OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 29 March 2007 [1]

I — Introduction

1. By judgment of 16 November 2005, the Tribunal d'instance (District Court), Saintes, France, referred two questions to the Court under Article 234 EC for a preliminary ruling on the interpretation of 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. [2]

2. In substance, the Court is asked first to clarify whether Articles 11 and 14 of Directive 87/102 permit provisions of national law which, in implementation of that directive, lay down rules on interdependence between credit agreements and contracts of sale for the goods or services being financed by that credit to make the application of such rules subject to the condition that the credit agreement must indicate the goods or services being financed; and, second, to clarify the aims of Directive 87/102 and whether it must be held that, under Community law, the national courts may of their own motion apply those provisions of national law, even where the national legal system precludes them from doing so of their own motion.

II — Legal background

A — *Community legislation*

3. Under Article 1(1) and (2)(c) of Directive 87/102, that directive 'applies to credit agreements', in other words, to all agreements whereby 'a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a loan or other similar financial accommodation'; however, the credit agreements listed in Article 2 of the directive are excluded.

1 — Original language: Italian.

2 — OJ 1987, L 42, p. 48. That directive was amended first by Council Directive 90/88/EEC of 22 February 1990 (OJ 1990 L 61, p. 14) and then by Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 17).

4. Article 4(1) of Directive 87/102 provides that the credit agreement must be made in writing and Article 4(2)(a) states that the written agreement must include a statement of the annual percentage rate of charge. Article 4(3) states that '[t]he written agreement shall further include the other essential terms of the contract' and indicates that '[b]y way of illustration, ... Annex [I] to this Directive contains a list of terms which Member States may require to be included in the written agreement as being essential'.

5. Article 11 of Directive 87/102 provides as follows:

'1. Member States shall ensure that the existence of a credit agreement shall not in any way affect the rights of the consumer against the supplier of goods or services purchased by means of such an agreement in cases where the goods or services are not supplied or are otherwise not in conformity with the contract for their supply.

2. Where:

(a) in order to buy goods or obtain services the consumer enters into a credit agreement with a person other than the supplier of them; and

(b) the grantor of the credit and the supplier of the goods or services have a pre-existing agreement whereunder credit is made available exclusively by that grantor of credit to customers of that supplier for the acquisition of goods or services from that supplier; and

(c) the consumer referred to in subparagraph (a) obtains his credit pursuant to that pre-existing agreement; and

(d) the goods or services covered by the credit agreement are not supplied, or are supplied only in part, or are not in conformity with the contract for supply of them; and

(e) the consumer has pursued his remedies against the supplier but has failed to obtain the satisfaction to which he is entitled,

the consumer shall have the right to pursue remedies against the grantor of credit. Member States shall determine to what extent and under what conditions these remedies shall be exercisable.

...'

6. Finally, Article 14 of Directive 87/102 provides as follows:

'1. Member States shall ensure that credit agreements shall not derogate, to the detriment of the consumer, from the provisions of national law implementing or corresponding to this Directive.

2. Member States shall further ensure that the provisions which they adopt in implementation of this directive are not circumvented as a result of the way in which agreements are formulated, in particular by the device of distributing the amount of credit over several agreements.'

B — *National legislation*

7. Under French law, the rules on consumer credit were originally set out in Law No 78-22 of 10 January 1978. [3] Those rules, which pre-date Directive 87/102 and were subsequently supplemented by Law No 89-421 of 23 June 1989, [4] were eventually incorporated in Book III, Title I, Chapter I, of the Code de la Consommation ('the Consumer Code') referred to in Law No 93-949 of 26 July 1993 [5] and Decree No 97-298 of 27 March 1997. [6]

3 — Loi relative à l'information et à la protection des consommateurs dans le domaine de certaines opérations de crédit (Law on consumer information and protection in connection with certain credit transactions, also known as the 'Scrivener Law', JORF, 11 January 1978, p. 299).

4 — Loi relative à l'information et à la protection des consommateurs ainsi qu'à diverses pratiques commerciales (Law on consumer information and protection and on various commercial practices, JORF, 29 June 1989, p. 8047).

5 — Loi instaurant le Code de la consommation — Partie législative (Law establishing the Consumer Code — Legislative part) (JORF, 27 July 1993, p. 10538).

6 — Décret relatif au Code de la consommation — Partie réglementaire (Decree on the Consumer Code — Regulatory part) (JORF, 3 April 1997, p. 78).

8. Under Article L. 311-2 of the Consumer Code, the provisions of Chapter I 'shall apply to credit transactions, including any related guarantees, granted ordinarily by natural or legal persons, either against payment or free of charge'. [7]

9. Under Article L. 311-8 of the Consumer Code, the credit transactions referred to in Article L. 311-2 must be concluded by means of a prior offer to be sent to the borrower, which, under Article L. 311-10, must (i) state, among the other terms of the credit, 'if applicable, the overall effective rate of charge' (paragraph 2); (ii) make reference 'if applicable, to Articles L. 311-20 to L. 311-31 and L. 311-13' among the other provisions of the Consumer Code (paragraph 3); and (iii) indicate, 'if applicable, the goods or services being financed' (paragraph 4).

10. Under Article L. 313-13 of the Consumer Code '[t]he prior credit offer shall be drawn up in accordance with the conditions laid down in the preceding articles using one of the standard models prescribed by the Banking Regulation Committee after consultation with the National Consumer Council'. Article R. 311-6 of the Consumer Code provides in turn that '[t]he prior credit offer referred to in Article L. 311-8 shall include the information appearing in whichever standard model, among those annexed to this Code, corresponds to the type of credit transaction proposed'.

7 — As in the case of all national provisions cited in this Opinion, the translation is not official.

11. Articles L. 311-20 to L. 311-28 of the Consumer Code lay down specific rules with regard to 'tied credit', where there is a degree of interdependence between the credit agreement and the contract of sale both at the time of conclusion of the contracts and during performance thereof.

12. In particular, Article L. 311-20 of the Consumer Code provides principally that 'where the prior credit offer indicates the goods or services being financed, the borrower's obligations shall arise only with effect from delivery of the goods or from supply of the services'.

13. Furthermore, Article L. 311-21(1) of the Consumer Code provides as follows:

'In the event of a dispute concerning the performance of the principal contract, the court may, pending the outcome of the dispute, suspend performance of the credit agreement. The credit agreement shall be set aside or annulled by operation of law where the contract in respect of which it was entered into is itself judicially set aside or annulled.'

14. Finally, Article L. 311-33 of the Consumer Code, which applies to all the types of credit transaction envisaged by Article L. 311-2, punishes failure on the part of the

grantor of credit to comply with the formalities laid down in Articles L. 311-8 to L. 311-13 by divesting it of the right to interest. In that way, the extent of the borrower's obligation to repay is limited to the principal, which must be repaid by the deadlines laid down.

III — Facts, questions referred for a preliminary ruling and course of the proceedings

15. The dispute in the main proceedings is between, on the one hand, Mr Max Rampion and Mrs Marie-Jeanne Rampion, née Godard, ('Mr and Mrs Rampion') and, on the other, Franfinance SA and K par K SAS ('KpK').

