OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 7 May 2009 [1]

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I — Introduction

1. This case raises the question whether a national court may, of its own motion, act and declare a contract negotiated away from business premises void because the consumer was not informed of his right of cancellation, even though the national law in force does not allow it to act of its own motion in such circumstances and the consumer who has not received such information must himself seek the annulment of the contract. The case concerns the interpretation of the provisions of the EC Treaty on consumer protection and the interpretation of the third paragraph of Article 4 of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [2] ('Directive 85/577') which provides that Member States must ensure that appropriate consumer protection measures are laid down in cases where the consumer has not been informed of his right of cancellation.

2. In the case of a contract negotiated away from business premises, the consumer's right to cancel a contract of that kind, as well as his being given due notice of that right and the provision of appropriate and effective measures in cases where that information is not supplied to him play an essential part in the protection of consumers. Where a consumer concludes a contract of that kind,

2 — OJ 1985 L 372, p. 31.

often he cannot estimate objectively all the consequences of the contract that will affect him. Since the consumer is the weaker party to the contract, it will be necessary to assess in this case whether, in order to secure the effective protection of his rights, national courts are required, in disputes dealing with such contracts, to ensure of their own motion that consumer rights are protected.

(t) a contribution to the strengthening of consumer protection;

…'

II — Relevant legislation

4. Article 95 EC provides:

A — *Community law*

'…

1. EC Treaty

3. Article 3(1) EC provides:

(3) The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

'For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

…

…'

5. Article 153 EC provides:

‘(1) In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

(2) Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.

(3) The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through:

(a) measures adopted pursuant to Article 95 in the context of the completion of the internal market;

(b) measures which support, supplement and monitor the policy pursued by the Member States.

(4) The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 3(b).

(5) Measures adopted pursuant to paragraph 4 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.’

2. Directive 85/577/EEC

6. The fourth, fifth and sixth recitals in the preamble to Directive 85/577 state:

‘Whereas the special feature of contracts concluded away from the business premises of the trader is that as a rule it is the trader who initiates the contract negotiations, for which the consumer is unprepared or which he does not expect; whereas the consumer is often unable to compare the quality and price of the offer with other offers; whereas this surprise

element generally exists not only in contracts made at the doorstep but also in other forms of contract concluded by the trader away from his business premises;

Whereas the consumer should be given 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; [3]

Whereas appropriate measures should be taken to ensure that the consumer is informed in writing of this period for reflection.'

3 — It should be mentioned with regard to the concepts of 'cancellation' and 'renunciation' that Directive 85/577 uses both expressions: the first paragraph of Article 4 deals with the consumer's right of cancellation ('droit de résiliation/résilier', 'Widerrufsrecht', 'derecho de rescisión/a rescindir'), whereas Article 5(1) states that the consumer has 'the right to renounce the effects of his undertaking' ('droit de renoncer aux effets de son engagement', 'das Recht, von der eingegangenen Verpflichtung zurückzutreten', 'derecho de renunciar a los efectos de su compromiso'). It should be noted with regard to the German version of Directive 85/577 that the same expression is used in the fifth recital as in Article 5(1) ('das Recht,... zurückzutreten'). A comparative analysis in law of the concepts of 'cancellation' and 'renunciation' would go beyond the scope of investigation of this Opinion since their legal consequences are determined by the law of the respective Member States; it should simply be made clear that, rather than using both expressions in my Opinion, I shall be using the expression 'cancellation' only.

7. 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 a visit by a trader

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

…

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

8. Article 4 of Directive 85/577 provides:

'In the case of transactions within the scope of Article 1, traders shall be required to give consumers written notice of their right of cancellation within the period laid down in Article 5, together with the name and address of a person against whom that right may be exercised.

Such notice shall be dated and shall state particulars enabling the contract to be identified. It shall be given to the consumer:

(a) in the case of Article 1(1), at the time of conclusion of the contract;

(b) in the case of Article 1(2), not later than the time of conclusion of the contract;

(c) in the case of Article 1(3) and 1(4), when the offer is made by the consumer.

Member States shall ensure that their national legislation lays down appropriate consumer protection measures in cases where the information referred to in this Article is not supplied.'

9. 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 [4] 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.'

B — *The Charter of Fundamental Rights of the European Union*

10. Under the heading 'Consumer protection', Article 38 of the Charter of Fundamental

4 — [This footnote concerns only the Slovenian version of the Opinion.]

Rights of the European Union [5] ('Charter') provides:

'Union policies shall ensure a high level of consumer protection.'

C — *National law*

11. Directive 85/577 was transposed into Spanish national law by Law 26/1991 of 21 November 1991 on contracts concluded away from business premises [6] ('Law 26/1991').

12. Article 3 of Law 26/1991 provides:

'1. The contract or contractual offer referred to in Article 1 must be set down in writing, in duplicate, must be accompanied by a cancellation notice, [7] and must be dated and signed by the consumer in his own hand.

2. The contract document must include, in prominent letters immediately above the space allocated for the consumer's signature, a clear and precise reference to the right of the consumer to revoke the consent given and to the conditions for and consequences of the exercise of that right.

3. The cancellation notice must include in a clearly visible form the words 'cancellation notice' and must state the name and address of the person to whom it must be sent and the particulars of the contract and the parties concerned.

4. Once the contract has been signed, the trader or the person acting on his behalf shall give to the consumer one copy of the contract and the cancellation notice.

5. The trader is responsible for proving that the obligations set out in this article have been complied with.'

5 — The Charter was solemnly proclaimed initially on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) and was subsequently adapted on 12 December 2007 in Strasbourg (OJ 2007 C 303, p. 1).

