OPINION OF ADVOCATE GENERAL LENZ

delivered on 7 December 1995 *

A — Introduction

1. This reference for a preliminary ruling from a Juzgado de Primera Instancia (Court of First Instance), Seville, is concerned with whether Article 11 of Council Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit [1] ('the directive') is directly applicable in proceedings between a consumer and a grantor of credit where the date for implementing the directive (1 January 1990) had expired yet it had not been transposed into Spanish law. Consequently, these proceedings are concerned once again with the question of the direct applicability of a directive in relations between private persons, with which the Court has had to deal repeatedly, most recently in the judgment of 14 July 1994 in *Faccini Dori*. [2] However, to date the Court has refused to hold that directives have such so-called horizontal direct effect.

2. The origin of the dispute is a credit agreement which the defendant in the main proceedings entered into in order to finance part of the consideration for a travel contract, where there was an agreement between the travel agent with which the travel contract was concluded and the company granting the credit under which the latter had the exclusive right to grant credit. Because of shortcomings in the service provided under the travel contract, the defendant in the main proceedings ceased paying instalments on the loan.

3. The national court seeks a ruling on whether the directive may be directly applicable in the defendant's favour. By order of 30 June 1994, it referred the following question to the Court for a preliminary ruling:

'Is 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, which has not been implemented in national law by the Spanish State, directly applicable in a case where a consumer seeks to rely, against a claim by the grantor of credit, on the defects in the service supplied by the supplier with

* Original language: German.

1 — Council Directive 87/102/EEC of 22 December 1986 (OJ 1987 L 42, p. 48).

2 — Case C-91/92 *Faccini Dori* [1994] ECR I-3325.

whom the said grantor of credit has concluded an exclusive agreement for granting credit to his customers?'

B — Opinion

4. After the request for a preliminary ruling was received at the Court, the judgment in *Faccini Dori* [3] was delivered, in which the Court answered the fundamental question relating to the horizontal direct effect of directives. That judgment was forwarded to the national court, which, when asked whether a ruling from the Court was still necessary in the instant case, stated that it wished to maintain its request for a preliminary ruling. Although the judgment in *Faccini Dori* basically answered the question as to whether directives could also have horizontal direct effect, doubts still remained as to whether the case-law should not be amended as a result of the addition of Article 129a to the EC Treaty by the Treaty on European Union. Article 129a requires the Community to contribute to the attainment of a high level of consumer protection.

5. In the course of the proceedings, written observations have been received from the plaintiff in the main proceedings, the Spanish and the French Governments and the Commission. All those participating in the proceedings agreed that there should not be a hearing.

3 — Cited in footnote 2.

6. It appears from the order for reference that the national court has difficulty in assisting Community law to achieve practical effectiveness. The provision which it deems relevant had not been transposed into national law at the material time, even though the prescribed period for implementing it had expired.

It would seem that there are no specific provisions of Spanish law to cover the material facts. It has to be assumed that there is a lacuna in Spanish law, which means that the national court could not give effect to the Community provision either by interpreting or by disapplying its national law. If the general rules of Spanish civil law were applied to the case, the outcome would conflict with the aims of the directive, since under national law a contract between two persons in principle cannot effect legal relations with a third party. Consequently, on the basis of the Court's case-law to date, the national court can see no way of securing the effectiveness of Community law, unless the provisions of an unimplemented directive on consumer protection could be applied to horizontal legal relations in conjunction with the recently introduced provision of Article 129a of the EC Treaty.

7. All those participating in the proceedings — the plaintiff in the main proceedings (the credit institution which brought the proceedings), the Spanish and the French Governments and the Commission — claim that the case-law to date should be adhered to.

I. Whether Article 11 of the directive is sufficiently precise and unconditional

8. The essential requirement which a directive must satisfy in order to have direct effect is that it must be sufficiently precise and unconditional as to enable rights to be derived from it directly for individuals. Article 11 of Directive 87/102 — at issue in these proceedings — reads 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.

3. Paragraph 2 shall not apply where the individual transaction in question is for an amount less than the equivalent of 200 ECU.'

9. Consequently, as a result of the particularly relevant provision in this case, Article 11(2), whether it is possible for the consumer to pursue remedies against the grantor of credit depends upon specific requirements which do not leave the Member States any leeway in implementation.

10. What might, however, suggest that the provision is not sufficiently precise and unconditional is — as the plaintiff in the main proceedings argues — that the second sentence of Article 11(2) provides for a certain discretion on the part of the Member States with regard to how the consumer can pursue his remedies — that is to say, as regards the form, the extent and the conditions. It may possibly follow from this that the legal position of the consumer will depend on the national implementing provision, with the result that Article 11 of the directive alone is not sufficiently specific.