16. Under a private agreement signed on 5 September 2003 following a visit to their home by a representative of KpK, Mr and Mrs Rampion purchased from the latter, for a total price of EUR 6 150, a number of windows to be delivered and installed, according to the terms of the contract of sale, no later than six to eight weeks after the technician had measured up. The contract of sale also mentioned the possibility of obtaining a credit from Franfinance to finance the total cost of the purchase.

17. On the same day Mr and Mrs Rampion entered into an arrangement with Franfinance for a credit facility, the maximum authorised credit balance being EUR 6 150. Although it is possible to identify the supplier (KpK) from that offer of credit, the type of goods or services being financed does not emerge.

18. On 27 November 2003, the date set for the delivery and installation of the windows, Mr and Mrs Rampion noticed that the sills and frames into which KpK was about to install the windows were infested with parasites. Accordingly, on 5 January 2004, they notified KpK by registered letter (with a form for acknowledgement of receipt) that they wished to terminate the contract of sale.

19. Since they received no satisfactory response to their request for termination of the contract of sale, Mr and Mrs Rampion brought proceedings against KpK and Franfinance before the Tribunal d'instance, Saintes ('the Tribunal d'instance'), by documents dated 29 October and 2 November 2004, seeking a declaration that the contract was void and the termination, in consequence, of the credit agreement, or, in the alternative, a declaration that the contract of sale was terminated owing to breach of contract by the supplier.

20. With regard to the application for voidance of the contract of sale, Mr and Mrs Rampion stated that the clause relating to the delivery deadline simply left the other party free to decide on that point and

maintained that the contract was void because it did not specify a precise delivery deadline as required under Article L. 114-1 of the Consumer Code.

21. With regard to the application for termination of the contract of sale on the ground of breach of contract, Mr and Mrs Rampion claimed that KpK had failed to check the soundness of the supporting structure in advance and to provide for it to be replaced and had therefore failed to fulfil its 'obligation to give advice' (*'obligation de conseil'*).

22. Both KpK and Franfinance contended before the court that the plaintiffs' applications should be dismissed, pleading in essence that:

— the words '6 to 8 weeks after [the technician] has measured up' satisfied the requirements of Article L. 114-1 of the Consumer Code;

— the credit was not contractually tied to the contract of sale for the windows, given that — leaving aside the fact that the credit agreement was an arrangement for a credit facility — the application of the provisions of the Consumer Code relating to the interdependence of contracts of sale and credit agreements was conditional, under Article L. 311-20 of the Consumer Code, upon an indication being given in the prior offer of credit of the goods being sold, and in any event such an indication was lacking in the present case.

23. By interlocutory decision of 1 June 2005, the Tribunal d'instance ordered the proceedings to be reopened for the purpose of receiving the observations of the parties on the points of law raised of the court's own motion in that decision concerning the provisions of Article L. 311-8 et seq. of the Consumer Code (relating to consumer credit) and Article L. 121-21 et seq. of the Consumer Code (relating to door-to-door selling).

24. After receiving the observations of the parties, the Tribunal d'instance, by judgment of 16 November 2005 ('the order for reference'), held it necessary, in order to resolve the dispute, to make a reference to the Court of Justice for a preliminary ruling.

25. First, the Tribunal d'instance noted that:

— under French law the provisions of Article 11 of Directive 87/102 are implemented by means of Articles L. 311-20 and L. 311-21 of the Consumer Code;

— according to some legal commentators, where a grantor of credit is aware that the credit is to be used for financing the purchase of goods or services, it must provide the borrower with an offer of credit stating that the loan is tied to that purchase;

— the Cour de cassation (Court of Cassation) takes a literal approach to the interpretation of Article L. 311-20 of the Consumer Code, making the application of the rules on interdependence between credit agreements and contracts of sale subject to the condition that the offer of credit must indicate the goods or services being financed;

— in the present case, although the credit agreement does not mention the tie with the contract of sale, in reality a link between the two does exist, even if the supplier and the grantor of credit deny this (while nevertheless failing to show that Mr and Mrs Rampion intended to use the loan to finance other expenditure);

— the arrangement of a freestanding credit facility, as opposed to a tied personal loan, would allow the grantor of credit to circumvent the consumer rights laid down in Article L. 311-20 et seq. of the Consumer Code, to avoid the constraints and costs associated with the interdependence of credit agreements and contracts of sale and to charge interest at a higher rate than that which can be charged on a tied personal loan, since the point at which the rate of interest becomes extortionate is not the same.

26. Secondly, the Tribunal d'instance points out that:

— the provisions of Article L. 311-20 et seq. of the Consumer Code relating to the interdependence of credit agreements and contracts of sale were not relied upon by the plaintiffs;

— the case-law of the Court of cassation does not permit a court to raise of its own motion a point of law relating to the rules governing consumer credit; it distinguishes between public policy rules designed to order society (*règles d'ordre public de direction*) — adopted in the general interest and which the courts may raise of their own motion — and public policy rules designed to protect specific interests (*règles d'ordre public de protection*) — adopted in the interest of a particular category of persons and which may be relied upon only by persons in that category — and considers that the rules governing consumer credit fall within the latter

category in that they were established solely in the interest of consumers; [8]

— the question arises, however, whether the case-law of the Court, [9] which recognises the power of courts to raise of their own motion points of law based on provisions flowing from Directive 93/13/EEC, [10] may, contrary to the view of the Cour de cassation [11] but in accordance with the views of a number of legal commentators, also extend to other consumer protection legislation, such as that governing consumer credit;

— for that purpose it is necessary first to examine the aims of Directive 87/102 to clarify whether, according to the intentions of the Community legislature, the regulation of consumer credit was established solely in the interest of consumers or also pursues wider objectives relating to the organisation of the market.

8 — In particular, Cass. Civ., 10 July 2002, Bull. I, No 195, p. 149, which indicates that the failure to comply with the obligations under Articles L. 311-2, L. 311-8 and L. 311-10 of the Consumer Code, even though they are mandatory on public policy grounds, can be challenged only by the person whom those provisions are intended to protect.

9 — Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941 and Case C-473/00 *Cofidis* [2002] ECR I-10875.

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

11 — Cass. Civ., 23 November 2004, Bull. I, No 287, p. 241.

27. On those grounds, the Tribunal d'instance stayed the proceedings in order to refer the following questions to the Court for a preliminary ruling:

'(1) Are Articles 11 and 14 of ... Directive 87/102/EEC to be interpreted as allowing courts to apply the rules on interdependence between a credit agreement and a contract for the supply of goods or services that is financed by that credit in cases where the credit agreement does not indicate the goods being financed or has been concluded in the form of a credit facility without indicating the goods being financed?

(2) Does Directive 87/102/EEC ... have an objective which extends beyond consumer protection alone to the organisation of the market and allows courts to apply of their own motion the provisions which flow from it?'

28. In accordance with Article 23 of the Statute of the Court, written observations were submitted by Franfrance, the Austrian, French, Italian, Spanish and German Governments and the Commission.

29. At the hearing on 8 February 2007, oral observations were made by the representatives of Franfinance, the French Government and the Commission.

IV — Legal analysis

A — *Question 1*

1. Preliminary considerations

30. I note first of all that Question 1, as formulated by the referring court, does not state clearly whether the rules on interdependence between credit agreements and contracts of sale that that court might apply despite there being no indication in the credit agreement of the goods being financed are those contained in Directive 87/102 itself or those in the national implementing legislation.