6 — Ley 26/1991, de 21 de noviembre, sobre contratos celebrados fuera de los establecimientos mercantiles, Boletín Oficial del Estado (BOE), 26.11.1991, No 283/1991.

7 — Law 26/1991 uses the expression 'revocación'.

13. Article 4 of Law 26/1991 sets out the consequences of failure to meet the requirements laid down in Article 3 and provides:

'A contract concluded or an offer made in breach of the conditions laid down in Article 3 may be cancelled at the request of the consumer.

Under no circumstances may the trader invoke the ground of cancellation unless non-compliance is attributable exclusively to the consumer.'

14. Article 9 of Law 26/1991 provides:

'The rights conferred on the consumer by this Law may not be waived. Nevertheless, the contractual terms which are most favourable to the consumer shall be deemed to be valid.'

III — Facts, main proceedings and question referred for a preliminary ruling

15. On 20 May 2003 Eva Martín Martín negotiated a contract at her home with a representative of EDP Editores S.L. ('EDP') for the purchase of 15 books, five DVDs and a DVD player. [8] Those goods were delivered to her on 2 June 2003. The purchase price was EUR 1 909, of which amount Eva Martín Martín paid EUR 47.48 but failed to settle the balance of EUR 1861.52.

16. Since EDP did not receive payment for the goods delivered, it applied to the Juzgado de Primera Instancia numero Uno de Salamanca (Court of First Instance No 1, Salamanca) for an order for payment against Eva Martín Martín in respect of the balance on the purchase price, that is to say EUR 1 861.52 plus default interest at the rate prescribed by statute. Eva Martín Martín lodged an appeal with the Audiencia Provincial de Salamanca (Provincial Court, Salamanca) ('referring court') against the judgment of 14 June 2007 ordering her to pay the amount claimed.

17. In the order for reference the referring court expresses the view that the contested contract might be void as the consumer was

8 — Although Eva Martín Martín signed the contract, her partner Juan Caballo Bueno is named in it as the purchaser. Throughout the proceedings before the Spanish courts, reference has only ever been made to Eva Martín Martín as the contracting party.

given no notice either of her right to cancel the contract within seven days from delivery of the goods concerned or of the conditions for and consequences of the exercise of that right. The referring court stresses that the consumer did not seek annulment of the contract either in the proceedings at first instance or in the appeal proceedings.

18. The referring court mentions in this connection that the consumer is required under Spanish law — to be more precise, under Article 4 of Law 26/1991 — to seek annulment of the contract where, upon its conclusion, the requirement to inform the consumer of his right of cancellation has not been met. Moreover, under the Spanish Law on Civil Procedure the principle that the parties delimit the subject-matter of the proceedings ('principio de rogación') applies, under which the court cannot examine of its own motion facts, evidence and claims which the parties have not invoked. The referring court is consequently uncertain whether, in adjudicating on this case, it should take into account only the claims asserted by the parties in the appellate proceedings, or whether Directive 85/577 allows it to declare the contract void of its own motion.

19. In those circumstances, the referring court decided to stay the proceedings by order of 20 May 2008 and referred the following question to the Court for a preliminary ruling:

'Must Article 153 EC, in conjunction with Articles 3 EC and 95 EC, Article 38 of the Charter of Fundamental Rights of the European Union, and Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, specifically [with] Article 4 thereof, be interpreted as meaning that a court seized of an appeal against a judgment given at first instance may, of its own motion, declare a contract which falls within the scope of that directive void, where no plea of nullity was raised at any point by the defendant consumer when submitting a defence to the order for payment procedure, at the hearing, or during the appeal?'

IV — Proceedings before the Court of Justice

20. The order for reference was received at the Court on 26 May 2008. In the written procedure, observations were submitted by

EDP, the Spanish Government, the Austrian Government and the Commission. At the hearing on 12 March 2009, EDP, the Spanish Government, the Czech Government — which did not submit written observations — and the Commission presented oral argument and answered questions from the Court.

V — Arguments of the parties

21. EDP takes the view that Article 4 of Directive 85/577 should not be construed as permitting the national court, of its own motion, to declare a contract negotiated with the consumer away from business premises void, if the consumer has not invoked its nullity.

22. In its submissions EDP notes that Member States must ensure pursuant to Article 4 of Directive 85/577 that their respective national legal order lays down appropriate consumer protection measures, and that the directive does not make provision in any of its articles for the court to have the power to determine nullity of its own motion if the consumer himself has not invoked it. The relevant Spanish legislation, [9] under which the consumer must seek the annulment of the contract, therefore is not, in its view, contrary to Article 4 of the directive; on the contrary, it offers a high level of protection of consumer rights. In EDP's view, account must still be taken in that regard of whether a national provision renders the exercise of rights conferred by Community law impossible in practice or excessively difficult. [10]

23. EDP notes further that Spanish law makes a distinction between relative and absolute nullity. It points out that the nullity of contracts negotiated away from business premises is 'relative nullity' and a declaration as such must invariably be sought by the party concerned. In the case of 'absolute nullity', it maintains that claims for annulment are not subject to a limitation period under Spanish law and, moreover, that such claims may be asserted by third parties; furthermore, the courts themselves may establish the nullity of their own motion.

24. The Spanish Government takes the view that Article 4 of Directive 85/577 is not necessarily to be construed as allowing the national court, of its own motion, to declare a contract negotiated away from business premises void if the consumer has not invoked the nullity of the contract at any point in the proceedings.

25. The level of consumer protection afforded to consumers by Law 26/1991, it

9 — EDP considers that Real Decreto Legislativo 1/2007 (Royal Legislative Decree 1/2007) of 16 November 2007 repealing Law 26/1991 is relevant in this case. As the Spanish Government points out (see footnote 11 of this Opinion), it is in fact still Law 26/1991, which was in force at the material time, that is relevant in this case.

