. A national court is not required to examine each contractual term individually with regard to whether it can be considered unfair. Among the terms whose unfairness has not been invoked by the parties, a court must examine *ex officio* terms whose unfairness can be clearly established, as a matter of fact, on the basis of the available evidence. This approach takes into account both the principle that the subject matter of an action is delimited by the parties and the principle of the protection of consumer interests, ensures a solution in accordance with these two principles and also respects EU case-law, according to which the *ex officio* examination of an unfair term is subject to the condition that the legal and factual elements necessary for this purpose are available.

31. The Hungarian Government contends that, on the basis of the Court's case-law,¹³ it does not make a difference in respect of the *ex officio* examination whether the consumer is represented by a lawyer. Moreover, if the examination of the evidence on the basis of the parties' offers of proof, taking into account the application and defence, clearly leads to a finding that a term not invoked by the parties is unfair, the court must declare *ex officio* the unfair nature of the term, but if the court does not have the necessary legal and factual elements for that purpose, it is not in a position to do so, since it is not possible to adduce evidence *ex officio*. As it stated at the hearing, the Court's case-law on the national court's duty to take *ex officio* investigative measures is linked to the scope of Directive 93/13, and where there are indications that a term could be unfair but the court needs further evidence to form an opinion on the matter, Hungarian law provides that the court informs the parties of this possibility and the consumer may thus extend his request and put the relevant documentation in the case file.

32. In support of its position, the Hungarian Government refers to certain opinions of the Kúria (Supreme Court, Hungary)¹⁴ which indicate in particular that in so far as the court must examine *ex officio* the unfairness of a term, it must allow the parties to submit observations on that point so as to avoid 'surprise judgments' which the parties did not expect. The Hungarian Government also draws attention to the summary opinion of the case-law analysis group of the Kúria on unfair terms in credit agreements,¹⁵ which considered, inter alia, that in actions brought by a consumer seeking to have unfair terms declared void, the court must under EU law verify only those terms not invoked by the consumer which are essential for the interpretation of the provisions necessary for the assessment of the application or defence or those which influence their application, and that in determining whether such terms are unfair, the court may not rule beyond the facts established on the basis of the parties' offers of evidence, public or well-known facts.

33. The Hungarian Government submits that the second question should be answered to the effect that it follows from Directive 93/13 and the Court's case-law that all the other terms of the contract must also be examined in order to assess whether the term on which the claim is based is unfair. During this examination, the national court may raise *ex officio* the unfairness of certain terms of the contract not invoked by the consumer. However, the national court must only raise *ex officio* the unfairness of terms for which it has the necessary legal and factual elements for this purpose.

34. Along similar lines, the Hungarian Government takes the view that the third question should be answered in the affirmative, it being understood that if, when the examination is carried out within the limits of the request, the national court finds, on the basis of the legal and factual elements available, that a contractual term is clearly and manifestly unfair, it must take it into account *ex officio* even where the parties have not invoked it.

¹³ The Hungarian Government refers in particular to the judgments of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350); of 21 February 2013, *Banif Plus Bank* (C-472/11, EU:C:2013:88); and of 30 May 2013, *Jőrös* (C-97/11, EU:C:2013:340).

¹⁴ The Hungarian Government refers to Opinion 1/2005 (VI. 15.) PK and Opinion 2/2010 (VI. 28.) PK of the Kúria (Supreme Court, Hungary).

¹⁵ „Az érvénytelenség jogkövetkezményeinek alkalmazhatósága kölcsönszerződéseknél” (‘The applicability of the legal consequences of a nullity in the case of credit agreements’), 2015, available at https://kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeney_i.pdf.

35. The Commission submits that the Court should answer the three questions, taken together, that Articles 4(1) and 6(1) of Directive 93/13 must be interpreted as meaning that it is for the national court called upon to rule on the unfairness of terms in contracts concluded with consumers, when assessing those terms, to take into account the circumstances of the contract and all its other terms, and to rule taking those factors into consideration when establishing the unfair nature of the contractual term or to ensure that the contract can survive without the unfair term. The national court's obligation to examine *ex officio* the unfairness of contractual terms falling within the scope of Directive 93/13 does not go so far as to require it to examine individually the unfairness of each of the contractual terms if the consumer does not so wish, provided that the consumer does not lose his right, on the basis of national procedural law, in particular by virtue of the principle of *res judicata*, to challenge in another action the terms not referred to in the main proceedings.

