JUDGMENT OF THE COURT (Third Chamber)
22 April 1999 *

In Case C-423/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Juzgado de Primera Instancia de Valencia (Spain) for a preliminary ruling in the proceedings pending before that court between

Travel Vac SL

and

Manuel José Antelm Sanchís,

on the interpretation of 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),

THE COURT (Third Chamber),

composed of: J.-P. Puissochet, President of the Chamber, J. C. Moitinho de Almeida and C. Gulmann (Rapporteur), Judges,

* Language of the case: Spanish.

Advocate General: S. Alber,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Travel Vac SL, by Salvador Vázquez Cantó, of the Valencia Bar,

— Mr Antelm Sanchís, by Josep Gallel Boix, of the Valencia Bar,

— the Spanish Government, by Nuria Díaz Abad, Abogado del Estado, acting as Agent,

— the Commission of the European Communities, by José Luis Iglesias Buhigues, Legal Adviser, and Pieter van Nuffel, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 26 November 1998,

gives the following

Judgment

1 By order of 11 November 1997, received by the Court on 15 December 1997, the Juzgado de Primera Instancia de Valencia referred to the Court for a preliminary ruling under Article 177 of the EC Treaty six questions on the interpretation of 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).

2 Those questions have been referred in proceedings between Travel Vac SL (hereinafter 'Travel Vac'), a company having its registered office in Valencia, and Mr Antelm Sanchís, who resides in Valencia, concerning Mr Antelm Sanchís' right to renounce the effects of his undertaking under a contract concluded with Travel Vac under the terms of which Mr Antelm Sanchís acquired a right to use immovable property on a time-share basis and rights to certain services.

3 Article 1(1) of Directive 85/577 provides:

'This Directive shall apply to contracts under which a trader supplies goods or services to a consumer and which are concluded:

— during an excursion organised by the trader away from his business premises,

or

— during a visit by a trader

(i) to the consumer's home or to that of another consumer;

(ii) to the consumer's place of work;

where the visit does not take place at the express request of the consumer.'

4 Article 3(2) of Directive 85/577 provides:

'This Directive shall not apply to:

(a) contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property.

...'

5 Article 5 of Directive 85/577 provides:

'1. The consumer shall have the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from receipt by the

consumer of the notice referred to in Article 4, in accordance with the procedure laid down by national law. It shall be sufficient if the notice is dispatched before the end of such period.

2. The giving of the notice shall have the effect of releasing the consumer from any obligations under the cancelled contract.'

6 Article 7 of Directive 85/577 provides: 'If the consumer exercises his right of renunciation, the legal effects of such renunciation shall be governed by national laws, particularly regarding the reimbursement of payments for goods or services provided and the return of goods received.'

7 Directive 85/577 was transposed into Spanish law by Law No 26/91 of 21 November 1991 (*Boletín Oficial del Estado* of 26 November 1991).

8 On 26 October 1994, the European Parliament and the Council adopted Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a time-share basis (OJ 1994 L 280, p. 83). The period prescribed by that directive for Member States to adopt the laws, regulations and administrative provisions necessary to implement it expired on 29 April 1997.

9 According to the order for reference, under the terms of their contract concluded on 14 September 1996 in Denia (Spain), Travel Vac sold to Mr Antelm Sanchís a 1/51 undivided share of a furnished apartment in the Parque Denia residential

development, entitling him to the exclusive use of that apartment during the 19th week of the calendar year under a 'time-share' scheme.

10 Under the contract, Travel Vac was also obliged to provide Mr Antelm Sanchís with certain services such as maintenance of the building, management and administration of the time-share scheme, use of the common services of the residential estate and membership of Resort Condominium International, an international club allowing the purchaser to exchange his holidays in accordance with the rules of the club.

11 Under the contract the purchaser had to pay the sum of ESP 1 090 000, of which ESP 285 000 was the cost of the undivided share, the balance of the price being made up of value added tax, joint ownership of the furniture as inventoried, the abovementioned services and membership of Resort Condominium International.

12 The contract also provided that the purchaser had the right to cancel the contract within seven days of its signature, on giving notice to the vendor by authentic document and on payment of 25% of the total price by way of damages expressly agreed.