10 — In that regard EDP cites the judgment in Case C-312/93 *Peterbroek and Others* [1995] ECR I-4599, paragraph 14.

submits, is entirely consistent with the requirements of the EC Treaty and Directive 85/577, and thus that law fully and duly transposes the provisions of Directive 85/577 [11] into Spanish law. By providing that the consumer can seek the annulment of the contract if he has not been informed of his right of cancellation, Article 4 of Law 26/1991 affords consumers adequate protection. The obligation incumbent on Member States under Article 4 of Directive 85/577 — under which they must ensure that their domestic legislation lays down appropriate consumer protection measures — can be met in various ways, including by enabling the consumer to seek annulment. The choice of means by which such consumer protection is secured falls to the domestic legal order of each Member State.

26. The Spanish Government asserts that it is apparent from the case-law on Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [12] ('Directive 93/13') that the court must be given an opportunity to establish of its own motion that unfair terms in consumer contracts are void where the safeguarding of public policy is at issue. In that regard it refers to the judgments in *Océano Grupo and Salvat Editores* [13] ('*Océano Grupo*'), *Cofidis* [14] and *Mostaza Claro*. [15] Although Directive 85/577 — not Directive 93/13 — is relevant in this case, that case-law must also be taken into account when examining cases on the basis of Directive 85/577. However, it is imperative, in its view, to examine whether this case concerns public policy.

27. The Austrian Government considers that Article 4 of Directive 85/577 should be construed as not requiring Member States to oblige their courts to declare, of their own motion, a contract negotiated away from business premises void, without the consumer having invoked its nullity in the proceedings before the national court.

28. It submits that it cannot be inferred from Article 4 of Directive 85/577 that the contract is in fact void because the trader has not informed the consumer of his right of cancellation. Unlike the provisions of this directive, Article 6(1) of Directive 93/13 expressly provides as follows: 'Member States shall lay down that unfair terms...

11 — The Spanish Government submits further that Law 26/1991 was replaced by Real Decreto Legislativo 1/2007 (Royal Legislative Decree 1/2007) of 16 November 2007 but that Law 26/1991 was still in force at the material time.

12 — OJ 1993 L 95, p. 29.

13 — Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941.

14 — Case C-473/00 *Cofidis* [2002] ECR I-10875.

15 — Case C-168/05 *Mostaza Claro* [2006] ECR I-10421.

shall... not be binding on the consumer.' In contrast, Article 4 of Directive 85/577 simply provides as follows: 'Member States shall ensure that their national legislation lays down appropriate consumer protection measures in cases where the information referred to in this Article is not supplied.' In the absence of Community rules governing the matter, it is, in accordance with settled case-law, for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law. [16]

29. The Austrian Government emphasises that where a consumer has not been informed of his right of cancellation, Member States can lay down other appropriate measures and, by way of example, mentions that the consumer can rescind the contract at any time; [17] another possible measure could be for the courts to be obliged to inform the consumer of his right of cancellation. An ex officio declaration of a contract's nullity is therefore only one of the possibilities available to Member States for protecting consumers for the purposes of Article 4 of Directive 85/577.

30. The Austrian Government thus takes the view that Article 4 of Directive 85/577 does not require the Member States to oblige their courts to declare, of their own motion, a contract void if the consumer has not been informed of his right of cancellation.

31. On the other hand, the Commission takes the view that Directive 85/577 should be interpreted as follows: where a contract has been negotiated in breach of the obligation to inform the consumer of his right to cancel the contract, the national court must, of its own motion, establish that infringement and declare the contract void, even though the consumer has not asserted the nullity of the contract. The Commission considers that the possibility for the consumer to seek annulment of the contract, where he has not been informed of his right to cancel it, is not an appropriate consumer protection measure for the purposes of Article 4 of Directive 85/577. There is a risk that the consumer will be unaware of his rights and consequently will not assert them.

32. The Commission notes that, according to settled case-law, in the absence of relevant Community rules, it is for the domestic legal system of each Member State, under the principle of procedural autonomy of the Member States, to lay down the detailed procedural rules designed to safeguard the

16 — Here the Austrian Government cites the judgments in Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5, and Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 39.

17 — The Austrian Government refers to the judgment in Case C-481/99 *Heininger* [2001] ECR I-9945.

rights which individuals derive from Community law; however, those rules may not be less favourable than those governing similar domestic situations (principle of equivalence) and must not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness). [18] The Commission further considers that national courts are able to act of their own motion only in exceptional cases involving the public interest. [19]

33. It adds that the Court has ruled in its case-law on Directive 93/13 that the national court has the power to determine of its own motion whether terms in consumer contracts are unfair. [20] Moreover, the Court has also ruled with regard to 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 [21] ('Directive 87/102') that the national court has the power to ensure of its own motion that the consumer is able to assert certain rights vis-à-vis the grantor of credit. [22] In the Commission's view, that case-law can be applied *mutatis mutandis* to the interpretation of Directive 85/577.

34. At the hearing the Commission added that other measures — such as administrative penalties, the possibility of cancelling the contract at any time or the obligation of the courts to inform the consumer of his right of cancellation — are not appropriate for protecting consumers: Although administrative penalties may act as a deterrent, they are not geared towards protecting individual consumers; the possibility of cancelling the contract at any time is not an appropriate measure because there is a risk that the consumer will be unaware of that right, and the obligation incumbent on the courts to inform the consumer of his right of cancellation is dependent on whether it is permitted to do so under national procedural law. The Commission makes the final point that, in view of the fact that the consumer will be seeking in some circumstances to maintain the contract in force, he must have the option of opposing the declaration of nullity and in such circumstances of continuing to be bound by the contract.