36. The Commission asserts that, in reference to the Court's case-law,¹⁶ while Articles 4(1) and 6(1) of Directive 93/13 do not require the national court to examine individually each of the terms when carrying out an overall assessment of the contract, if, during that assessment, the court encounters other terms which may be considered unfair, it must indicate this to the parties and invite the consumer to amend his claim, so as to ensure the effectiveness of Article 6(1) of Directive 93/13. The applicant's claim constitutes the limit of the court's *ex officio* examination under Directive 93/13, and it is irrelevant to the level of protection guaranteed by that directive whether the consumer is represented by a lawyer. As it stated at the hearing, the court must examine *ex officio* all terms suspected to be unfair where legal and factual elements are available, and the court is also required, following from the Court's case-law,¹⁷ to take *ex officio* investigative measures, in which it may ask the parties to transmit the relevant documentary evidence, so that it can decide whether a given term is unfair.

VI. Analysis

37. My analysis is divided into two parts. First, in Section A, I will address the first question, since it concerns the scope of the national court's duty to examine *ex officio* the unfairness of contractual terms under Articles 6(1) and 7(1) of Directive 93/13. Second, in Section B, I will examine the second and third questions together, since they also relate to the national court's assessment of the unfairness of a contractual term under Article 4(1) of Directive 93/13.

A. Question 1

38. By its first question, the referring court essentially wishes to know whether a national court is required under Articles 6(1) and 7(1) of Directive 93/13 to examine *ex officio* the unfairness of all of the terms of the contract even if they are not necessary to decide on the parties' claims in the dispute, having regard to the principles of civil procedural law that the subject matter of the action is delimited by the parties and the court can go no further than that subject matter (*ne ultra petita*), along with rules on legal representation as set out in the Hungarian law (see points 7 to 11 of this Opinion).

39. I have reached the conclusion that, under Articles 6(1) and 7(1) of Directive 93/13, a national court is required to examine *ex officio* the unfairness of contractual terms which are related to the object of the dispute and have a link with the legal or factual elements in the case file.

¹⁶ The Commission refers in particular to the judgments of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350); of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164); and of 21 April 2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283).

¹⁷ The Commission refers to the judgments of 9 November 2010, *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:659), and of 21 February 2013, *Banif Plus Bank* (C-472/11, EU:C:2013:88).

40. With a view to answering the question, I will first address the ambit of the national court's duty to make an *ex officio* examination of unfair terms. Next, I will examine the extent of the national court's duty to take *ex officio* investigative measures. Finally, I will turn to the potential relevance of whether or not the consumer has legal representation.

1. Ambit of the *ex officio* examination of unfair terms

41. It should be noted at the outset that the first question referred in the present case has not yet been dealt with in the Court's case-law. Indeed, as indicated in the observations of UniCredit Bank Hungary, in the Court's case-law so far on the national court's *ex officio* examination of unfair terms under Directive 93/13, generally there was no question that the contractual terms formed the basis of the parties' claims or were the subject of the dispute before the referring court.¹⁸

42. Also, the Court addressed a different question in its judgment in *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750). By its fifth question,¹⁹ the referring court asked whether, in light of the principle that the subject matter of an action is delimited by the parties, it was precluded from examining *ex officio* the unfairness of terms not relied on by the consumer in support of his claim in his capacity as an applicant. In its judgment,²⁰ the Court held that Articles 6(1) and 7(1) of Directive 93/13 must be interpreted as requiring the national court to examine *ex officio*, including where necessary in the place of the consumer in his capacity as an applicant, any unfairness of a contractual term, provided that the court has available to it the legal and factual elements necessary for that task. Thus, while the judgment in *OTP Bank and OTP Faktoring* is relevant to the present case, it did not address to what extent the national court's *ex officio* review of unfair terms covers all terms of the contract.

43. Generally speaking, the principle that the subject matter of an action is delimited by the parties is a guiding principle in civil proceedings across the Member States with particular relevance to consumer actions before the national courts.²¹ Under that principle, it is for the parties to initiate or terminate the proceedings and to determine their subject matter and, in consequence, the court can go no further than that subject matter (*ne ultra petita*).²²

¹⁸ See, for example, judgments of 9 November 2010, *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:659, in particular paragraphs 49, 52 and 56); of 30 May 2013, *Jörös* (C-397/11, EU:C:2013:340, in particular paragraphs 15 to 17, 21 and 23); and of 17 May 2018, *Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen* (C-147/16, EU:C:2018:320, paragraph 30).