31. In this regard, it is important to note that, on the basis of the case-law of the Court, it cannot be the provisions of the Directive that apply in the present case, which relates to a dispute between individuals, since a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual In consequence, even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties. [12]

32. Question 1 must therefore be understood — and is admissible only if so understood — as seeking an interpretation of Articles 11 and 14 of Directive 87/102, not in order to apply them directly to the case before the referring court, but in order to enable that court to interpret and apply the rules of national law on interdependence between credit agreements and contracts of sale in a manner consistent with the requirements of those articles.

33. Indeed, it is settled case-law that the Member States' obligation under a directive to achieve the result envisaged by that directive and their duty under Article 10 EC to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. [13] Thus, in applying national law,

12 — Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraphs 108 and 109, and the case-law cited.

13 — Ibid., paragraph 110.

the national court must interpret national law, so far as is possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and thus comply with the third paragraph of Article 249 EC. [14]

34. The rules of French law on interdependence between credit agreements and contracts of sale, as referred to in the order for reference, are those laid down in Articles L. 311-20 and L. 311-21 of the Consumer Code. The referring court itself indicates that the application of those provisions, as interpreted by the Cour de cassation, presupposes that the goods or services being financed are indicated in the credit agreement.

35. It is worth recalling next that the obligation on the national courts to interpret national legislation in the light of the wording and purpose of a directive is qualified by the phrase 'so far as possible': in other words, the obligation applies only where the wording of the legislation in question leaves room for different interpretations. Thus, the scope of the obligation does not go so far as to require an interpretation that runs counter to the national legislation. [15]

36. On that premise, it will be for the referring court to assess whether the aforementioned provisions of the Consumer Code are open to an interpretation that differs from that made by the Cour de cassation but which is not for that reason *contra legem*, and can thus be applied to a case such as that before the referring court, in which it is common ground that there is no indication in the credit agreement of the goods being financed. [16]

37. It is therefore worth remembering in this regard that, according to the Court, although the principle that national law must be interpreted in conformity with Community law chiefly concerns provisions of national law adopted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied in such a way that it does not produce a result contrary to that sought by the directive. [17] If, in that context, if is possible in certain circumstances, through the application of interpretative methods recognised by national law, for a provision of national law to be construed in such a way as to avoid conflict with another rule of national law or, for that purpose, to narrow the effects of that provision by applying it only in so far as is

14 — Ibid., paragraph 113.

15 — To that effect see, inter alia, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 45.

16 — I would point out in this regard that the national rule on interdependence that is raised in more specific terms in the present case — that is to say, the rule providing for the credit agreement to be set aside or annulled by operation of law where the contract of sale is itself judicially set aside or annulled (the second sentence of Article L. 311-21(1) of the Consumer Code) — does not refer explicitly to a requirement that the credit agreement must indicate the goods or services being financed.

17 — *Pfeiffer and Others*, paragraph 115.

compatible with the other rule, the national court is under an obligation to use those methods in order to achieve the result sought by the directive. [18]

38. Accordingly, without prejudice to the findings that Articles 11 and 14 of Directive 87/102 cannot be applied directly in the present case and that the resolution of the dispute in the main proceedings is to be sought in the national legislation interpreted, so far as is possible, in accordance with the wording and purpose of Directive 87/102, Question 1 — which is admissible on the view that it seeks an interpretation of national law that is consistent with Community legislation [19] — could be rephrased as follows:

Do Articles 11 and 14 of Directive 87/102 require the rules of national law, adopted in implementation of Article 11 of that directive, on the interdependence of credit agreements and contracts of sale to apply even where the credit agreement does not indicate the goods or services being financed?

2. Substance

39. The written observations submitted by the various interested Governments and by the Commission all essentially argue for an affirmative reply to this question. These parties point out that Article 11(2) of Directive 87/102 makes the consumer's right to pursue remedies against the grantor of credit subject to a series of conditions, which do not include a requirement that the credit agreement indicate the goods or services being financed, and that Article 14(2) of the Directive supports the interpretation that Article 11(2) does not authorise the Member States to impose such a condition, which would make it possible to circumvent the consumer protection provisions on the interdependence of credit agreements and contracts of sale.

40. Franfinance adopts a different approach. In its view, Question 1 essentially asks whether Article 11 of Directive 87/102 on the interdependence of credit agreements and contracts of sale is applicable to a contract for the opening of a credit facility such as that in the present case. [20] The answer to that question, according to Franfinance, should be negative, since in its view

18 — Ibid., paragraph 116.

19 — The Commission expressed that view in paragraphs 18 and 19 of its written observations. Moreover, as the Court has stated, the Court has jurisdiction to give preliminary rulings on the interpretation of acts of the Community institutions, whether or not they are directly applicable (Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 21).

20 — Franfinance points out that Article II-1 of the prior offer of credit signed by Mr and Mrs Rampion indicates that they are 'authorised to draw on their Franfinance account, up to the amount of the maximum authorised overdraft, to finance purchases [they] make ... from [KpK] or its affiliated companies'.

Article 11 of Directive 87/102, like Article 7 thereof, [21] relates only to tied credit, in other words, credit arrangements under which the consumer makes a single purchase financed on credit. Franfinance maintains that that situation should be kept distinct from the situation where, *at the time* of a purchase, the consumer obtains what is in reality a revolving credit that will enable him to make further purchases from the supplier or from other operators affiliated to it (credit facility ancillary to several purchases). The use of the singular form in the phrase 'contract for supply of them' in Article 11(2)(d) is, according to Franfinance, indicative of the fact that, under that article, there can be no tied credit subject to the provisions of that article unless the credit is used to finance only one contract of sale.

41. The fact that a contract for a credit facility such as that at issue gives no indication of the goods or services being financed is, according to Franfinance, entirely consistent with the nature of such a contract, which reflects a precise choice and a precise need on the part of the consumer, who will be able to re-use the credit up to the amounts he has repaid. As is also evident from Article II of the terms printed on the reverse of the prior offer of credit, the credit in question therefore constitutes an advance on a *current account.*

42. Franfinance adds that, moreover, the rule under French law that the goods or services being financed must be indicated in the credit agreement is a condition for classifying the credit as tied and for applying the rules on interdependence set out in Articles L. 311-20 and L. 311-21. According to Franfinance, this is a requirement laid down by the national legislature in exercise of the powers granted to it under the second sentence of Article 11(2) of Directive 87/102 to determine, in particular, 'under what conditions' the consumer's right to pursue remedies against the grantor of credit is to be exercisable; in the view of Franfinance, those conditions are open to disapproval by the Court only if they are such as to deprive the provisions of the Directive of substance, which in its opinion does not occur in the case of the requirement in question.

43. In order to reply to Question 1, I consider it appropriate to deal first with the classification of the credit agreement signed by Mr and Mrs Rampion and the relevance of Article 14 of Directive 87/102, then with the scope of Article 11 of the Directive and lastly with the interpretation to be given to the rules laid down in Article 11 regarding the requirement to give an indication in the credit agreement of the goods or services being financed.

21 — Article 7 of Directive 87/102 provides that '[i]n the case of credit granted for the acquisition of goods, Member States shall lay down the conditions under which goods may be repossessed, in particular if the consumer has not given his consent. They shall further ensure that where the creditor recovers possession of the goods the account between the parties shall be made up so as to ensure that the repossession does not entail any unjustified enrichment'.