18 — In this regard the Commission relies on the judgments in Joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen* [1995] ECR I-4705, paragraph 17, Case C-129/00 *Commission* v *Italy* [2003] ECR I-14637, paragraph 25, Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 28, and in *Mostaza Claro* (cited in footnote 15, at paragraph 24).

19 — In this connection the Commission refers to the judgments in *van Schijndel and van Veen* (at paragraph 21) and *van der Weerd* (at paragraph 35), cited in footnote 18.

20 — The Commission in this regard cites the judgments in *Océano Grupo* (cited in footnote 13, at paragraph 28), *Cofidis* (cited in footnote 14, at paragraph 32) and *Mostaza Claro* (cited in footnote 15, at paragraph 27).

21 — OJ 1987 L 42, p. 48. That directive was repealed by Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66).

22 — The Commission refers here to the judgment in Case C-429/06 *Rampion and Godard* [2007] ECR I-8017.

35. The Czech Government, which did not make any written observations, submitted at the hearing that it did not share the Commission's view and considered that Directive 85/577 should not be interpreted as meaning that the national court may, of its own motion, declare a contract negotiated away from business premises void, where the consumer has not been informed of his right to cancel that contract.

36. The Czech Government cites three grounds in support of its viewpoint: First, it asserts that the ex officio declaration of nullity encroaches upon the consumer's right to decide for himself whether or not he wishes to maintain the contract in force; after all, under Article 5 of Directive 85/577 the consumer alone has the right to cancel the contract. Even if the consumer has not been informed of his right of cancellation, this right does not cease to be valid as the period allowed for cancellation under Article 5 of Directive 85/577 does not commence until the consumer receives notice of that right. Secondly, the Czech Government asserts that the Member States enjoy exclusive competence in matters of civil procedure; competence is shared only in the context of judicial cooperation in civil matters and only where cross-border disputes are involved. In its view, it is uncertain whether reference can be had to Article 94 EC (ex Article 100 of the EC Treaty), which was taken as the basis for enacting Directive 85/577, for adopting measures which fall within that exclusive competence of the Member States. It maintains that the principle of proportionality must be taken into account in assessing that issue. Thirdly, the Czech Government asserts that the case-law relating to other directives in the field of consumer protection, in which regard the Court has already allowed the national courts to act of their own motion, must not be applied to this case, given that it concerns the interpretation of Directive 85/577, which contains different provisions and has a different scheme to the directives in respect of which the Court has allowed the national courts to act of their own motion.

VI — Appraisal by the Advocate General

A — *Introduction*

37. This dispute concerns the problem area of contracts concluded away from business premises and the ensuing effects where the

consumer has not been informed of his right to cancel a contract of that kind. The Court has already addressed the problems ensuing from failure to supply such information on a number of occasions in its case-law, [23] although it has not ruled to date whether in such circumstances the national courts themselves must play an active role and act of their own motion where the consumer has not been informed. In adjudicating on this case the Court will therefore have to give very specific consideration to the objectives of Directive 85/577 and the wording of its individual provisions.

38. By its request for a preliminary ruling the referring court is seeking to ascertain whether Article 153 EC, in conjunction with Articles 3 EC and 95 EC, Article 38 of the Charter, and the provisions of Directive 85/577 — specifically Article 4 thereof — must be interpreted as allowing the national court, of its own motion, to declare a contract negotiated away from business premises void, where the consumer has not been informed of his right to cancel the contract, even though the consumer has not asserted the nullity of that contract in the proceedings before the national courts.

23 — Cf. *Heininger* (cited in footnote 17), Case C-350/03 *Schulte* [2005] ECR I-9215, Case C-229/04 *Crailsheimer Volksbank* [2005] ECR I-9273, and Case C-412/06 *Hamilton* [2008] ECR I-2383.

B — *Analysis of the question referred for a preliminary ruling*

1. Introductory remarks

(a) Provisions of Community law in respect of which the referring court has requested an interpretation

39. In its question the referring court is requesting an interpretation of a number of Community provisions, specifically Article 153 EC, in conjunction with Articles 3 EC and 95 EC, Article 38 of the Charter, and the provisions of Directive 85/577. Among those provisions, the interpretation of the provisions of Directive 85/577, which — as an instrument of secondary legislation — gives tangible form to Community consumer protection efforts enshrined in primary legislation, will be of central importance to determining this case.

40. Article 153 EC, which can be found in the Treaty under the heading 'Consumer protection', provides generally in paragraph 1 that, in order to promote the interests of consumers and to ensure a high level of consumer protection, the Community is to contribute to protecting the health, safety and economic

interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests; paragraph 2 thereof provides that consumer protection requirements are to be taken into account in defining and implementing other Community policies and activities. The provisions of Article 153(3) and (4) lay down the measures to be adopted by the Community to attain the consumer protection objective and the legal basis for their adoption. Under Article 153(5) Member States may introduce more stringent protective measures for consumer protection.

41. Article 153 EC is, therefore, a general provision of primary Community law concerning consumer protection. A more general provision on consumer protection is set out in Article 3(1) EC which defines various areas of Community activity, including under subparagraph (t) a contribution to the strengthening of consumer protection. The provisions of Directive 85/577 will have to be interpreted in the light of those general provisions of the EC Treaty.

42. In its question the referring court is also seeking an interpretation of Article 95 EC and Article 38 of the Charter.