¹⁹ See judgment of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750, paragraphs 33 and 34).

²⁰ See judgment of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750, paragraphs 84 to 91).

²¹ See, in that regard, Report prepared by a Consortium of European universities led by the Max Planck Institute Luxembourg for Procedural Law as commissioned by the European Commission, 'An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judges and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law', JUST/2014/RCON/PR/CIVI/0082, Strand 2, Procedural Protection for Consumers, June 2017 ('Evaluation Study'), paragraphs 289 to 295. It may be useful to note that this principle may be expressed in various language versions as, for example, Dutch ('lijdelijkheidsbeginsel'); French ('principe dispositif'); German ('Dispositionsgrundsatz'); Hungarian ('rendelkezési elv'); and Spanish ('principio dispositivo').

²² See, for example, judgment of 7 August 2018, *Hochtief* (C-300/17, EU:C:2018:635, paragraph 52 and the case-law cited); Opinions of Advocate General Ruiz-Jarabo Colomer in *Vedial v OHIM* (C-106/03 P, EU:C:2004:457, points 28 to 30); of Advocate General Kokott in *Duarte Hueros* (C-32/12, EU:C:2013:128, point 32); and of Advocate General Mengozzi in *British Airways v Commission* (C-122/16 P, EU:C:2017:406, points 84 and 85), noting that the principle of *ne ultra petita* is a corollary of the principle that the subject matter of an action is delimited by the parties.

44. Set against that backdrop, it may be considered that the Court's case-law on the national court's *ex officio* examination of unfair terms under Articles 6(1) and 7(1) of Directive 93/13 affects the operation of the principle that the subject matter of an action is delimited by the parties, in the sense that the national court is required to play an active role in raising *ex officio* the unfairness of terms in consumer contracts, even if this would have the result that under the national procedural law the court would go beyond the ambit of the dispute defined by the parties.²³

45. Article 6(1) of Directive 93/13 requires Member States to lay down that unfair terms are not binding on consumers,²⁴ whereas under Article 7(1) of that directive, read in conjunction with the twenty-fourth recital thereof, Member States must provide for adequate and effective means to prevent the continued use of unfair terms in consumer contracts.²⁵ While those provisions have given rise to an extensive body of case-law,²⁶ I will outline the applicable principles drawn from that case-law which are most pertinent to my analysis of the present case.

46. The Court has ruled, starting in its seminal judgment in *Océano Grupo Editorial and Salvat Editores*,²⁷ that the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier as regards both his bargaining power and his level of knowledge which leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.²⁸ In order to guarantee the protection intended by Directive 93/13, the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the parties to the contract.²⁹

²³ See, for example, Anthi Beka, *The Active Role of Courts in Consumer Litigation: Applying EU Law of the National Courts' Own Motion* (Intersentia 2018) pp. 123-125 and citations therein. As the Court recognised in its judgment of 7 June 2007, *van der Weerd and Others* (C-222/05 to C-225/05, EU:C:2007:318, paragraph 40), in respect of the *ex officio* application of EU law by national courts, the Court's approach in the field of EU consumer protection law and in particular Directive 93/13 differs from that taken in the line of case-law stemming from the judgment of 14 December 1995, *van Schijndel and van Veen* (C-430/93 and C-431/93, EU:C:1995:441). For a detailed discussion, see, for example, Beka, cited above, chapter 2; Arthur Hartkamp et al. (eds.), *Cases, Materials and Text on European Law and Private Law* (Hart 2017) chapter 7.

²⁴ See, for example, judgments of 26 January 2017, *Banco Primus* (C-421/14, EU:C:2017:60, paragraphs 41 and 42), and of 17 May 2018, *Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen* (C-147/16, EU:C:2018:320, paragraphs 27 and 35). The Court stated that Article 6(1) of Directive 93/13 is a mandatory provision which must be regarded as a provision of equal standing to national rules ranking within the domestic legal system as rules of public policy.

²⁵ See, for example, judgments of 30 April 2014, *Kásler and Káslerné Rábai* (C-26/13, EU:C:2014:282, paragraph 78), and of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750, paragraph 86).

