# JUDGMENT OF THE COURT (Fifth Chamber)
1 April 2004 *

In Case C-237/02,

REFERENCE to the Court under Article 234 EC by the Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

**Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG**

and

**Ludger Hofstetter,**

**Ulrike Hofstetter,**

on the interpretation of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), acting for the President of the Fifth Chamber, C.W.A. Timmermans, A. Rosas, A. La Pergola and S. von Bahr, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG, by U. Jeutter, Rechtsanwalt,

— Mr and Mrs Hofstetter, by D. Fiebelkorn, Rechtsanwältin,

— the German Government, by W.-D. Plessing, acting as Agent,

— the Commission of the European Communities, by M. França and H. Kreppel, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 25 September 2003,

gives the following

## Judgment

1 By order of 2 May 2002, received at the Court on 27 June 2002, the Bundesgerichtshof (Federal Court of Justice) referred a question for a preliminary ruling under Article 234 EC on the interpretation of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) (hereinafter 'the Directive').

2 That question was raised in proceedings between Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG (hereinafter 'Freiburger Kommunalbauten'), claimant in the main proceedings, and Mr and Mrs Hofstetter, defendants in the main proceedings, relating to liability for default interest on the price payable for the building and purchase of a parking space.

## Legal background

*The Directive*

3 Article 1(1) of the Directive states that its purpose 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.

4 Article 3 of the Directive provides:

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

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

...

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

5 The terms specified in that Annex include:

'Terms which have the object or effect of:

...

(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations ...;

...

(o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;

...'

6 Article 4(1) of the Directive states:

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

*National law*

7 At the time relevant to the facts in the main proceedings, the protection of consumers against the unfair terms referred to in the Directive was governed under German law by the Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (Law on standard business terms, hereinafter 'the AGBG') of 9 December 1976 (BGBl. 1976, I, p. 3317). Paragraph 9 of that Law stated:

'1. Provisions in standard business terms are invalid if, contrary to the requirement of good faith, they place the contractual partner of the user at an unreasonable disadvantage.

2. In case of doubt, an unreasonable disadvantage is deemed to exist if a provision:

(1) cannot be reconciled with essential basic principles of the statutory rule from which it deviates, or

(2) restricts the essential rights or duties that are inherent in the nature of the contract in such a manner that there is a risk that the purpose of the contract will not be achieved.'

8 As regards the contract under which the work was let, Paragraph 641 of the Bürgerliches Gesetzbuch (German civil code, hereinafter 'the BGB') sets out, in non-mandatory terms, a rule relating to the circumstances in which payment may be demanded. That provision states that payment is due upon acceptance of the work.

## The main proceedings

9 By notarial contract of 5 May 1998, Freiburger Kommunalbauten, a municipal construction company acting in the course of its business, sold to Mr and Mrs Hofstetter, who were dealing as consumers, a parking space located in a multi-storey car park that Freiburger Kommunalbauten was to build.

10 Under clause 5 of the contract, the whole of the price was due upon delivery of a security by the contractor. In the event of late payment, the purchaser was liable to pay default interest.

11 The security took the form of a bank guarantee and was delivered to Mr and Mrs Hofstetter on 20 May 1999. The guarantor undertook, as a primary liability, to guarantee any claims Mr and Mrs Hofstetter might assert against Freiburger Kommunalbauten for repayment of the purchase price paid it or of which it was entitled to dispose.

12 Mr and Mrs Hofstetter refused to make the payment. They claimed that the provision requiring payment of the whole of the price was contrary to Paragraph 9 of the AGBG. They paid the price only after they had accepted the parking space, free of defects, on 21 December 1999.

13 Freiburger Kommunalbauten claimed default interest for late payment. The Landgericht Freiburg (Freiburg Regional Court) (Germany) upheld the claim. On appeal, the Oberlandesgericht Karlsruhe (Karlsruhe Higher Regional Court) (Germany) dismissed the claim. Freiburger Kommunalbauten then appealed on a point of law to the Bundesgerichtshof.