(a) Nature of the credit agreement at issue, and Article 14 of Directive 87/102

44. Franfinance is emphatic that the agreement which it concluded with Mr and Mrs Rampion relates not to tied credit but to a credit facility, that it corresponds to one of the standard contractual models set out in Articles L. 313-13 and R. 311-6 of the Consumer Code and that it is not subject to the rules on interdependence laid down in Articles L. 311-20 and L. 311-21 of the Consumer Code.

45. In the order for reference, the Tribunal d'instance states that KpK and Franfinance rely on the form of the credit agreement and the wording of Article L. 311-20 in order to deny any link between the credit agreement and the contract of sale concluded in the present case. However, as proof that a manifest link exists between the two contracts, the referring court states that: (i) the credit agreement was entered into on the same day as the contract of sale, with a credit limit equal to the sale price and allowing use of the balance of the credit after deduction of the deposit from the sale price only after payment of that deposit; (ii) the offer of credit identifies the supplier; and (iii) under the contract of sale Franfinance is to debit, for transfer to KpK, the deposit of 10% of the purchase price from Mr and Mrs Rampion's bank account. The referring court also observes that the defendants do not demonstrate that the plaintiffs intended to use the credit for other purposes, once the capital sum borrowed had been at least partly repaid. Furthermore, the referring court states that the form in which the credit agreement was drawn up allows the grantor of credit to avoid application of the provisions of the Consumer Code on interdependence between credit agreements and contracts of sale, to the detriment of the consumer, and permits a higher rate of interest to be charged.

46. More than one of the interested Governments point out that the circumstances of this case, as described in the preceding paragraph, reveal a clear link between the two contracts signed by Mr and Mrs Rampion, despite the fact that the credit agreement does not indicate the goods and services being financed.

47. In view of the foregoing observations, I am bound to point out that it is not for the Court to make the correct classification of the credit agreement at issue. That classification falls within the jurisdiction of the national court and it must be made on the basis of the relevant provisions of national law, including those relating to the powers of the courts. Those provisions fall to be interpreted by the national court, in accordance with the duties incumbent upon it under Articles 10 EC and 249 EC, in a way consistent with the purpose of Article 14 of Directive 87/102, which is to prevent the use of particular forms of agreement or contract that derogate from the provisions of national law implementing or corresponding to the

Directive, to the detriment of the consumer (paragraph 1), or that circumvent those provisions (paragraph 2).

48. In particular, national legislation on the powers of the courts must be interpreted, so far as is possible, as permitting the courts to reclassify, on the basis of the substance of the contract and the true objective of the contracting parties, a credit facility as tied credit for the purposes of applying the consumer protection provisions of the Consumer Code. Moreover, Franfinance in its written observations and the French Government at the hearing referred to recent judgments of the Cour de cassation recognising the power of national courts to reclassify as tied credit a credit agreement presented by the parties in a different guise. In addition, I observe that the literal wording of Question 1, as formulated in the order for reference, suggests that the Tribunal d'instance does not rule out the possibility of classifying the credit agreement at issue as something other than a credit facility. The apparent redundancy of the double hypothesis in the final part of the question ('where the credit agreement does not indicate the goods being financed or has been concluded in the form of a credit facility without indicating the goods being financed') can be explained in that light.

49. The purpose of Article 14 of Directive 87/102 is to oblige the Member States to adopt measures to counter *contractual conduct on the part of individuals* that is likely to thwart the intended results of the Directive, in other words measures which give binding force to the provisions of national law implementing or corresponding to the other provisions of the Directive (paragraph 1) and which ensure that those provisions are not circumvented by fraudulent devices relating to the way in which agreements are drafted (paragraph 2). The objective of Article 14 is therefore to ensure the effective application of such provisions of national law, but I do not consider that article relevant for the purposes of reconstructing the content which those provisions of national law must have in order to comply with the other provisions of the Directive; that content depends only on the interpretation of the latter provisions.

50. I therefore consider that Article 14 does not preclude the Member States from making the right of the consumer to pursue remedies against the grantor of credit in the event of breach of contract by the supplier subject to the condition that the credit agreement must indicate the goods or services being financed. In my view, Article 14 can be of no assistance in answering the question whether the Member States may make the application of the rules on interdependence between credit agreements and contracts of sale dependent on such an indication: that question must, instead, be answered solely on the basis of Article 11 of Directive 87/102.

(b) Does the credit agreement at issue fall within the scope of Article 11 of Directive 87/102?

51. To cater for the possibility that the referring court will decide that the credit agreement at issue should not be reclassified as tied credit but as a *genuine* overdraft facility, as Franfinance maintains, it is necessary to assess whether there is merit in Franfinance's argument that Article 11 of the Directive is irrelevant in that it does not relate to contracts of that type.

52. Taking a step backwards, I observe, as does the Commission, that the definition of 'credit agreement' in Article 1(2)(c) of Directive 87/102 is sufficiently broad to accommodate without difficulty an advance on a current account.

53. Moreover, it is evident from Annex I to the Directive — which lists the terms that Member States may, under Article 4(3) of the Directive, require to be included in credit agreements — that '[c]redit agreements for financing the supply of particular goods or services' (paragraph 1 of the Annex) are only one of the types of credit agreement subject to the provisions of the Directive, alongside '[c]redit agreements operated by credit cards' (paragraph 2), '[c]redit agreements operated by running account which are not otherwise covered by the Directive' (paragraph 3) and '[o]ther credit agreements covered by the Directive' (paragraph 4). [22]

54. Thus an advance on a current account does not as such fall outside the scope of Directive 87/102.

55. I must, however, point out that the forms of credit which, under Article 2(1) of the Directive, are excluded from its scope include, under point (e) and subject nevertheless to the provisions of Article 6 [23], 'credit in the form of advances on a current account granted by a credit institution or financial institution other than on credit card accounts', or, to use the equivalent terms employed in Article 6, 'credit in the form of an advance on a current account, other than on credit card accounts'.

56. It is not easy to discern from the case-file whether the current account opened by

22 — It is no accident that it is only in paragraph 1 of the Annex in question — in other words, only in respect of '[c]redit agreements for financing the supply of particular goods or services' — that a 'description of the goods or services covered by the agreement' is referred to as a term that may be required as being essential.

23 — Article 6 establishes the information that the credit institution or financial institution is required to provide to the consumer for that type of contract.

Franfinance for Mr and Mrs Rampion was covered by a credit card or not. However, that is a matter that must be ascertained by the Tribunal d'instance, which, in considering at page 5 of the order for reference that the standard contract used in the present case by Franfinance was that of a 'prior offer of a credit facility ancillary to a contract of sale, usable in fractions and *accompanied by a credit card*',[24] appears to hold that the account was indeed covered by a credit card.

57. Leaving aside the problem of whether or not there was a credit card linked to the current account opened by Franfinance for Mr and Mrs Rampion, it is now necessary to ask whether Article 11 of Directive 87/102 can be applied[25] to advances on current accounts.