43. Measures which have as their object the establishment and functioning of the internal market are adopted on the basis of Article 95 EC. The reason for the referring court's request for an interpretation of that provision is not apparent from the decision to refer, bearing in mind that Directive 85/577 was not issued on that legal basis but on the basis of Article 94 EC (ex Article 100 of the EC Treaty). An interpretation of Article 95 EC therefore is not necessary, in my view, in this case.

44. Article 38 of the Charter states that Union policies are to ensure a high level of consumer protection. With regard to the provisions of the Charter it should be pointed out that they fall outside the scope of the Community legal order and thus the Court has no jurisdiction over their interpretation. [24] In their Opinions, the advocates general none the less often have recourse to them in their reasoning, [25] and the Court itself has already mentioned the Charter in the grounds of its judgments. [26] In this case, the provisions of the Charter can therefore be used as an aid to interpreting the provisions of Directive 85/577, but it will not be possible to rely on them in answering the question referred.

24 — Cf. to that effect Orders in Case C-328/04 *Vajnai* [2005] ECR I-8577, paragraph 13, and in judgment of 16 January 2008 in Case C-361/07 *Polier*, paragraph 11.

25 — Cf., for example, the Opinion of Advocate General Poiares Maduro in Case C-465/07 *Elgafaji* [2009] ECR I-921, points 21 and 23, my Opinion in Case C-308/07 P *Gorostiaga* [2009] ECR I-1059, points 56, 91 and 92, the Opinion of Advocate General Mengozzi in Case C-12/08 *Mono Car Styling* [2009], pending before the Court, points 49, 83, 95 and 97, and the Opinion of Advocate General Kokott in Case C-75/08 *Mellor* [2009] ECR I-3799, points 24, 25 and 33.

26 — See *Unibet* (cited in footnote 16, at paragraph 37).

45. Interpreting the provisions of Directive 85/577 will be essential to answering the question referred. Although the referring court makes express reference only to Article 4 of the directive in its question, it is for the Court, according to settled case-law, to provide the referring court with all those elements for the interpretation of Community law which may be of assistance in adjudicating on the case in the main proceedings, whether or not that court has specifically referred to them in its questions. [27] In interpreting Directive 85/577, account will have to be taken — in addition to Article 4 — in particular of Article 5 which likewise refers to the consumer's right to cancel the contract.

(b) Issues raised by the question referred

46. Before embarking on my examination of the question referred, I should like to point to the complex nature of the legal issues which are raised by this question and which should be presented as the main themes in its examination.

47. First, it is clear from the referring court's observations in the order for reference that this court proceeds on the assumption that the Spanish legislation, under which the consumer must apply for a declaration that the contract is void, is inconsistent with Community law, in particular with Directive 85/577 and the provisions of the EC Treaty on consumer protection. In examining the question referred it will therefore have to be assessed whether that assumption on the part of the referring court is correct and whether the relevant Spanish law lays down appropriate measures where a consumer has not been informed of his right to cancel the contract.

48. Secondly, account must be taken of the fact that the question referred refers to ex officio declaration of nullity because Spanish law provides that the consequence of a failure to supply the relevant information to the consumer is that the contract is voidable; since the referring court takes the view that this relative nullity is not an appropriate consumer protection measure, it is seeking to apply absolute nullity in order to guarantee that protection. The referring court does not therefore ask whether it can apply the provisions of Directive 85/577 of its own motion but whether it can apply of its own motion the provisions of national, Spanish law transposing that directive into national law. Directive 85/577 does not provide in any of its provisions that the contract is void if the consumer has not been informed of his right to cancel a contract negotiated away from business premises. Directive 85/577 likewise does not make provision for other consequences where the consumer has not been informed of that right; it simply provides in the third paragraph of Article 4 that Member States are to ensure that their national legislation lays down *appropriate* consumer protection *measures* in cases where such information is not supplied. Member States therefore decide for themselves the consequences of a failure to inform a consumer of

27 — Cf., for example, Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8, Case C-87/97 *Consorzio per la tutela del formaggio Gorgonzola* [1999] ECR I-1301, paragraph 16, Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 38, Case C-452/03 *RAL (Channel Islands) and Others* [2005] ECR I-3947, paragraph 25, and Case C-336/07 *Kabel Deutschland* [2008] ECR I-10889, paragraph 47.

his right to cancel the contract; the directive demands only that those measures are appropriate to the protection of consumers. [28] In answering the question referred the Court will therefore have to ensure that the other Member States are not required by its decision to provide in their respective domestic legal order for the nullity of the contract as a consequence of a failure to inform the consumer of his right to cancel the contract.

2. Whether the relative nullity of the contract is an appropriate measure for the purposes of the third paragraph of Article 4 of Directive 85/577

49. In the remainder of the Opinion I will (i) examine whether the relative nullity of the contract under Spanish law constitutes an appropriate measure for the purposes of the third paragraph of Article 4 of Directive 85/577; (ii) present the general rule of Community law governing ex officio assessment; (iii) examine the substance of the case-law by which the Court has acknowledged an exception to that rule and will discuss whether that case-law can be applied to this case; and (iv) assess whether the referring court has a right or an obligation in this case to act of its own motion.

50. The Spanish legislation provides that a contract negotiated without the consumer having been informed of his right to cancel the contract may be declared void upon application of the consumer; in Spanish law therefore it is a case of relative nullity.