²⁶ For a general discussion, see, for example, Commission Notice, Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (OJ 2019 C 323, p. 4) ('Commission Notice'), section 5. As indicated therein, alongside the case-law establishing the national court's *ex officio* examination of unfair terms under Directive 93/13, there is considerable case-law relating to its application within the context of various national procedural rules involving assessment of their compatibility with the principles that such rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it impossible in practice or excessively difficult to exercise rights conferred by EU law (principle of effectiveness), along with the principle of effective judicial protection guaranteed by EU law.

²⁷ See judgment of 27 June 2000 (C-240/98 to C-244/98, EU:C:2000:346, paragraphs 25 to 29).

²⁸ See, for example, judgment of 26 March 2019, *Abanca Corporación Bancaria and Bankia* (C-70/17 and C-179/17, EU:C:2019:250, paragraph 49 and the case-law cited).

²⁹ See, for example, judgment of 17 May 2018, *Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen* (C-147/16, EU:C:2018:320, paragraph 28 and the case-law cited). In that regard, the Court has considered that, even if Directive 93/13 requires the national court to take positive action in favour of the consumer, this does not mean that the court has to make up fully for a consumer's total inertia. See, for example, judgment of 1 October 2015, *ERSTE Bank Hungary* (C-32/14, EU:C:2015:637, paragraph 62 and the case-law cited). In the present case, there may be inconsistencies between the case file submitted to the Court and certain parties' observations, and in particular that Laws DH1 and DH2 were the reason for the referring court to close the new proceedings (see points 17 to 20 of this Opinion) seems at odds with UniCredit Bank Hungary's observations at the hearing that Mrs Lintner failed to respond to the referring court's invitation to indicate which clauses she wished to challenge for unfairness. As these matters fall within the referring court's jurisdiction, I will not consider them further.

47. It is in the light of those considerations that the Court has held that, in the exercise of the functions incumbent upon a national court under Directive 93/13, that court is required to assess of its own motion whether a contractual term is unfair, and in so doing, compensate for that imbalance between the consumer and the seller or supplier.³⁰ That obligation for the national court is regarded as necessary for ensuring that the consumer enjoys effective protection, in view of the not insignificant risk that he is unaware of his rights or encounters difficulties in enforcing them.³¹

48. Notably, in that context, the Court's clear recognition since *Pannon*³² of the national court's obligation, as opposed to power, to examine *ex officio* the unfairness of contractual terms under Directive 93/13 has been accompanied by the condition that the national court has available to it the legal and factual elements necessary for that task.³³ If those elements are not available to it, a national court is not in a position to examine whether a contractual term is unfair under that directive.³⁴

49. In the present case, on the basis of the foregoing case-law and in particular the condition that the national court must have available to it the necessary legal and factual elements to make an *ex officio* assessment, I take the view that the ambit of the national court's duty to examine *ex officio* unfair terms under Directive 93/13 extends only to the contractual terms which are related to the object of the dispute and have a link with the legal or factual elements in the case file.

50. This proposed approach may be considered to respect the principle that the subject matter of an action is delimited by the parties, since it does not go beyond the ambit of the dispute as determined by the parties. As one commentator has considered: 'Even if the principle of party presentation [according to which the delimitation of the ambit of the dispute belongs to the parties] is *tempered* in order to accommodate the underlying power imbalance of the parties, the consumer proceedings do not become inquisitorial. The requirement to observe the factual ambit of the dispute is the "borderline" which the courts cannot cross.'³⁵

51. On the contrary, as indicated in all of the parties' observations in the present case, an approach obliging the national court to carry out an unlimited *ex officio* examination of the unfairness of contractual terms under Directive 93/13 would appear to run counter to fundamental principles of civil procedural law of the Member States, including the principles that the subject matter of an action is delimited by the parties and that the court may not rule *ultra petita*.

52. At the same time, this proposed approach ensures the system of protection underlying Directive 93/13 and the active role played by the national court in raising *ex officio* the unfairness of terms which have not been challenged by the consumer following from the Court's case-law mentioned in points 46 and 47 of this Opinion.³⁶

30 See, for example, judgment of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750, paragraph 87 and the case-law cited).

31 See, for example, judgment of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750, paragraph 88 and the case-law cited).

32 Judgment of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350, paragraphs 32 and 35); see also, in that regard, judgment of 28 July 2016, *Tomášová* (C-168/15, EU:C:2016:602, paragraphs 28 to 31).