58. There appears to be nothing in the wording of that article to suggest otherwise. The reference made by Franfinance to the phrase 'contract for supply of them' used in Article 11(2)(d) is completely irrelevant. Those words do not mean that, as a precondition for application of the rules set out in Article 11(2), the credit agreement must finance a single contract of sale. Grammatically, the words 'of them' link the 'contract of sale', not to the 'credit agreement', but to 'the goods or services covered' by it. Moreover, the expression 'the goods or services covered by the credit agreement' used in Article 11(2)(d) are not necessarily to be understood as implying a description of such goods or services in the credit agreement but may, and in my opinion must, be interpreted as meaning 'the goods or services financed by the credit agreement'. I also observe that Article 11(2)(a), by referring to a credit agreement entered into 'in order to buy goods or obtain services', appears to include credit agreements concluded with a view to the purchase of a number of goods or services.

59. Quite apart from the literal meaning, it cannot be claimed that consumer protection in terms of the interdependence between credit agreements and contracts of sale is unjustified where the credit agreement consists in an advance on a current account.

60. In the words of the 21st recital in the preamble to Directive 87/102, designed to explain the reason for the introduction of the rules set out in Article 11, 'as regards goods or services which the consumer has contracted to acquire on credit, the consumer should, at least in the circumstances defined below, have rights vis-à-vis the grantor of credit which are in addition to his normal contractual rights against him and against the supplier of the goods or services'. That recital goes on to state that 'the circum-

24 — Standard contract No 6 annexed to the Consumer Code, in the version in force at the material time. Emphasis added.

25 — Needless to say, I am not suggesting direct application here.

stances referred to above are those where the grantor of credit and the supplier of goods or services have a pre-existing agreement whereunder credit is made available exclusively by that grantor of credit to customers of that supplier for the purpose of enabling the consumer to acquire goods or services from the latter'.

61. This therefore constitutes additional protection of the consumer vis-à-vis a grantor of credit who is not the supplier (Article 11(2)(a)) where 'the goods or services covered by the credit agreement are not supplied, or are supplied only in part, or are not in conformity with the contract for supply of them' (Article 11(2)(d)); that protection must apply 'at least' where there is a pre-existing agreement between the supplier and the grantor of credit for the purpose described and on the basis of which the consumer has obtained the credit (Article 11(2)(b) and (c)), without prejudice to the fact that such protection applies only after 'the consumer has pursued his remedies against the supplier but has failed to obtain the satisfaction to which he is entitled' (Article 11(2)(e)).

62. Such additional protection for the consumer in the event of breach of contract by the supplier, in the form of a right to pursue remedies against the grantor of credit, is designed to offset the weakening of consumer protection (as compared with the situation where credit is granted directly by the supplier) which would otherwise result from the 'splitting' of the consideration paid by the consumer that is inherent in the purchase of goods or services on credit granted by a person other than the supplier; such splitting could make it impossible for the consumer to enforce a claim for non-supply so as not to have to repay the credit.

63. It is crystal clear that the risk of consumer protection being weakened in the way that Article 11 aims to address also arises where the credit can be used not only for a single purchase but for a number of purchases.

64. There is therefore in my view no reason for considering that, by its very nature, an advance on a current account to finance an indeterminate series of purchases of goods or services falls outside the scope of Article 11 of Directive 87/102.

65. This does not mean, however, that the protection that must be afforded to the consumer under that article cannot be differentiated to take account of the specific nature of such credit as compared with credit granted for a single purchase.

66. Moreover, Article 11(2) is constructed in a way that allows the Member States to establish protection rules appropriate to the characteristics of each type of credit agreement. In fact, Article 11(2) does not specify the form that such additional consumer protection should take: in other words, it does not state precisely the purpose of the 'right to pursue remedies against the grantor of credit' that the consumer must be recognised as enjoying. That is to be specified by the Member States, which are authorised under the second sentence to determine 'to what extent and under what conditions these remedies shall be exercisable'. [26]

67. Various forms of protection can be envisaged in this regard. I would mention, by way of example: action against the grantor of credit on the ground of breach of contract by the supplier in order to avoid or suspend repayment of the credit; a request to reduce the credit or set aside the credit agreement, with the grantor of credit returning any repayments already made; a request for correct performance of the contract of sale, at the expense of the grantor of credit, if the contract relates to fungible objects; and even an application for compensation from the grantor of credit for damage due to breach of contract by the supplier. [27] In France Articles L. 311-20 and L. 311-21 of the Consumer Code provide for: (i) the obligations of the borrower to become effective only from the time of delivery of the goods or supply of the services, which appears to mean in practice that action can be brought against the grantor of credit for breach of contract when this consists in failure to deliver or to supply; (ii) judicial suspension of performance of the credit agreement in the event of disputes relating to performance of the contract of sale; and (iii) the setting aside or annulment of the credit agreement by operation of law where the contract of sale is judicially set aside or annulled.

68. It is possible to imagine, in relation to breach of contract by the supplier of one of the goods or services which the consumer purchases on credit over time by drawing on a *genuine* advance on a current account, that the remedy afforded to the consumer against the grantor of credit could be the right to bring an action for breach of contract in order to avoid, temporarily or definitively,

26 — However, this goes beyond the issue raised in the reference for a preliminary ruling from the Tribunal d'instance and I shall therefore not tackle here the question whether Article 11(2) of Directive 87/102 is sufficiently precise and unconditional as to the nature of the rights that must be granted to the consumer. See in this regard, in the affirmative, points 11 to 13 of the Opinion of Advocate General Lenz in Case C-192/94 *El Corte Inglés* [1996] ECR I-1281, who deduces from Article 11 of Directive 87/102 that the consumer is entitled to 'a certain minimum standard' when it comes to asserting his remedies.

27 — The national legislation that most extends the scope of consumer protection against the grantor of credit is that of the United Kingdom. Section 75 of the Consumer Credit Act 1974 goes so far as to provide, in the case of a credit subject to that Act and granted to a consumer under a pre-existing agreement between a creditor and a supplier, that in the event of misrepresentation or breach of contract by the supplier the consumer has 'a like claim' against the creditor comparable to that against the supplier. The grantor of credit and the supplier have joint and several liability (hence without there being a requirement first to sue the supplier), which would even include liability for damages due to breach of contract by the supplier.

the obligations incumbent on the consumer under the credit agreement *in relation to that particular purchase*, but not a right to have the agreement set aside *in its entirety*.

69. Thus, having established that a contract for an advance on a current account within the scope of Directive 87/102 is also subject to Article 11 thereof, if the referring court holds that the credit agreement signed by Mr and Mrs Rampion in the present case should be classified as such an advance it is for that court to assess the extent to which the provisions of national law implementing or corresponding to that article can be applied to such an agreement, [28] so as not to produce a result contrary to that sought by the directive.

(c) Interpretation of Article 11 of the Directive and the requirement that the credit agreement must indicate the goods or services being financed

70. It remains for me to examine whether Article 11 permits a provision of national law, designed to implement Article 11, to make the right for the consumer to pursue remedies against the grantor of credit subject to the condition that the goods or services being financed must be indicated in the credit agreement.