11. It should be observed in this connection that Article 11(2) must be seen in the context of the provisions of the directive. Article 11(1) lays down a clear aim for the Member States in that it prohibits the consumer's being disadvantaged in any way as a result of the severance of a credit agreement from the transaction financed thereby. It follows from this, however, as regards Article 11(2) that the Member States have no discretion as to *whether* the consumer is to be enabled to pursue remedies against the grantor of credit. Member States are intended to have a free rein only with regard to *how* this takes place or, in other words, with regard to the actual configuration from the technical legal point of view of the legal position (consumer claim, defence, etc).

12. It appears from the context of the provisions of the directive that the basic grant of a legal position for the consumer is to be governed by Community law. In particular, the

first to the fourth recitals in the preamble to the directive mention the aim of approximating the law in the interest of avoiding distortions of competition. [4] Consequently, the basic question of granting protective rights for consumers is not left to the discretion of the Member States. This means that Article 11 of the directive can be regarded as being sufficiently precise and unconditional inasmuch as the consumer is to be afforded in any event the legal position referred to therein.

13. The discretion afforded to the Member States by the second sentence of Article 11(2) with regard to what extent and under what conditions the remedies are to be exercisable is therefore limited. As appears from Article 11(1) of the directive, the consumer may not in any event be in a worse position than he would have been had the credit agreement concluded in order to finance the underlying contract formed part of that contract. The remedies which the consumer may assert against the grantor of the credit must, in qualitative terms, at least not be worse that those available to him directly against the other party to the contract in respect of the transaction being financed. It follows that Article 11(2) of the directive is sufficiently precise and unconditional also in so far as the consumer is entitled to a certain minimum standard when it comes to asserting his remedies.

4 — Cf. Articles 100 and 100a of the EC Treaty.

II. The so-called horizontal effect of Article 11 of the directive

14. The question raised by the national court in its reference for a preliminary ruling essentially seeks to establish whether Article 11 of the directive can be applied directly in litigation between a consumer and a grantor of credit — that is to say, in legal relations between private persons — where the directive has not been transposed into national law within the prescribed period.

15. It should be considered *in limine* whether a national court is entitled to apply a provision of a directive which is directly applicable even where the beneficiary of the provision does not 'rely' on the provision. In the leading cases of the Court concerning the direct applicability of directives, direct effect constitutes a claim which the beneficiary is entitled to assert against the State by 'relying' on the relevant provision. [5] Nevertheless, in *Verholen* [6] the Court declared as follows:

'Community law does not preclude a national court from examining of its own

5 — See Case 8/81 *Becker* [1982] ECR 53.

6 — Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen and Others* [1991] ECR I-3757, point 1 of the operative part.

motion whether national rules are in conformity with the precise and unconditional provisions of a directive, the period for whose implementation has elapsed, where the individual has not relied on that directive before the national court'.

It may be inferred from this that, where all the other conditions are satisfied in order for a provision of a directive to be directly applicable, a national court may apply the provision in question even where the beneficiary has not expressly relied upon it. For the court to take a Community provision into account of its own motion is consonant with the primacy of Community law and fosters the effective application of Community law in the Member States.

1. *Case-law to date on the 'horizontal direct effect' of directives*

16. In its case-law to date, the Court has refused to hold that directives may be applied directly to legal relations between private persons, that is to say that they may have so-called horizontal direct effect. [7] Its reasoning is that no obligations for individuals may be inferred from the direct applicability of directives, since it is only in relation to Member States that directives are binding, the Member States being, under the third paragraph of Article 189, the only addressees of directives.

17. The Court has confirmed this stance, contrary to the view taken by its Advocate General [8] and many learned commentators, yet again in its judgment in *Faccini Dori*. [9] The contrary view taken by myself in my Opinion in that case related to directives adopted after the entry into force of the Single European Act and the Treaty on European Union. The directive at issue in these proceedings was adopted *before* those treaties entered into force. I am consequently unable to see any reason for proposing that the Court should go back on its case-law in that respect *in this case*.

2. *Effects of Article 129a of the EC Treaty with regard to the 'horizontal direct effect' of directives*

18. Unlike in the case of the legal position underlying *Faccini Dori*, Article 129a has

7 — Case 152/84 *Marshall* [1986] ECR 723, paragraph 48; Joined Cases 372/85 to 374/85 *Traen and Others* [1987] ECR 2141, paragraph 24; Case 14/86 *Pretore di Salò* [1987] ECR 2545, paragraph 19; Case C-221/88 *Busseni* [1990] ECR I-495, paragraph 23; Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 6; Case C-91/92 *Faccini Dori*, cited in footnote 2, paragraph 20.

8 — My Opinion in Case C-91/92 in *Faccini Dori* [1994] ECR I-3325, at I-3328 and I-3345, point 73.