14 The Bundesgerichtshof held that the disputed contract fell within the scope of the Directive as set out in Article 3(2). It is inclined to the view that clause 5 of the disputed contract is not an unfair term under German law. However, it considers

that having regard to the wide variety of rules applying in the Member States this assessment is not free from doubt. The Bundesgerichtshof therefore decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is a term, contained in a seller's standard business conditions, which provides that the purchaser of a building which is to be constructed is to pay the total price for that building, irrespective of whether there has been any progress in the construction, provided that the seller has previously provided him with a guarantee from a credit institution securing any monetary claims the purchaser may have in respect of defective performance or non-performance of the contract, to be regarded as unfair within the meaning of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts?'

## The question referred

15 All of the observations submitted to the Court concern the balancing of the advantages and disadvantages of the disputed clause under the national law.

16 Freiburger Kommunalbauten and the German Government submit that the disputed clause is not unfair. The disadvantages to which a consumer might be exposed as a result of the obligation to pay the price before performance of the contract are counterbalanced by the bank guarantee provided by the builder. It is true that this clause reverses the order for performance of the obligations under the contract laid down, in non-mandatory terms, in Paragraph 641 of the BGB.

However, as it reduces the need for the builder to finance the building work through use of borrowings, the price of that work may be reduced as a result. Furthermore, the bank guarantee provided by the builder limits the disadvantages faced by purchasers, as it guarantees repayment to them of sums paid in cases of both non-performance and defective performance of the contract, even if the builder were to become insolvent.

17 Mr and Mrs Hofstetter submit that the disputed clause is unfair and is a term of the kind referred to at point 1(b) and (o) of the Annex to the Directive. The fundamental principle, recognised in all systems of civil law, that mutual obligations must be performed contemporaneously, is contravened and the 'equality of arms' between the contracting parties is upset to the detriment of the consumer, whose position is significantly weakened, particularly where litigation arises in relation to defects in construction. They add that the clause is highly unusual, that it is unclear and that it was imposed by a builder who was in a monopoly situation.

18 Having carried out a detailed analysis of German law, the Commission of the European Communities is of the view that the disputed clause gives rise on any analysis to a disadvantage which is detrimental to the consumer. The question whether it causes a significant and unjustified imbalance for the purposes of Article 3(1) of the Directive is a matter to be decided by the national court.

19 It should be noted in that regard that in referring to concepts of good faith and significant imbalance between the rights and obligations of the parties, Article 3 of the Directive merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated (see, to that effect, Case C-478/99 *Commission* v *Sweden* [2002] ECR I-4147, paragraph 17).

20 The Annex to which Article 3(3) of the Directive refers only contains an indicative and non-exhaustive list of terms which may be regarded as unfair. A term appearing in the list need not necessarily be considered unfair and, conversely, a term that does not appear in the list may none the less be regarded as unfair (*Commission* v *Sweden,* paragraph 20).

21 As to the question whether a particular term in a contract is, or is not, unfair, Article 4 of the Directive provides that the answer should be reached 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. It should be pointed out in that respect that 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.

22 It follows, as the Advocate General has observed at point 25 of his Opinion, that in the context of its jurisdiction under Article 234 EC to interpret Community law, the Court may interpret general criteria used by the Community legislature in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question.

23 It is true that in Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraphs 21 to 24, the Court held that a term, drafted in advance by the seller, the purpose of which is to confer

jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller has his principal place of business, satisfies all the criteria necessary for it to be judged unfair for the purposes of the Directive. Nevertheless, that assessment was reached in relation to a term which was solely to the benefit of the seller and contained no benefit in return for the consumer. Whatever the nature of the contract, it thereby undermined the effectiveness of the legal protection of the rights which the Directive affords to the consumer. It was thus possible to hold that the term was unfair without having to consider all the circumstances in which the contract was concluded and without having to assess the advantages and disadvantages that that term would have under the national law applicable to the contract.

24 As is clear from the observations submitted to the Court, that does not apply to the term at issue in the main proceedings.

25 The answer to the question referred for a preliminary ruling is therefore that it is for the national court to decide whether a contractual term such as that at issue in the main proceedings satisfies the requirements for it to be regarded as unfair under Article 3(1) of the Directive.

## Costs

26 The costs incurred by the German Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Bundesgerichtshof by order of 2 May 2002, hereby rules:

**It is for the national court to decide whether a contractual term such as that at issue in the main proceedings satisfies the requirements for it to be regarded as unfair under Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.**

Jann Timmermans Rosas

La Pergola von Bahr

Delivered in open court in Luxembourg on 1 April 2004.

R. Grass V. Skouris

Registrar President