51. At this point I should like to make clear, as regards theory and terminology, in connection with the term 'nullity', that Spain is one of the Member States which distinguish between

28 — As the Commission makes clear in its *Discussion paper on the Review of Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises (Doorstep Selling Directive),* which can be consulted at http://ec.europa.eu/consumers/cons_int/safe_shop/door_sell/doorstepselling_discussionpaper.pdf, at page 9. In academic writings, cf. also Ehricke, U., 'L'extension au contrat d'acquisition du bien immobilier des effets juridiques de la révocation d'un contrat de crédit immobilier en application de la directive 85/577/CEE sur le démarchage à domicile. Réflexions sur les limites des principes d'interprétation conforme et d'effet utile des directives', in *Revue Européenne de Droit Bancaire et Financier* (EUREDIA), No 1/2004, p. 163, which points out that Directive 85/577 confers on the Member States broad discretion in transposing its provisions into national law.

'absolute nullity' and 'relative nullity' (a group which includes Belgium [29] and France [30]), as opposed to those Member States which differentiate between the 'nullity' and 'voidability' of contracts (for example, Austria, [31] Germany, [32] the Netherlands [33] and Slovenia [34]). Absolute nullity arises under Spanish law, for example, where one of the conditions for the conclusion of a contract is not met or where the contract is in breach of mandatory provisions or offends against moral principles; [35] on the other hand, relative nullity arises, for example, where there is no proper consent in the conclusion of the contract. [36] Absolute nullity is observed by the courts of their own motion and can be invoked by any party with an interest in it, whereas relative nullity must be asserted by the party concerned. [37] The distinction between nullity and voidability may be different from the point of view of terminology, but the two terms are comparable from a conceptual viewpoint; [38] any person may plead the nullity of a contract, and the courts must take account of a nullity of their own motion; however, where there are grounds for avoiding the contract, only the party affected may assert them. [39] It should also be mentioned that the nullity and voidability of contracts are dealt with in the document drawn up by experts and entitled *Draft Common Frame of Reference (DCFR).* [40] Article II.-7:301 of that document states that a contract is void where (a) it infringes a principle recognised as fundamental in the laws of the Member States of the European Union, and (b) nullity is required to give effect

29 — See, for example, van Gerven, W., *Verbintenissenrecht,* 2nd edition, Acco, Löwen 2006, p. 146 et seq., which explains that Belgian law distinguishes between absolute and relative nullity.

30 — See, for example, Flour, J., Aubert, J.-L., Savaux, É., *Les obligations. 1. Acte juridique*, 12th edition, Sirey, Paris 2006, p. 259, paragraph 324.

31 — Provision is made for voidability under Austrian law, for example, in cases where the conclusion of the contract has been induced by deceit or threat; see Rummel, P., in Rummel, P., *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, Manz, Vienna 2000, commentary on Paragraph 870, p. 1321, paragraph 1. On the other hand, nullity exists, for example, under Paragraph 879 of the Allgemeines bürgerliches Gesetzbuch (General Civil Code; 'ABGB'), where the contract is in breach of a statutory prohibition or contrary to morality. It should be highlighted that Austrian doctrine, in connection with nullity, none the less distinguishes additionally as between absolute nullity, which any person can invoke and which the courts must acknowledge of their own motion, and relative nullity which can be invoked only by the person protected by the infringed provision. In this connection see Krejci, H., in Rummel, P., *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, Manz, Vienna 2000, commentary on Paragraph 879, p. 1447, paragraphs 247 to 249.

32 — See, for example, Larenz, K., Wolf, M., *Allgemeiner Teil des Bürgerlichen Gesetzbuchs*, 9th edition, Beck, Munich 2004, p. 796, paragraph 4 et seq. (on nullity), and p. 800, paragraph 21 et seq. (on voidability).

33 — See, for example, Hijma, J., *Bijzondere overeenkomsten*, 1st part, 7th edition, Kluwer, Deventer 2007, p. 224, paragraph 218; Hartkamp, A. S., *Verbintenissenrecht*, 2nd part, 12th edition, Kluwer, Deventer 2005, p. 484, paragraph 459.

34 — See. for example, Polajnar Pavčnik, A., in: Juhart, M., Plavšak, N. (Ed.), *Obligacijski zakonik s komentarjem*, 1st volume, GV založba, Ljubljana 2003, commentary on Article 86, p. 506 et seq. (on nullity) and commentary on Article 94, p. 524 et seq. (on voidability).

35 — See Moreno Gil, Ó., *Código civil y jurisprudencia concordada,* Boletín oficial del estado, Madrid 2006, p. 1430, commentary on Article 1.300, paragraphs 4.399 and 4.407. See on French law, for example, Flour, J. et al., loc. cit. (footnote 30), p. 259, paragraph 325; on Belgian law, see for example Cornelis, L., *Algemene theorie van de verbintenis*, Intersentia, Antwerpen/Groningen 2000, p. 676, paragraph 539.

36 — See Moreno Gil, Ó., loc. cit. (footnote 35), p. 1430, commentary on Article 1.300, paragraph 4.399. See, on French law, Flour, J., et al., loc. cit. (footnote 30), paragraph 325, and p. 262, paragraph 328; see, on Belgian law, van Gerven, W., loc. cit. (footnote 29), p. 147.

37 — See Moreno Gil, Ó., loc. cit. (footnote 35), p. 1430, commentary on Article 1.300, paragraphs 4.399 and 4.407. See, on French law, Flour, J., et al., loc. cit. (footnote 30), p. 260, paragraph 326; on Belgian law see, for example, van Gerven, W., loc. cit. (footnote 29), p. 147.

38 — See, on German law, for example, Larenz, K., Wolf, M., loc. cit. (footnote 32), p. 796, paragraph 2, where non-compliance with procedural rules and infringement of statutory prohibitions or breach of morality are provided as examples of grounds for nullity, whereas mistake and deceit are given as examples of grounds for voidability. On Netherlands law, see Hartkamp, A. S., loc. cit. (footnote 33), p. 484 et seq., paragraphs 459 and 460; on Slovenian law, see Polajnar Pavčnik, A., loc. cit. (footnote 34); on nullity, see the commentary on Article 86 (p. 506 et seq.), and, on voidability, see commentary on Article 524 et seq.