13 The order for reference also states that it was agreed between the parties that Mr Antelm Sanchís was to appear at the bank to sign the document confirming the contract within three days of signing it, therefore by 17 September 1996 at the latest. However, Mr Antelm Sanchís did not appear at the bank within the period prescribed, but, instead, went to the vendor's offices in Valencia on 17 September 1996 and stated orally that the whole contract was of no effect and that the documents he had signed should be returned to him.

14 On 22 November 1996, Travel Vac applied to the Juzgado de Primera Instancia for an order for enforcement against Mr Antelm Sanchís in respect of his failure to pay a bill of exchange for ESP 90 000 which he handed over when the contract was signed.

15 The national court raised the question whether Directive 85/577 applied to the case and, if so, whether it could grant the counterclaim for cancellation of the contract made by Mr Antelm Sanchís.

16 It therefore decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are time-share contracts generally, and the contract at issue in the present case in particular, to be regarded as falling within the scope of Article 3(2)(a) of Directive 85/577/EEC, which contains provisions excluding the application of that directive?

(2) Even if, by virtue of that article, the contract at issue in the present case, being a time-share contract, is excluded from the application of that directive, could such exclusion be precluded by the fact that the contract is not concerned solely with immovable property but also involves the provision of services and other matters relating exclusively to the fulfilment of obligations (clause 3) which account for the greater part of the consideration payable (inasmuch as the value of the immovable property itself amounts to ESP 285 000 out of the total contract value of ESP 1 090 000)?

(3) Is the complex of holiday time-share flats offered to consumers in the town of Denia covered by the first indent of Article 1(1) of Directive 85/577, having

regard to the fact that the premises of Travel Vac SL are located at 5-6° Calle Profesor Beltrán Báguena, Valencia?

(4) Is the right of renunciation granted to the consumer by Article 5(1) of the directive based on a presumption that the exercise of his free will has been affected or manipulated as a result of the circumstances referred to in Article 1 of the directive; if so, to what extent does that right of renunciation, as guaranteed by the directive, arise from deliberate deceit on the part of the vendor using, as one of the contracting parties, "false pretences which induce the other to enter into a contract which would not otherwise have been concluded" (Article 1269 of the Spanish Civil Code) and, generally, from the freely given consent which necessarily forms part of any contract (Articles 1254, 1258, 1261 et seq. of the Spanish Civil Code)?

(5) Must the notice provided for by Article 5(1) of the directive be given expressly, or can it, where appropriate, take the form of specific unequivocal acts such as, in the present case, the non-appearance of the consumer at the time stipulated and agreed for signature of the confirmation on the Bank's premises, on 17 September 1996, three days after signature of the contract appearing on page 76 in the case-file, the consumer's position being evidenced and made clear by his appearance in the vendor's premises in Valencia on the same day, 17 September 1996, when he stated orally that "it was all off and that the documents which he had signed were to be returned to him"?

(6) Are the provisions of Article 7 of the directive concerning repayments, return of goods and other effects arising in favour of the vendor upon the exercise by the consumer of his right of renunciation pursuant to Article 5 compatible with a stipulation for payment of "compensation for damage caused to the vendor" in the form of a lump sum quantified at 25% of the total price of the transaction, as laid down in clause 4 of the contract (on the reverse of page 76 in the case-file)?'

The first and second questions

17 By its first and second questions, which must be considered together, the national court is asking essentially whether Directive 85/577 applies to a contract for the purchase of a right to use immovable property on a time-share basis and for the provision of services whose value is higher than that of the right to use the immovable property.

18 Travel Vac submits that Directive 85/577 does not apply to time-share contracts, either as regards the acquisition of a right *in rem* or as regards the acquisition of a right *in personam* over the property concerned. In its view, such contracts are covered by Directive 94/47.

19 Mr Antelm Sanchís argues that a time-share contract creates no rights over immovable property but relates to the provision of services to enable a consumer to make use of one or more immovable properties through the purchase of a 'share' as though he were a member of a club or association. Under this type of contract, any consumer can require from the trader the provision of certain services in order to be able to occupy intermittently one or more immovable properties for a short period.