33 See, for example, judgments of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 46), and of 30 May 2013, *Jörös* (C-397/11, EU:C:2013:340, paragraph 28).

34 See, in that regard, judgment of 13 September 2018, *Profi Credit Polska* (C-176/17, EU:C:2018:711, paragraph 47), and order of 28 November 2018, *PKO Bank Polski* (C-632/17, EU:C:2018:963, paragraph 38).

35 *Beka* (see footnote 23 above), pp. 77 and 192.

36 It is worth noting that early on in the Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, COM(2000) 248 final, 27 April 2000, section 4, pp. 19-20, the Commission indicated: 'It goes without saying that we are referring to the courts' power or obligation to assess *ex officio* the unfairness of contractual terms which are relevant to the resolution of the dispute at issue and not all the other terms of the contract.'

53. This proposed approach also appears to be in line with the case-law and practice of certain Member States.³⁷ For instance, in France, the courts have an obligation to set aside unfair terms in consumer cases where the unfairness derives from the elements of the dispute.³⁸ In the Netherlands, the Hoge Raad (Supreme Court) considered in its judgment in *Heesakkers v Voets*³⁹ that if the court has the necessary factual and legal information to suspect that an agreement falls within the scope of Directive 93/13 and contains a clause which is unfair within the above meaning, it should examine the matter, even if the claim or the defence has not been based on allegations aimed at such examination. In Spain, judgments of the Tribunal Supremo (Supreme Court) indicate that the national judge is obliged to control *ex officio* the unfairness of contractual terms as soon as it has the necessary legal and factual elements.⁴⁰ Furthermore, in light of the observations of the Hungarian Government (see points 31 and 32 of this Opinion), it appears that, in Hungary, a national court's *ex officio* examination applies to terms whose unfairness can be established on the basis of the case file.

2. *Ex officio investigative measures*

54. In reference to the observations of the Hungarian Government and the Commission (see points 31 and 36 of this Opinion), it is necessary to consider whether, in circumstances where the national court has indications or suspicions that contractual terms which are related to the object of the dispute and have a link to the legal or factual elements in the case file could be unfair, Directive 93/13 requires that the court be able to take *ex officio* investigative measures to verify this.

55. I take the view that Articles 6(1) and 7(1) of Directive 93/13 require that the national court be able to take *ex officio* investigative measures to complete the case file, such as requesting clarification or documentary evidence from the parties, in order to obtain the necessary legal and factual elements to carry out an *ex officio* examination of whether a contractual term is unfair. I do so for the following reasons.

56. In *VB Pénzügyi Lízing*,⁴¹ the Court was asked by way of a reference for a preliminary ruling from a Hungarian court, inter alia, whether, in a situation in which the national court begins to consider whether a contractual term conferring exclusive territorial jurisdiction may be unfair, the court must undertake, of its own motion, an investigation with a view to establishing the legal and factual elements necessary to assess whether the term is unfair, where the national procedural rules permit that only if one of the parties so requests.

57. In its judgment,⁴² the Court held that the national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of Directive 93/13 and, if it does, assess of its own motion whether such a term is unfair. In dividing the

37 See, for example, Hartkamp et al. (see footnote 23 above), pp. 433-461 (providing comparative analysis of case-law relating to unfair terms from Belgium, France, Hungary, Italy, the Netherlands, Poland, Spain and the United Kingdom).

38 See Article R632-1 of the Code de la consommation (the Consumer Code) (English translation based on Beka (see footnote 23 above), pp. 195 and 328-334). That provision states: 'Le juge peut relever d'office toutes les dispositions du présent code dans les litiges nés de son application. Il écarte d'office, après avoir recueilli les observations des parties, l'application d'une clause dont le caractère abusif ressort des éléments du débat.'

39 See judgment of the Hoge Raad der Nederlanden (Supreme Court, the Netherlands) of 13 September 2013, 274 ECLI:NL:HR:2013:691 (English translation based on Hartkamp et al. (see footnote 23 above), pp. 436-440, in particular p. 438). For further discussion, see, for example, Alain Ancery and Bart Krans, 'Consumer Protection and EU-Driven Judicial Activism in the Netherlands', in Anna Nylund and Magne Strandberg (eds.), *Civil Procedure and Harmonisation of Law: The Dynamics of EU and International Treaties* (Intersentia 2019) 125, in particular pp. 136-137.