9 — Cited in footnote 2, paragraph 24.

now been added to the Treaty. The national court therefore expressly asks the Court to consider whether the entry of that provision into force may prompt a fundamental change in the case-law.

19. The parties' views on this are as follows.

20. The *plaintiff in the main proceedings* considers that Article 129a is not capable of calling in question the case-law to date. The principle of a high level of consumer protection is not a new one in the EC Treaty, but was already enshrined in Article 100a(3). It would make no sense for the mere introduction of an article on consumer protection in the Treaty to be able to change the whole of the Court's case-law on the direct applicability of directives. The proposition asserted by the national court implies that there are privileged directives, which have horizontal directive effect *per se*, and non-privileged directives. The third paragraph of Article 189 affords no opening for such a distinction.

21. The *Government of the Kingdom of Spain* argues that Article 129a does not alter the legal position which existed before it was added to the Treaty. Even before the Treaty on European Union entered into force, Article 100a(3) was concerned with a high level of consumer protection. Article 129a simply makes it additionally possible to supplement the consumer protection policies pursued by the Member States by means of specific actions. Moreover, even before Article 129a entered into force, there were manifold Community provisions in the field of consumer protection.

Contrary to the national court's assumption, not all Treaty provisions have direct effect. Lastly, there is nothing to prevent a provision of the Treaty from being directly applicable and a directive based on the provision in question not satisfying the requirements in order for it to be directly applicable.

22. The *Government of the French Republic* submits — in reliance on the Court's case-law to date — that Article 129a is not capable of having direct effect. In order for individuals to be able to rely on that provision before the national courts, it would have to have direct effect. In no case, however, can

the directive have effects which place a burden on individuals.

23. Lastly, the *Commission* takes the view that the position of Article 129a in the Treaty shows that it creates a legal basis for consumer protection policy as a Community policy. In order to achieve the aim of a high level of consumer protection, Article 129a refers both to measures to be adopted in the context of the completion of the internal market and to specific action on the part of the Council in support of Member States' policies in this area. Article 129a constructs a Community policy in a predetermined framework which does not confer direct effect on the provision in question or enable an unimplemented directive to be relied upon as against individuals. There is therefore no doubt that the *Faccini Dori* case-law should not be changed on account of Article 129a.

24. In order to answer the national court's question, it will first be necessary to ascertain the basic function and importance of Article 129a of the EC Treaty within the structure of the provisions of Community law, since, as far as can be seen, there is as yet no case-law on the interpretation of that provision. Secondly, it will have to be considered whether, and if so what, conclusions have to be drawn with regard to any change in the case-law on the horizontal direct effect of directives.

(a) Interpretation of Article 129a of the EC Treaty

25. Article 129a reads as follows:

'1. The Community shall contribute to the attainment of a high level of consumer protection through:

(a) measures adopted pursuant to Article 100a in the context of the completion of the internal market;

(b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.

2. The Council, acting in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee, shall adopt the specific action referred to in paragraph 1(b).

3. Action adopted pursuant to paragraph 2 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.'

26. As a result of the Treaty on European Union, Article 3(s) of the EC Treaty confers on the Community the task of making 'a contribution to the attainment of a high level of consumer protection'. The key change in the Treaty in the sphere of consumer protection was the addition of Article 129a in Part Three of the EC Treaty, which deals with Community policies.

27. It is conspicuous, in connection with Article 3(s) of the EC Treaty, that Article 129a(1) provides merely that the Community is to 'contribute' in the sphere of consumer protection, with the result that it was evidently intended also to leave leeway for competence on the part of the Member States. Consequently, there is much to suggest that Article 129a of the EC Treaty sets out concurrent Community competence, which is therefore subject to the requirement of compliance with the principle of subsidiarity. [10] Accordingly, even if Article 129a contained something novel, it would be subject to Community action being necessary rather than action on the part of the Member States.

28. According to Article 129a(1) of the EC Treaty, the Community has to strive for a 'high level of consumer protection'. Similar wording is also to be found in Article 100a(3) of the EC Treaty:

'The Commission, in its proposals (...) concerning (...) consumer protection, will take as a base a high level of protection.'

That provision was introduced into the Treaty by the Single European Act, which means that the expression 'a high level of consumer protection' is not an innovation brought about by the Treaty on European Union.