20 The Spanish Government submits that a time-share contract in general must be considered to be one of the cases to which Directive 85/577 does not apply, according to its Article 3(2)(a), in so far as it confers a right *in rem* over an immovable property. However, since, in the main proceedings, the rights in movable property are of greater value than the rights in immovable property, the contract is covered by Directive 85/577.

21 The Commission takes the view that Directive 85/577 applies to the contract at issue in the main proceedings given that the shared use of the building is only one aspect of the contract which covers the provision of a set of tourist services.

22 The Court holds it necessary to observe first of all that, whilst it is true that time-share contracts are covered by Directive 94/47, this does not preclude a contract having a time-share element from being covered by Directive 85/577 if the conditions for the application of that directive are otherwise fulfilled.

23 Neither directive contains provisions ruling out the application of the other. Moreover, it would defeat the object of Directive 85/577 to interpret it as meaning that the protection it provides is excluded solely because a contract generally falls under Directive 94/47. Such an interpretation would deprive consumers of the protection of Directive 85/577 even when the contract was concluded away from business premises.

24 It must be pointed out next that, under Article 3(2)(a) of Directive 85/577, that directive does not apply to contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property.

25 However, it must be observed, as the Commission points out, that, since a contract like that at issue in the main proceedings does not only concern the right to use a time-share apartment, but also concerns the provision of separate services of a value higher than that of the right to use the property, that contract is not covered by the exception provided for in Article 3(2)(a) of Directive 85/577.

26 Accordingly, the answer to the first and second questions must be that Directive 85/577 applies to a contract relating to the acquisition of a right to use immovable property on a time-share basis and to the provision of services whose value is higher than that of the right to use the immovable property.

The third question

27 By its third question, the national court asks essentially whether a contract can be considered to have been concluded during an excursion organised by the trader away from his business premises within the meaning of Article 1(1) of Directive 85/577 if it was signed at a tourist complex of time-share apartments located in a town to which the consumer was invited and which is not the town where the trader has its registered office.

28 Mr Antelm Sanchís states, first, that the term 'excursion' implies that the consumer leaves the town where he lives. In the present case, the contract was concluded during an excursion. The trader had invited him to Denia, a town situated about 100 km from Valencia where he lives. The excursion was organised by the trader, who told him that he had to travel on a specified day at a specified time and to a specified town.

29 Second, Mr Antelm Sanchís states that the contract was concluded in Denia, at premises adapted for the purpose of presenting the product to various consumers, that is to say, away from the vendor's business premises in Valencia.

30 The Spanish Government submits that Directive 85/577 is applicable if the trader initiates negotiations, even if the contract was concluded at his business premises.

31 The Commission points out, first, that the national case-file shows that Mr Antelm Sanchís received several letters pressing him to visit the premises to collect a luxury gift which he would receive, without obligation, when he did. Those letters were followed by numerous telephone calls urging him to take part in sales meetings organised by Travel Vac at the tourist complex where consumers were kept for several hours and repeatedly offered alcoholic drinks.

32 The Commission takes the view that Directive 85/577 applies to a contract concluded in a tourist complex between a trader whose business premises are in a place different from that where the contract is concluded and a consumer whom that trader has invited to come personally to that place in order to present to him the trader's products and services, if that invitation is accompanied by inducements which have nothing to do with the products and services presented and which were offered to the consumer merely for attending the presentation and which clearly induced him to attend it.

33 It must be borne in mind that, according to Article 1(1), first indent, of Directive 85/577, a contract is covered by that directive if it is concluded during an excursion organised by the trader away from his business premises.

34 Furthermore, the fourth recital of Directive 85/577 states that the special feature of contracts concluded away from the business premises of the trader is that it is the trader who initiates the contract negotiations.

35 As regards the question whether a contract was concluded during an excursion organised by the trader, it must be observed, first, that a contract concluded in a town other than the one in which the consumer lives and at a certain distance from it, such that he has had to undertake a journey to reach that town, must be considered to have been concluded during an excursion within the meaning of Directive 85/577.

36 Second, where the initiative for such an excursion comes from the trader, in the sense that he invites the consumer to a specified place by letters and/or telephone calls indicating the date, time and place of the meeting, it must be considered that the excursion has been organised by the trader within the meaning of Directive 85/577.