71. I share the position adopted by the Commission and the interested Governments: such a condition is not compatible with Article 11. Contrary to the assertion of Franfinance, the establishment of such a condition is not permissible under the second sentence of Article 11(2). That provision, which delegates to the Member States power to determine not only 'to what extent' but also 'under what conditions' the right to pursue remedies against the grantor of credit 'shall be exercisable', is clearly not designed to re-open discussion about the conditions in which that right arises, which the first sentence of Article 11(2) lays down exhaustively; instead, it authorises the Member States to specify the procedural arrangements for exercise of that right. [29]

72. In other words, Article 11 of the Directive must be interpreted as meaning that, where a consumer obtains from a person other than the supplier credit for the purchase of goods or services under a pre-existing agreement of the kind specified in Article 11(2)(b) between that person and the supplier, the consumer is entitled — where the goods or services acquired on credit are not supplied or are supplied only in part or incorrectly — to pursue remedies against the grantor of credit after unsuccess-

28 — I am thinking, for example, of application by analogy of Articles L. 311-20 and L. 311-21 of the Consumer Code, which apply only to 'tied credit'.

29 — In my view, such arrangements may also include specifying the condition laid down in Article 11(2)(e) of the Directive, in other words the prior action that the consumer must take against the supplier in breach of contract before being able to exercise his right to remedies against the grantor of credit; for example, whether it is sufficient that a notice of breach of contract remains unanswered or whether it is necessary to have brought legal proceedings to no avail.

fully pursuing remedies against the supplier, whether or not the goods or services in question are indicated in the credit agreement.

73. It will naturally be for the referring court to ascertain the extent to which the relevant provisions of national law can be applied so as not to produce a result contrary to that sought by Article 11 of the Directive interpreted in that way.

74. Finally, I consider it worth stating, given the references made both by the referring court and by some of the interested Governments to a manifest link between the credit agreement and the contract of sale in the present case, that Article 11 does not make the consumer's right to pursue remedies against the grantor of credit in the event of breach of contract by the supplier contingent upon there being such a link. What that article requires is that the consumer be granted that right at least where the grantor of credit and the supplier have a pre-existing agreement whereunder credit is made available exclusively by that grantor of credit to customers of that supplier for the acquisition of goods or services from that supplier and the consumer obtains his credit pursuant to that pre-existing agreement (21st recital in the preamble to Directive 87/102 and Article 11(2)(b) and (c) thereof).

75. I therefore propose that the Court reply as follows to Question 1:

Article 11 of Directive 87/102 requires that it be possible to apply national rules on interdependence between credit agreements and contracts for the supply of goods or services, implementing or corresponding to that article, even where the credit agreement does not indicate the goods or services being financed.

B — *Question 2*

1. Preliminary considerations and admissibility

76. It is clear from the order for reference that the Tribunal d'instance wonders whether it would be possible for it to apply of its own motion, not the provisions of Directive 87/102 (which, as I have pointed out above, cannot be applied directly in a dispute between individuals), but certain provisions of *national law* implementing or corresponding to those of the Directive.

77. Although, in the section dealing with the facts, the order for reference relates that, in the course of the main proceedings, the Tribunal d'instance had, by interlocutory decision of 1 June 2005, raised of its own motion points of law based on articles of the Consumer Code relating to door-to-door selling and on Article L. 311-10 of the Consumer Code, in that it makes it compulsory for the credit agreement to refer to the provisions on interdependence set out in Article L. 311-20 et seq. of the Consumer Code, the part of the order for reference dealing with Question 2 considers instead — and solely — the possibility that the court may apply of its own motion the latter provisions, which transpose Articles 11 and 14 of the Directive into French law. [30]

78. I therefore consider that, despite its broad wording, Question 2 should, in the light of the grounds of the order for reference, be read as referring to the possibility for the national court to apply of its own motion the rules on interdependence between credit agreements and contracts of sale set out in Article L. 311-20 et seq. of the Consumer Code, in that they implement Article 11 of Directive 87/102.

79. The referring court recalls that, under the procedural rules of the French national legal system as interpreted by the Cour de cassation, only public policy rules designed to order society (*règles d'ordre public de direction*), adopted in the general interest, and not public policy rules designed to protect specific interests (*règles d'ordre public de protection*), adopted in the interest of a particular category of persons, may be raised by the courts of their own motion. The referring court points out that the case-law of the Cour de cassation — in considering that the consumer credit legislation was introduced solely in the interest of consumers and therefore falls outside the scope of *règles d'ordre public de direction* — precludes the national courts from applying of their own motion the provisions of Article L. 311-20 et seq. of the Consumer Code.

80. In order to verify whether the approach of the Cour de cassation is correct, the referring court asks the Court to clarify whether Directive 87/102 pursues aims broader than simple consumer protection, that is to say, aims relating to the organisation of the consumer credit market. The referring court appears to believe that, if that is so, it would be free to apply of its own motion the provisions of Articles L. 311-20 et seq. of the Consumer Code since they would constitute *règles d'ordre public de direction*.

81. It therefore appears that the referring court seeks clarification by the Court of the aims of Directive 87/102 essentially in order to apply concepts and rules of *national procedural law* which could lead it to apply of its own motion the rules set out in Articles

30 — Moreover, Question 2 would have no relevance to the resolution of the dispute if it were considered in relation to the possible application of the court's own motion, as postulated by the referring court in the interlocutory decision of 1 June 2005, of rules of the Consumer Code on door-to-door selling — *which implement not Directive 87/102* but Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31) — or Article L. 311-10(3) of the Code, which requires the credit agreement to make reference to the rules on interdependence laid down in Article L. 311-20 et seq., *but without such reference being required under Directive 87/102.*

L. 311-20 and L. 311-21 of the Consumer Code. Viewed in this way, the national court would be applying such rules of its own motion in accordance with national law, rather than by dint of Community law.

82. That said, I nevertheless consider that the Court should address Question 2 from a wider perspective in order to indicate to the referring court the extent to which application by the national courts of the aforementioned provisions of the Consumer Code of their own motion may be permissible under Community law, in other words, over and above the application of the aforementioned concepts and rules of national procedural law in the light of the aims pursued by Directive 87/102.

83. However, Franfinance disputes the admissibility of Question 2, contending that it is not relevant for the purposes of deciding the dispute in the main proceedings. It points out that, contrary to what is stated in the order for reference, in their application Mr and Mrs Rampion expressly raised the question of the interdependence between the credit agreement and the contract of sale, in particular asking the court to set aside the credit agreement 'in consequence' of declaring that the contract of sale is void. In Franfinance's view, there is therefore no need for the court to apply of its own motion provisions that have been relied on by the plaintiffs.

84. In this regard, it is evident from the documents before the Court that Mr and Mrs Rampion applied for the credit agreement signed with Franfinance to be set aside by the court 'in consequence' of the declaration that the contract of sale entered into with KpK is void, which was the principal form of order sought in their application. Nevertheless, it does not appear that they explicitly cited Articles L. 311-20 and L. 311-21 of the Consumer Code in support of their application for the credit agreement to be set aside. Although it does not seem unreasonable to hold, as does Franfinance in essence, that those articles may be considered as having been invoked, at least implicitly, by Mr and Mrs Rampion, I observe that the referring court appears to be of the opposite opinion and that it is for that court, and not for the Court of Justice, to rule on the point, as it is purely a matter of national procedural law. Moreover, it does not appear that Mr and Mrs Rampion applied for the credit agreement to be set aside also in consequence of the termination of the contract of sale, for which they applied in the alternative.

85. It is therefore not obvious that, as Franfinance maintains, the interpretation of Community law sought by means of Question 2 bears no relation to the actual facts or purpose of the main proceedings or that the problem raised is hypothetical. Accordingly, I do not consider that the admissibility of Question 2 can be called into doubt.