39 — On German law, see, for example, Larenz, K., Wolf, M., loc. cit. (footnote 32), p. 797, paragraph 5; on Netherlands law, see Hartkamp, A. S., loc. cit. (footnote 33), p. 485; on ex officio annulment, see paragraph 459, on asserting voidability, see paragraph 460; on Slovenian law, see Polajnar Pavčnik, A., loc. cit. (footnote 34); on ex officio annulment, see commentary on Article 92 (p. 50 et seq.), on asserting voidability, see commentary on Article 95 (p. 527 et seq.).

40 — Von Bar, C. et al. (Ed.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR).* Interim Outline Edition; prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Sellier, European Law Publishers, Munich 2008.

to that principle. [41] The DCFR provides for the voidability of contracts in cases where, for example, there is mistake, [42] fraud [43] or coercion or threats [44] in the conclusion of the contract.

52. In order to establish whether the Spanish legislation which provides for relative nullity of the contract where the consumer has not been informed of his right to cancel the contract is an appropriate measure for the purposes of the third paragraph of Article 4 of Directive 85/577, it is essential to focus primarily on the special features of contracts negotiated away from business premises and on the significance of the consumer's right to cancel such contracts.

53. As is apparent from the fourth recital in the preamble to Directive 85/577, it is as a rule the trader who initiates the negotiations for the conclusion of such a contract, the consumer being put in a position in which there is an element of surprise, given that he is unprepared for the conclusion of the contract. [45] Special protection must therefore be afforded to the consumer as he is unable to compare the quality and price of that offer with other offers. [46]

54. Because of the special features of contracts negotiated away from business premises, when concluding a contract the consumer must be given a period for reflection — a *spatium deliberandi* [47] — during which he assesses the obligations arising from the contract, and have the opportunity to cancel the contract within a period of not less

41 — In its original wording, Article II.-7:301: Contracts infringing fundamental principles reads: 'A contract is void to the extent that: (a) it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and (b) nullity is required to give effect to that principle.'

42 — See, for example, paragraph (1) of Article II.-7:201: Mistake, which in its original wording reads: 'A party may avoid a contract for mistake of fact or law existing when the contract was concluded if: (a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or could reasonably be expected to have known this; and (b) the other party (i) caused the mistake; (ii) caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known of the mistake; (iii) caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors; or (iv) made the same mistake.'

43 — See, for example, paragraph (1) of Article II.-7:205: Fraud, which in its original wording reads: 'A party may avoid a contract when the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose.'

44 — See, for example, paragraph (1) of Article II.-7:206: Coercion or threats, which in its original wording reads: 'A party may avoid a contract when the other party has induced the conclusion of the contract by coercion or by the threat of an imminent and serious harm which it is wrongful to inflict, or wrongful to use as a means to obtain the conclusion of the contract.'

45 — The Court has pointed out in the *Crailsheimer Volksbank* judgment, for example, (cited in footnote 23, at paragraph 43) that the objective of Directive 85/577 is to protect the consumer from the element of surprise inherent in doorstep selling. The element of surprise is also underlined, for example, by Martín Briceño, M. del R., *La Directiva 85/577, de 20 de diciembre, referente a la protección de los consumidores en el caso de contratos negociados fuera de los establecimientos comerciales, La armonización legislativa de la Unión Europea*, Dykinson, Madrid 1999, p. 162.

46 — See, for example, Martín Briceño, loc. cit. (footnote 45), p. 162; Habersack, M., 'The Doorstep Selling Directive and Mortgage Loan Contracts', in: *European Business Law Review*, No 6/2000, p. 394.

47 — Manes, P., 'Il diritto di pentimento nei contratti dei consumatori dalla legislazione francese alla normativa italiana in attuazione della direttiva 85/577', in: *Contratto e impresa. Europa*, No 2/1996, p. 696, uses that expression to refer to the period for reflection.

than seven days pursuant to Article 5(1) of Directive 85/577. [48] If the consumer decides to cancel the contract, he is released pursuant to Article 5(2) of the directive from any obligations under the cancelled contract. That right conferred on the consumer is so important that he may not waive it. [49]

55. In order to guarantee that the consumer has the opportunity to exercise that important right, it is crucial for him to be properly informed of it in writing. After all, the trader can use to his advantage the fact that he can persuade the consumer to conclude the contract — perhaps because of a surge of enthusiasm or because the consumer is unable to compare this offer with other offers — and omit to inform him of his right to cancel the contract. When the consumer subsequently 'cools off', [50] he might regret his decision but — if unaware that he has the option to cancel the contract — will assume that he is in fact bound by the contract.

56. Accordingly, as regards consumer protection in the case of contracts negotiated away from business premises, it is therefore not only important that the consumer *possesses* the right to cancel the contract but also that he *is aware* of his rights and is informed of them. [51] As the Court has already pointed out in the *Heininger* judgment, if the consumer is not aware of his right to cancel the contract, he will not be able to exercise it. [52] Where he has not been supplied with information concerning the right of cancellation, he consequently will not be able to exercise any associated rights, for example, the right to seek annulment of the contract negotiated in the absence of such information, unless measures are taken to ensure that he is informed effectively about those rights (relating to the right of cancellation).