40 See, for example, judgments of the Tribunal Supremo (Supreme Court, Spain) of 4 June 2019, ECLI:ESTS:2019:1713, and of 4 June 2019, ECLI:ESTS:2019:1942.

41 See judgment of 9 November 2010 (C-137/08, EU:C:2010:659, paragraphs 24, 25 and 45).

42 See judgment of 9 November 2010, *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:659, paragraphs 49 to 56). Compare Opinion of Advocate General Trstenjak in *VB Pénzügyi Lízing* (C-137/08, EU:C:2010:401, points 109 to 115).

examination into two stages, the Court underlined that, in the first stage, the court must ‘in all cases and whatever the rules of domestic law’ determine whether the contested term falls within the scope of that directive, and if so, in the second stage, the court must assess that term, if necessary of its own motion, according to the requirements of unfairness under that directive.

58. The Court has confirmed its ruling in *VB Pénzügyi Lízing* in subsequent cases, sometimes associated with a term conferring exclusive territorial jurisdiction,⁴³ or framed in more general terms to the effect that the national court must investigate of its own motion whether a term in a contract concluded between a seller or supplier and a consumer falls within the scope of the Directive and, if it does, assess of its own motion whether such a term is unfair.⁴⁴

59. Even so, that line of case-law following from *VB Pénzügyi Lízing* appears to have left open questions in particular relating to whether the national court’s duty to take *ex officio* investigative measures is limited to the scope of Directive 93/13⁴⁵ or may also apply to the unfairness assessment, as well as what such investigative measures may involve.

60. Viewed from a comparative perspective, it appears that the civil procedural laws of the Member States generally provide courts with powers to instruct the parties to provide additional evidence and to ask questions of the parties for clarification, whereas the Member States take divergent approaches when it comes to actual so-called ‘measures of inquiry’ — for example, where the courts gather evidence of their own motion through *ex officio* hearing of witnesses, *ex officio* ordering of evidence by third parties, *ex officio* hearing of experts, or *ex officio* visits — which go beyond the mere asking of questions or requesting the submission of additional documents from the parties.⁴⁶

61. On that basis, it may be considered that *ex officio* investigative measures taken by the national court to complete the case file, such as requesting clarification or documentary evidence from the parties in the dispute, in order to form an opinion whether a contractual term is unfair constitute appropriate means of ensuring the system of protection for consumers under Directive 93/13 so that the national court is able to carry out its *ex officio* examination of unfair terms pursuant to the provisions of that directive.

62. The fact that the Court has emphasised the need for sufficient evidence in order to rely on Directive 93/13 in its case-law may be viewed as lending support for the position that the national court has at its disposal sufficient legal and factual elements for the *ex officio* examination if necessary by being able to take *ex officio* investigative measures to that effect.

63. For instance, in *Profi Credit Polska*,⁴⁷ the Court held that under the particular circumstances of that case in which a national court is hearing an application under a consumer credit agreement for which it has serious doubts as to the unfairness of provisions agreed between the parties and it does not have available to it the necessary legal and factual elements, Articles 6(1) and 7(1) of Directive 93/13 require the court to examine *ex officio* whether the provisions agreed between the parties are

⁴³ See, for example, judgments of 14 June 2012, *Banco Español de Crédito* (C-618/10, EU:C:2012:349, paragraph 44), and of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 47). See also Opinion of Advocate General Trstenjak in *Banco Español de Crédito* (C-618/10, EU:C:2012:74, in particular points 32 to 46).

⁴⁴ See, for example, judgments of 21 February 2013, *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraph 24); of 9 July 2015, *Bucura* (C-348/14, not published, EU:C:2015:447, paragraph 43); and of 7 November 2019, *Profi Credit Polska* (C-419/18 and C-483/18, EU:C:2019:930, paragraph 66). See also, for example, Opinions of Advocate General Wahl in *CA Consumer Finance* (C-449/13, EU:C:2014:2213, point 31); of Advocate General Szpunar in *Finanmadrid EFC* (C-49/14, EU:C:2015:746, point 39); and of Advocate General Kokott in *Margarit Panicello* (C-503/15, EU:C:2016:696, point 142 footnote 70).

⁴⁵ See, in that regard, Verica Trstenjak, ‘Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU’ (2013) *European Review of Private Law* 451, 468-472.