2. Substance

86. As regards the purposes pursued by the Community legislature in adopting Directive 87/102, it can be seen from its preamble that the aim of the Directive was to smooth out differences between the laws of the Member States in the field of consumer credit with the dual aim of ensuring both the creation of a common consumer credit market (third and fifth recitals) and the protection of consumers who avail themselves of such credit (sixth, seventh and ninth recitals). [31] The Commission and the French, Italian and Spanish Governments point this out in their written observations on Question 2.

87. In particular, with regard to the first aim, the preamble to the Directive shows that 'differences of law can lead to distortions of competition between grantors of credit in the common market' (second recital), 'limit the opportunities the consumer has to obtain credit in other Member States' and 'affect the volume and the nature of the credit sought, and also the purchase of goods and services' (third recital), and in consequence 'have an influence on the free movement of goods and services obtainable by consumers on credit', 'thus directly affect[ing] the functioning of the common market' (fourth recital) where the establishment of a common market in consumer credit would benefit alike consumers, grantors of credit, manufacturers, wholesalers and retailers of goods and providers of services' (fifth recital).

88. Thus there can be no doubt that the harmonisation of national legislation in the field of consumer credit pursued by means of Directive 87/102 is not directed solely at ensuring a minimum standard of consumer protection in each Member State but also and primarily at promoting, as regards consumer credit, the creation of more uniform competitive conditions throughout the Community by removing the main legislative causes of obstacles and distortions in the free play of competition between grantors of credit, with benefits in terms of economic efficiency both in the consumer credit market and in the markets in goods and services that can be purchased on credit.

89. It does not therefore seem possible to endorse an interpretation according to which the provisions of Directive 87/102, and consequently those of national legislation implementing them, were laid down exclusively in order to protect consumers. That said, it is in any case for the referring court and not for the Court of Justice to assess whether, in the light of the specified aims of Directive 87/102, the national laws imple-

31 — Case C-208/98 *Berliner Kindl Brauerei* [2000] ECR I-1741, paragraph 20, and Case C-264/02 *Cofinoga Mérignac* [2004] ECR I-2157, paragraph 25.

menting it — including Articles L. 311-20 and L. 311-21 of the Consumer Code — are to be classified as *règles d'ordre public de direction* (as I suspect) so that they may be applied by the courts of their own motion *in accordance with national procedural law.*

90. I therefore do not consider that the reply to Question 2 can be confined to the considerations set out above. In my opinion, if that question is read in the light of the grounds of the order for reference, it raises in broader terms the question whether the courts may apply the provisions of Articles L. 311-20 and L. 311-21 of the Consumer Code of their own motion. By asking to what extent the approach adopted by the Court in *Océano Grupo Editorial and Salvat Editores* and *Cofidis* can be transposed to the rules on consumer credit, [32] the Tribunal d'instance is essentially also asking the Court to indicate whether the national courts may apply the provisions of Articles L. 311-20 and L. 311-21 of the Consumer Code of their own motion *under Community law* even where they are precluded by national procedural law from doing so.

91. I therefore share the opinion of the Commission that, in order to reply to Question 2, it is necessary to ascertain whether the protection that Directive 87/102 aims to provide to consumers implies that the national courts may apply of their own motion a provision of national law for consumer protection implementing Article 11(2) of that Directive. [33]

92. The Commission and the Italian and Spanish Governments argue in favour of an affirmative reply to that question, essentially because of the relevance, in their view, to the matters under examination of the reasons which led the Court to rule, in *Océano Grupo Editorial and Salvat Editores* and *Cofidis*, that, if the rights that Directive 93/13 intended to confer on consumers are to be effectively protected, the national courts must be free to raise of their own motion the unfair nature of a contract term.

93. That view is not shared by the Austrian and French Governments. The Austrian Government observes that it is for the Member States alone to determine the means of providing judicial protection of the rights that Directive 87/102 intended to confer on consumers and that although they are required to ensure that such protection is effective, this does not necessarily imply that the national courts must or may apply the consumer protection provisions of their own motion. The French Government also refers to the principle of the procedural autonomy of the Member States, which in its view is specifically confirmed here by the second

32 — See point 26 above.

33 — See paragraph 33 of the Commission's written observations.

sentence of Article 11(2) of Directive 87/102. The French Government maintains that the case-law of the Cour de cassation under which the French courts may not raise of their own motion an argument based on the rules on interdependence between credit agreements and contracts of sale does not infringe the principles of equivalence and effectiveness, which, according to Community case-law, limit that procedural autonomy. In particular, from the standpoint of the effectiveness of protection, the French Government points out that the case-law of the Cour de cassation does not make it either excessively difficult or impossible in practice for the consumer to obtain a judicial ruling that the conditions for applying those rules are met, a ruling which moreover no provision in the Consumer Code requires the consumer to seek within a set period of time. Finally, according to the French Government, the judgments in *Océano Grupo Editorial and Salvat Editores* and *Cofidis* are not relevant in the present case, in that the approach espoused in those judgments is based on provisions of Directive 93/13 which have no echo in Directive 87/102.

94. For my part, I shall begin by pointing out that, according to settled case-law, under the principle of cooperation laid down in Article 10 EC, it is for the national courts to ensure the judicial protection to which individuals are entitled thanks to the direct effect of Community law. In the absence of Community rules governing a matter, it is for the national legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions and must not make it impossible or excessively difficult in practice to exercise rights conferred by Community law. [34]

95. In operation here are certain well-known principles: the principle of the 'procedural autonomy' of the Member States and the limits placed on that autonomy by compliance with the principle of 'equivalence' (of conditions) and the principle of 'effectiveness' (of protection). Those principles, asserted with reference to the judicial protection of the rights that individuals derive from rules of Community law which have direct effect, must be considered to apply in the same way with reference to the judicial protection of the rights that individuals derive from rules of national law implementing or corresponding to provisions of a Community directive. In both cases it is a question of rights 'derived from Community law' and it would be utterly inconsistent to accept that the limits to the procedural autonomy of the Member States in providing judicial protection of such rights can be less stringent when a directive has been transposed into national law than when it has not.

34 — See, in particular, Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraphs 12 to 16; Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12; and Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12.

96. As a rule, it must be held that the principle of effectiveness of protection is respected when the detailed procedural rules governing actions for safeguarding rights derived from Community law give the individual an adequate opportunity to enforce those rights before the courts. [35] Time-limits that are too short or a burden of proof that is too onerous, for example, may make it excessively difficult or impossible in practice for individuals to exercise their rights before the courts.

97. The rules and principles of national procedural law relating to the courts' powers of initiative undoubtedly form part of those detailed procedural rules. Although it is true that a prohibition on the national courts applying of their own motion rules recognising rights derived from Community law does not weaken the possibility for the holder of those rights to enforce them himself before the courts, the Court has already held that, in certain circumstances, the effective protection of rights conferred by Community law may nevertheless require that the national courts be free to act of their own motion.