37 As regards the question whether the contract was concluded away from the trader's business premises, it must be observed that this concept refers to premises in which the trader usually carries on his business and which are clearly identified as premises for sales to the public.

38 The answer to the third question must therefore be that a contract concluded in a situation in which a trader has invited a consumer to go in person to a specified place at a certain distance from the place where the consumer lives, and which is different from the premises where the trader usually carries on his business and is not clearly identified as premises for sales to the public, in order to present to him the products and services he is offering, must be considered to have been concluded during an excursion organised by the trader away from his business premises within the meaning of Directive 85/577.

The fourth question

39 By its fourth question, the national court is asking essentially whether it is sufficient, in order for a consumer to be able to exercise his right of renunciation under Article 5(1) of Directive 85/577, for the contract to have been concluded in circumstances such as those described in Article 1 of that directive, or whether it must also be shown that the consumer was influenced or manipulated by the trader.

40 The Spanish Government states that account should be taken of the fact that the right of renunciation granted to the consumer is intended to meet the risk of abusive commercial practices, so that the right arises simply if he is a consumer and the contract falls within the directive, without his needing to prove that such abusive practices took place and even if there were no such practices.

41 The Commission claims that the right of renunciation is unconditional inasmuch as its exercise in no way depends on the existence of any false pretences on the part of the trader or on the trader's intention to manipulate the consumer in order to force him to make a decision in the trader's interest. The right of renunciation is implicit in any contract covered by Directive 85/577.

42 The fourth recital of Directive 85/577 explains that, when a contract is concluded away from a trader's business premises, the consumer is unprepared for the contract negotiations, and that he is often unable to compare the quality and price of the offer with other offers. For that reason, according to the fifth recital of the directive, the consumer should be allowed a right of cancellation over a period of at least seven days in order to enable him to assess the obligations arising under the contract.

43 It follows that, in order for the consumer to have the right of renunciation provided for by Directive 85/577, it is sufficient for him to be in one of the situations described in Article 1 of that directive. Specific conduct or an intention to manipulate on the part of the trader are not, however, required and do not therefore have to be proved.

44 Accordingly, the answer to the fourth question must be that the consumer can exercise his right of renunciation under Article 5(1) of Directive 85/577 where the contract has been concluded in circumstances such as those described in Article 1 of that directive, without there being any need to prove that the consumer was influenced or manipulated by the trader.

The fifth question

45 By its fifth question the national court is asking essentially whether Directive 85/577 precludes a Member State from adopting rules providing that the notice of renunciation provided for by Article 5(1) of the directive is not subject to any condition as to form.

46 Mr Antelm Sanchís takes the view that the expression 'by sending notice' in Article 5(1) of Directive 85/577 must be understood as meaning that the trader must be notified of renunciation in accordance with the domestic rules of each Member State. The expression 'by sending' should therefore cover mere 'oral' communication. He adds that Spanish law requires no particular form for the sending of notice.

47 The Spanish Government points out that Article 5(2) of the Spanish Law which transposes Article 5(1) of Directive 85/577 provides that 'renunciation is not subject to any condition as to form'.

48 The Commission points out that Directive 85/577 lays down neither the form nor the conditions for the notice mentioned in Article 5(1) of that directive. Given its protective function, the Commission takes the view that the provision must be interpreted broadly, as not requiring the consumer to observe any particular form, as long as his wish to cancel the contract is established and it is clearly communicated to the trader within the period prescribed.

49 It should be borne in mind first of all that Article 5(1) of Directive 85/577 provides that the consumer has the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from receipt by the consumer of the notice referred to in Article 4, in accordance with the procedure laid down by national law.

50 It follows that Directive 85/577 does not preclude a Member State from adopting rules which provide that notice of renunciation is not subject to any condition as to form, so allowing the notice to consist, in particular, of unequivocal acts. Given the objective of the directive, namely to protect the consumer, a Member State may adopt such provisions to make it easier for the consumer to exercise his right of renunciation.