⁴⁶ See, for example, Evaluation Study (see footnote 21 above), paragraphs 390 to 395. As further indicated in paragraphs 396 to 399 thereof, the question of consumer status for the purposes of the scope of the relevant EU directive may be considered part of the court’s task of qualifying the facts of the case in light of the relevant legal rules, in application of the *iura novit curia* principle. See, in that regard, judgment of 4 June 2015, *Faber* (C-497/13, EU:C:2015:357, paragraphs 39 to 48).

⁴⁷ See judgment of 7 November 2019 (C-419/18 and C-483/18, EU:C:2019:930, in particular paragraphs 64, 66 to 68 and 77).

unfair, and in that regard, require that the court be able to request the production of the documents on which the application is based, so that the court is able to verify that the rights that consumers derive from that directive are observed. The Court emphasised that such a request does not contravene the principle that the subject matter of an action is delimited by the parties, since it forms part of the evidential framework of the proceedings.

64. By contrast, it should be noted that no arguments have been presented to the Court that an obligation for the national court to take more extensive *ex officio* ‘measures of inquiry’ as referred to in point 60 of this Opinion would be necessary for ensuring the system of protection for consumers under Directive 93/13 in the particular circumstances of the present case. This matter remains in principle within the discretion of the national court based on the relevant national procedural law, subject to compliance with EU law.⁴⁸

3. Legal representation

65. As a final point, I take the view that the issue of legal representation does not have any bearing in respect of the assessment of the ambit of the national court’s *ex officio* examination of unfair terms under Directive 93/13 in the circumstances of the present case.

66. I acknowledge that, from a comparative perspective, even in the Member States which strictly adhere to the principle that the subject matter of an action is delimited by the parties, the extent to which the court actively intervenes and/or raises issues of its own motion is based on various circumstances, including whether or not the party is represented, and that, in certain Member States, the court may be expected to be more active when the weaker party is not represented by a lawyer, with the aim of reducing the inequality between the parties.⁴⁹

67. That said, as indicated by the Hungarian Government, the system of protection afforded by Directive 93/13 and the national court’s obligation to carry out an *ex officio* examination of unfair terms flowing from the Court’s case-law as set out in points 46 and 47 of this Opinion is based on the imbalance which exists between the consumer and the seller or supplier at the time of conclusion of the contract, and not at the time of the exercise of the rights arising from the contract.

68. Consequently, as the Court held in *Rampion and Godard*,⁵⁰ involving the interpretation of EU legislation on consumer credit,⁵¹ the fact that a case is brought by a consumer and the consumer is represented in those proceedings by a lawyer does not justify a different conclusion in respect of the need to permit the court to act of its own motion, since the issue of *ex officio* examination must be

⁴⁸ See, in that regard, Opinion of Advocate General Kokott in *Margarit Panicello* (C-503/15, EU:C:2016:696, points 142 to 145), noting that a situation in which a national court has indications that certain contractual terms are unfair, but cannot investigate because its powers of examination are restricted would be problematic. Yet, in that case, the Advocate General considered that the national rules in question allowed the court to take into account documentary evidence and were interpreted as allowing for more extensive investigative powers in legitimate cases and thus were not precluded by Directive 93/13. The Court did not have the opportunity to rule on the matter, as it found the reference inadmissible. See judgment of 16 February 2017, *Margarit Panicello* (C-503/15, EU:C:2017:126).

⁴⁹ See, in that regard, Evaluation Study (see footnote 21 above), in particular paragraphs 317 to 320 and 340 to 342.

⁵⁰ Judgment of 4 October 2007, *Rampion and Godard* (C-429/05, EU:C:2007:575, paragraph 65), and Opinion of Advocate General Mengozzi in *Rampion and Godard* (C-429/05, EU:C:2007:199, point 107). See also, in that regard, judgment of 4 June 2015, *Faber* (C-497/13, EU:C:2015:357, paragraph 47), and Opinion of Advocate General Sharpston in *Faber* (C-497/13, EU:C:2014:2403, point 72).

⁵¹ Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48), as amended by Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 17). That directive has since been repealed by Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66).

settled independently of the specific circumstances of the case. This reasoning is applicable to the assessment of the national court's *ex officio* examination of unfair terms under Directive 93/13, especially seeing as the Court applied the considerations from its case-law on Directive 93/13 to the circumstances arising in that case.⁵²

69. In light of the foregoing, I take the view that Articles 6(1) and 7(1) of Directive 93/13 require a national court to examine *ex officio* the unfairness of contractual terms which are related to the object of the dispute and have a link with the legal or factual elements in the case file. Those provisions also require that the national court be able to take *ex officio* investigative measures to complete the case file in order to obtain the necessary legal and factual elements to carry out that examination.