98. In *Peterbroeck*, [36] the Court stated that Community law precludes application of a national procedural rule whose effect, in circumstances such as those of the case before the referring court, is to prevent the national courts from considering of their own motion whether a measure of national law is compatible with a provision of Community law where the latter provision has not been invoked by the individual within a certain period. In the same judgment, the Court indicated that 'each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the proceedings as a whole before the various national judicial bodies, and the progress and special features of those proceedings'. [37]

99. In *Océano Grupo Editorial and Salvat Editores*, although the Court did not make express reference to its case-law cited in paragraph 94 above, it held, with regard to a jurisdiction clause included in a contract between a consumer and a professional within the meaning of Directive 93/13, that effective protection of the consumer can be attained only if the national courts have the power to find of their own motion that such a term is unfair within the meaning of that directive. [38] The Court reached that conclu-

35 — At point 25 of his Opinion in Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705, Advocate General Jacobs deemed it 'sufficient', for the purposes of complying with the principle of effectiveness, 'that individuals are given, by the national procedural rules, an effective opportunity of enforcing their rights'.

36 — *Peterbroeck*, paragraph 21.

37 — Ibid., paragraph 14. The same analytical criterion was subsequently reiterated by the Court in *Cofidis*, paragraph 37.

38 — *Océano Grupo Editorial and Salvat Editores*, paragraph 26.

sion *solely on the basis* of the following considerations, set out in paragraph 26 of that judgment:

'The aim of Article 6 of ... Directive [93/13], which requires Member States to provide that unfair terms are not to be binding on the consumer, could not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. In disputes where the amounts involved are often small, the lawyers' fees may be higher than the amount at stake, which may deter the consumer from defending himself against the application of an unfair term. While it is true that, in a number of Member States, procedural rules enable individuals to defend themselves in such proceedings, there is a real risk that the consumer, particularly because of a lack of awareness, will not challenge the unfair nature of the term pleaded against him.'

100. Thus the Court inferred the need to permit the courts to act of their own motion in order to ensure effective consumer protection as intended by Directive 93/13 from the fact that the imbalance between the amount involved in the dispute and the fees to be paid to a lawyer may deter the consumer from defending his rights by judicial means or may lead him, where permitted to do so under the national legal system, to defend himself — hence inadequately.

101. These considerations were reiterated by the Court in the subsequent *Cofidis* judgment [39] in order to state that a procedural rule which prohibits the national court, on expiry of a limitation period, from finding of its own motion or following a plea raised by a consumer that a term sought to be enforced by a professional is unfair is liable, in proceedings in which consumers are defendants, to render application of the protection intended to be conferred on them by Directive 93/13 excessively difficult. [40]

102. I concur with the view of the Commission and the Spanish Government that the above considerations are also perfectly valid with regard to the protection of consumer rights deriving from Directive 87/102. I would go so far as to say that they are all the more valid in that situation, because if the consumer purchases goods or services on credit it is usually because his financial resources are fairly limited, so that there is even greater risk that the cost of legal assistance will deter him from defending his rights before the courts, or at least from doing so adequately.

39 — *Cofidis*, paragraphs 33 and 34.

40 — Ibid., paragraph 36.

103. Nor do I consider that the fact, pointed out by the French Government, that Directive 87/102 does not contain provisions similar to those of Articles 6 and 7 of Directive 93/13 can militate in the opposite direction.

104. With regard to Article 6 of Directive 93/13, which, it is true, is the basis for the reasoning set out by the Court in paragraph 26 of *Océano Grupo Editorial and Salvat Editores* (see point 99 above), I do not think that its literal wording is a decisive factor in that reasoning. By requiring Member States to provide 'that unfair terms used in a contract concluded with a consumer by a seller or supplier shall ... not be binding on the consumer', that article merely describes the substance of the protection that Directive 93/13 intends to offer the consumer, at the level of substantive law, against contract terms that have not been individually negotiated and which can be classified as unfair within the meaning of the Directive, whereas the reasoning of the Court concentrates primarily on the particular conditions as to the nature of the dispute and the procedure required to resolve it and to the possible obstacle that they pose for effective judicial protection of the substantive legal position that the directive in question intended to confer on the consumer.

105. While Article 11(2) of Directive 87/102 does not specify the 'limits' to the consumer's right to pursue remedies against the grantor of credit and leaves it to the Member States to determine them, that provision nevertheless intends that, in certain circumstances, that right on the part of consumers should be recognised under the national legal system; and Community law more generally requires national procedural law to provide effective protection for that right, which is conferred on consumers under national substantive law but is derived from Community law. However, there is a risk that, where the courts are not permitted to act of their own motion, such effective protection may be impeded by the particular nature of the dispute and the procedure required to resolve it, as the Court noted in paragraph 26 of *Océano Grupo Editorial and Salvat Editores*.

106. As regards Article 7 of Directive 93/13, it is true that, in paragraphs 27 and 28 of *Océano Grupo Editorial and Salvat Editores*, the Court observed that the power of the courts to determine of their own motion whether a contract term is unfair is also a proper means of preventing the continued use of unfair terms in contracts concluded between consumers and sellers or suppliers, an aim which the Member States must pursue in compliance with that article. However, it appears to me that, in the context of the broad logic of that judgment, that observation is only a supplementary ground for the Court's findings as to the need to permit the courts to act of their own motion, findings at which, as I have already pointed out, the Court had already arrived as

a result of the reasoning set out in paragraph 26 of that judgment, which hinges solely on the circumstances that may deter the consumer from adequately defending in the courts the legal position which Directive 93/13 intended to confer on him.

107. From another perspective, I then observe that the fact that the case pending before the Tribunal d'instance was brought by Mr and Mrs Rampion and that they are represented in that action by a lawyer, whereas in the national court proceedings leading to the judgments in *Océano Grupo Editorial and Salvat Editores* and *Cofidis* the consumers had been defendants and had not appeared in court, does not justify a different conclusion in the present case as to the need to permit the courts to act of their own motion in order to provide effective protection of consumer rights. The problem should be resolved at a general level, in other words, in the light of the nature of the dispute and the characteristics of the procedure needed to resolve it, independently therefore of the specific circumstances of the individual case. Furthermore, in my view it cannot be acceptable that a consumer protection provision can be considered applicable of the court's own motion in relation to one consumer and not in relation to another solely because the former has not taken steps to defend himself in court with the assistance of a lawyer and the second has.

108. I therefore propose that the Court reply as follows to Question 2:

Directive 87/102 does not pursue solely the objective of protecting consumers who obtain consumer credit but also and primarily that of ensuring the creation of a common market in consumer credit.

For effective protection of the rights that Article 11 of Directive 87/102 intends to confer on consumers it must be possible for the national courts to apply of their own motion the national rules on interdependence between credit agreements and contracts for the supply of goods or services, implementing or corresponding to that article.

V — Conclusions

109. In the light of the foregoing considerations, I propose that the Court reply as follows to the questions referred for a preliminary ruling by the Tribunal d'instance, Saintes, by judgment of 16 November 2005:

(1) Article 11 of 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 requires that it be possible to apply national rules on interdependence between credit agreements and contracts for the supply of goods or services, implementing or corresponding to that article, even where the credit agreement does not indicate the goods or services being financed.

(2) Directive 87/102 does not pursue solely the objective of protecting consumers who obtain consumer credit but also and primarily that of ensuring the creation of a common market in consumer credit.

For effective protection of the rights that Article 11 of Directive 87/102 intends to confer on consumers it must be possible for the national courts to apply of their own motion the national rules on interdependence between credit agreements and contracts for the supply of goods or services, implementing or corresponding to that article.