51 Whilst, as regards observance of the period prescribed, the last sentence of Article 5(1) provides that it is sufficient for notice to be sent before the end of that period, this does not mean that notice must be given in writing. This provision merely concerns the calculation of the minimum period of seven days where the consumer gives notice of renunciation in writing.

52 The answer to the fifth question must accordingly be that Directive 85/577 does not preclude a Member State from adopting rules providing that the notice of renunciation provided for by Article 5(1) of the directive is not subject to any condition as to form.

The sixth question

53 By its sixth question, the national court is asking essentially whether Directive 85/577 precludes the inclusion in a contract of a clause requiring payment by the consumer of a lump sum for damage caused to the trader for the sole reason that he has exercised his right of renunciation.

54 Mr Antelm Sanchís submits that the contract is not made until the period of at least seven days mentioned in Article 5(1) of Directive 85/577 has elapsed. If statutory penalties are not payable because the consumer exercised his right to cancel within the period prescribed by the directive, contractual penalties cannot be payable either on the ground that they are unlawful.

55 The Spanish Government takes the view that, if a consumer exercises his right to cancel, the contract becomes null and void and the parties must consider that they have discharged all obligations towards one another without any penalty clause being enforceable.

56 The Commission considers that a clause such as that described at paragraph 53 of this judgment is contrary to the binding provisions of Article 5(2) of Directive 85/577. If notice of renunciation given by the consumer has the effect of releasing him from all obligations under the contract, the vendor cannot impose on him a

contractual obligation to pay damages by way of compensation for the sole reason that he exercised the right of renunciation granted by Directive 85/577.

57 On that point, it should be borne in mind that Article 5(2) of Directive 85/577 provides that, in the event of renunciation the consumer is released from any obligations under the cancelled contract.

58 It follows that, after cancellation of the contract, the obligation to pay damages if the contract is not performed is extinguished. As the Advocate General points out in point 59 of his Opinion, to enforce payment of such damages would be tantamount to imposing a penalty on the consumer for exercising his right of renunciation, which would be contrary to the protective purpose of Directive 85/577 which is precisely to prevent the consumer from undertaking financial obligations without being prepared for them.

59 Whilst Article 7 of Directive 85/577 refers to national laws to govern the legal effects of renunciation, particularly as regards the reimbursement of payments for goods or services provided and the return of goods received, that provision does not concern payment of compensation for exerise of the right of renunciation, but only the effects of renunciation on the parties, for which provision may be made in those laws, as regards the reimbursement or return of payments or goods already supplied.

60 Accordingly, the answer to the sixth question must be that Directive 85/577 precludes the inclusion in a contract of a clause imposing payment by the consumer of a lump sum for damage caused to the trader for the sole reason that the consumer has exercised his right of renunciation.

Costs

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

On those grounds,

THE COURT (Third Chamber),

in answer to the questions referred to it by the Juzgado de Primera Instancia de Valencia by order of 11 November 1997, hereby rules:

1. **Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises applies to a contract relating to the acquisition of a right to use immovable property on a time-share basis and to the provision of services whose value is higher than that of the right to use the immovable property.**

2. **A contract concluded in a situation in which a trader has invited a consumer to go in person to a specified place at a certain distance from the place where the consumer lives and which is different from the premises where the trader usually carries on his business and is not clearly identified as premises for**

sales to the public, in order to present to him the products and services he is offering, must be considered to have been concluded during an excursion organised by the trader away from his business premises within the meaning of Directive 85/577.

3. **The consumer can exercise his right of renunciation under Article 5(1) of Directive 85/577 where the contract has been concluded in circumstances such as those described in Article 1 of that directive, without there being any need to prove that the consumer was influenced or manipulated by the trader.**

4. **Directive 85/577 does not preclude a Member State from adopting rules providing that the notice of renunciation provided for by Article 5(1) of the directive is not subject to any condition as to form.**

5. **Directive 85/577 precludes the inclusion in a contract of a clause imposing payment by the consumer of a lump sum for damage caused to the trader for the sole reason that the consumer has exercised his right of renunciation.**

Puissochet Moitinho de Almeida Gulmann

Delivered in open court in Luxembourg on 22 April 1999.

R. Grass J.-P. Puissochet

Registrar President of the Third Chamber