29. Nevertheless, the national court would see the use of this expression in Article 129a of the EC Treaty as an innovation with

10 — See Article 3b of the EC Treaty.

respect to Article 100a which is connected with the higher degree of political and legal integration introduced by the Maastricht Treaty. In fact, however, it is clear already from the wording of Article 129a(1)(a) of the EC Treaty that reference was intended in the first place to be made only to the possibilities already available in the context of the completion of the internal market pursuant to Article 100a. The only way in which Article 129a(1)(a) diverges from Article 100a is that the former provision commits the *Community* to achieving a 'high level of consumer protection', whilst Article 100a puts the *Commission* under a corresponding duty. [11]

30. At this point, it may be objected that precisely this extension of the obligation to the Community as a whole, that is to say, to all the Community institutions, including the Court, expresses the advance in terms of integration resulting from the Maastricht Treaty, which requires a higher degree of efficiency of Community law to be secured. The requirement for efficiency (*effet utile*) applies, however, still only in the context of the law in force and the existing division of powers. The obligation on the *Community* with regard to consumer protection does not embody any obligation on the Member States or on individual Community citizens. However, Article 129a would have to embody such an obligation if it were to be the basis for the horizontal effect of a directive on consumer protection.

31. Consequently, the question remaining unanswered is what independent significance Article 129a may have as compared with Article 100a of the EC Treaty. It may be assumed that a large number of measures in the context of the internal market will contain references to consumer protection. Consequently, in future measures based on Article 100a will invariably have to have regard also to Article 129a of the EC Treaty and to the aforementioned obligation on the part of the Community *as a whole*. Accordingly, as in the case of the comparable problems of the relationship between Article 100a and Article 130s, which have been resolved by the Court, Article 100a might have to be regarded as the more specific provision, compared with Article 129a, as regards consumer protection in the context of the internal market. [12]

32. However, *indent (b)* of Article 129a(1) contains an additional innovation inasmuch as it as sets out for the first time competence on the part of the Community to take specific action in the field of consumer protection policy *outside* the ambit of measures relating to the internal market. [13] Previously,

11 — See Article 100a(3) of the EC Treaty.

12 — Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, paragraph 25.

13 — Engelhardt in Lenz (ed.), *EG-Vertrag, Kommentar*, Article 129a, note 8.

such measures could be based only on Article 235 of the EC Treaty. However, unlike Article 100a and Article 129a(1)(a), Article 129a(1)(b) authorizes the Community only to support and supplement the policy pursued by the Member States and hence to act only on an ancillary basis. [14] This view is also supported by the 'reinforcement of protection' clause contained in Article 129a(3), which leaves certain powers to the Member States. Furthermore, the position of Article 129a within the scheme of the Treaty at the end of the part relating to Community policies and the words 'specific action' (rather than 'measures') tend to suggest that Community activities in this area are not binding.

33. It must therefore be considered as an intermediate finding that Article 129a(1)(a) does not embody any qualitative change as compared with Article 100a such as to justify giving horizontal direct effect to consumer protection directives. Only Article 129a(1)(b) and Article 129a(2) and (3) embody a qualitative enlargement of the former consumer protection under Community law.

(b) Consequences with regard to any 'horizontal direct effect' of consumer protection directives

34. It remains, however, to be considered whether the innovation which has been found to have been introduced by Article 129a(1)(b) of the EC Treaty is capable of having a bearing on the horizontal direct effect of directives. As I have already stated, [15] in this context the Community acts only in order to supplement the consumer protection policies of the Member States. In my view, no original competence on the part of the Community to adopt measures binding on private persons, upon which the horizontal direct effect of directives would depend, can be inferred from Article 129a of the EC Treaty.

35. Indeed, it is even doubtful whether Article 129a has direct effect, which itself is a basic precondition in order to be able to rely on that provision in arguing that directives should have direct effect. Article 129a of the EC Treaty does set the Community clear aims, but, in view of its nature as a competence-conferring provision, it leaves relatively large margins of discretion as regards its implementation. Consequently, it lacks the very requirement that the provision in question should be sufficiently precise and unconditional.

14 — See point 26 above.

15 — In point 31.

36. Lastly, if it were to be held that directives have direct effect in view of Article 129a, this would entail consumer protection directives being treated differently than other directives. However, such differentiation is not set out in the third paragraph of Article 189 of the EC Treaty and it does not appear that Article 129a contains a more specific provision than the third paragraph of Article 189.

37. It therefore remains to be stated that an amendment of the Court's case-law with regard to the so-called horizontal effect of directives is not necessitated by the introduction of Article 129a in the EC Treaty.

C — Conclusion

38. In view of the foregoing considerations, I propose that the Court reply to the national court's question as follows:

(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 is not directly applicable in a case where a consumer seeks to rely, against a claim by the grantor of credit, on the defects in the service supplied by the supplier with whom the said grantor of credit has concluded an exclusive agreement for granting credit to his customers.

(2) Article 129a of the EC Treaty, which places the Communities under a duty to contribute to the attainment of a high level of consumer protection, is not capable of affording a basis for the direct applicability of directives on consumer protection.