B. Questions 2 and 3

70. By the second and third questions, taken together, the referring court in substance seeks guidance whether, in the event that the first question is answered in the negative, a national court is required under Articles 4(1), 6(1) and 7(1) of Directive 93/13 to examine the unfairness of all of the other contractual terms when examining the unfairness of a particular contractual term.

71. I have reached the conclusion that these questions should be answered to the effect that, under Articles 4(1), 6(1) and 7(1) of Directive 93/13, a national court is not required to examine *ex officio* all of the other contractual terms autonomously for unfairness when carrying out an overall assessment of the contract for the purposes of examining the unfairness of a particular contractual term. My reasons for so concluding are as follows.

72. It should be borne in mind that Article 4(1) of Directive 93/13 states in relevant part that ‘the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and *to all the other terms of the contract* or of another contract on which it is dependent’.⁵³ That provision is part of the framework for the unfairness assessment of contractual terms set out in Directive 93/13.⁵⁴

73. As the Court held in *Banif Plus Bank*,⁵⁵ in reference to that provision, the national court must, in order to determine whether the contractual term on which the claim brought before it is based may be unfair, take account of all of the other terms of the contract, and thus not just the terms on which the claim before it is based.

74. This implies an overall assessment of the terms of the contract.⁵⁶ Indeed, as Advocate General Saugmandsgaard Øe pointed out, ‘for the purposes of assessing unfairness, a contractual term cannot be isolated from its context. It follows that such an assessment is not absolute but relative, inasmuch as it is dependent on the particular facts attending the conclusion of the contract, including the cumulative effect of all of the terms of the contract.’⁵⁷

⁵² See judgment of 4 October 2007, *Rampion and Godard* (C-429/05, EU:C:2007:575, in particular paragraphs 60 to 63 and 69).

⁵³ Emphasis added.

⁵⁴ For a general discussion, see, for example, Commission Notice (see footnote 26 above), section 3.

⁵⁵ See judgment of 21 February 2013, *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraphs 37 to 41). See also, for example, judgment of 16 January 2014, *Constructora Principado* (C-226/12, EU:C:2014:10, paragraph 24).

⁵⁶ See, for example, judgment of 21 April 2016, *Radlinger and Radlingerová* (C-377/14, EU:C:2016:283, paragraph 95).

⁵⁷ Opinion of Advocate General Saugmandsgaard Øe in *Biuro podróży Partner* (C-119/15, EU:C:2016:387, point 44).

75. Thus, the national court is required, under Article 4(1) of Directive 93/13, to take account of all of the other terms of the contract when examining the unfairness of a particular term. Yet, that does not mean that the national court is required to examine *ex officio* those other terms autonomously for unfairness as part of that assessment pursuant to Articles 6(1) and 7(1) of that directive.

76. Nevertheless, as indicated by the Hungarian Government and the Commission, in the process of undertaking that overall assessment, the national court may encounter contractual terms which may be considered to be unfair and which the court is required to examine *ex officio* where it has the necessary legal and factual elements to that end in accordance with the Court's case-law (see point 48 of this Opinion). While the fact that a national court takes into account the other terms of the contract for the purposes of assessing the unfairness of a particular contractual term should not be equated with an *ex officio* examination, this may promote such an examination of any of those terms where the necessary legal and factual elements are available for that purpose.

77. In light of the foregoing, I take the view that, under Articles 4(1), 6(1) and 7(1) of Directive 93/13, a national court is not required to examine *ex officio* all of the other contractual terms autonomously for unfairness when carrying out an overall assessment of the contract for the purposes of examining the unfairness of a particular contractual term.

VII. Conclusion

78. I propose that the Court answer the questions referred by the Fővárosi Törvényszék (Budapest High Court, Hungary) as follows:

- (1) Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts require the national court to examine of its own motion the unfairness of contractual terms which are related to the object of the dispute and have a link with the legal or factual elements in the case file.
- (2) Articles 4(1), 6(1) and 7(1) of Council Directive 93/13/EEC do not require the national court to examine of its own motion all of the other contractual terms autonomously for unfairness when carrying out an overall assessment of the contract for the purposes of examining the unfairness of a particular contractual term.