57. The Spanish legislation which provides that the consumer may seek annulment of a contract negotiated away from business premises if he has not been informed of the right to cancel the contract is not therefore, in my view, an appropriate measure for the purposes of the third paragraph of Article 4 of

48 — In the academic writings, see, for example, Habersack, loc. cit. (footnote 46), p. 394. Mankowski, P., 'Die gemeinschaftsrechtliche Kontrolle von Erlöschenstatbeständen für verbraucherschützende Widerrufsrechte', in: *Juristenzeitung*, No 23/2008, p. 1143, states that the right of cancellation is, ultimately, the only consumer protection instrument in Directive 85/577 and that any restriction of that right would necessarily lead to a reduction in such protection.

49 — See Article 6 of Directive 85/577 under which the consumer may not waive the rights conferred on him by that directive.

50 — The period for reflection following conclusion of the contract is often referred to as the '*cooling off period*'. See, for example, the Green Paper on the Review of the Consumer Acquis (presented by the European Commission), COM(2006) 744 final, p. 10 of the English version; European Commission *Discussion paper on the Review of Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises (Doorstep Selling Directive) (*cited in footnote 28).

51 — It should be added that Directive 85/577 accordingly places a special responsibility on the trader's shoulders since the exercise of consumer rights is dependent on the supplying of information by the trader. See, in that connection, the Opinion of Advocate General Léger in the *Heininger* case (cited in footnote 17, at point 60).

52 — See the judgment in *Heininger* (cited in footnote 17, at paragraph 45). See also the judgment in *Hamilton* (cited in footnote 23, at paragraph 33) and the Opinion of Advocate General Léger in the *Heininger* case, at point 60. In the academic writings see, for example, Rudisch, B., 'Das "Heininger"-Urteil des EuGH vom 13.12.2001, Rs C-481/99: Meilenstein oder Stolperstein für den Verbraucherschutz bei Realkrediten?', in: Eccher, B., Nemeth, K., Tangl, A. (Ed.), *Verbraucherschutz in Europa. Festgabe für em. o. Univ.-Prof. Dr. Heinrich Mayrhofer*, Verlag Österreich, Vienna 2002, p. 202.

Directive 85/577, unless measures are taken to ensure that the consumer is informed effectively of the rights conferred on him in these circumstances by national law.

58. It must therefore be examined below whether the national court should act of its own motion where the consumer has not been informed of his right to cancel the contract.

3. General rule: There is no general obligation in Community law to make an ex officio assessment

59. It must be pointed out that there is no general obligation incumbent on the national courts under Community law to safeguard of their own motion the rights which individuals acquire under Community law. According to settled case-law, in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are a matter for the domestic legal order of each Member State, under the principle of the procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness). [53] Each case which raises the question whether a national procedural provision renders the exercise of the rights conferred on individuals by the Community legal order impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. [54]

60. It is further apparent from the case-law that the principle of effectiveness does not impose a duty on national courts to raise a plea based on a Community provision of their own motion, irrespective of the importance of that provision to the Community legal order, where the parties are given a genuine oppor-

53 — Cf., to that effect, the judgments in *Peterbroeck* (cited in footnote 10, at paragraph 12), *van Schijndel and van Veen* (cited in footnote 18, at paragraph 17), in Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 31, Case C-129/00 *Commission* v *Italy* [2003] ECR I-14637, paragraph 25, *van der Weerd* (cited in footnote 18, at paragraph 28) and *Mostaza Claro* (cited in footnote 15, at paragraph 24).

54 — Cf. *Peterbroeck* (cited in footnote 10, at paragraph 14), *van Schijndel and Van Veen* (cited in footnote 18, at paragraph 19) and *van der Weerd* (cited in footnote 18, at paragraph 33).

tunity to raise a plea based on Community law before a national court. [55] This is justified by the principle that, in a civil suit, it is for the parties to take the initiative, and thus the court is able to act of its own motion only in exceptional cases involving the public interest. [56]

61. However, the Court has introduced into its case-law an exception to that general rule in respect of some consumer protection directives — first in connection with Directive 93/13 and subsequently in connection with Directive 87/102 — and has allowed the national court to raise certain pleas of its own motion with a view to ensuring consumer protection and achieving the objectives of those directives. [57]

55 — See *van der Weerd* (cited in footnote 18, at paragraph 41) and, to that effect, *van Schijndel and van Veen* (cited in footnote 18, at paragraph 22). In the academic writings, for example, see Lenaerts, K., Arts, D., Maselis, I., *Procedural Law of the European Union*, 2nd edition, Sweet & Maxwell, London 2006, p. 104, paragraph 3-035; Simon, D., 'Modalités du relevé d'office', in: *Europe — Revue mensuelle LexisNexis JurisClasseur*, August-September 2007, p. 12; Jans, J. H., Marseille, A. T., 'Joined Cases C-222–225/05, Van der Weerd and others v. Minister van Landbouw, Natuur en Voedselkwaliteit, Judgment of the Court (Fourth Chamber) of 7 June 2007, [2007] ECR I-4233', in: *Common Market Law Review*, No 3/2008, pp. 858–859.

56 — Cf. *van Schijndel and van Veen* (cited in footnote 18, at paragraph 21) and *van der Weerd* (cited in footnote 18, at paragraph 35).

57 — It should be added that the Court has allowed an exception to that rule in other circumstances too, such as in the *Peterbroek* judgment (cited in footnote 10) where it ruled that Community law precludes application of a domestic procedural rule which prevents the national court from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law when the latter provision has not been invoked by the litigant within a certain period. The same is true as regards applying the provisions coming under Community competition law; cf. judgments in Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 40, and Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 31.

62. I shall, therefore, set out the substance of the case-law on Directives 93/13 and 87/102 below before going on to examine whether that case-law can be applied *mutatis mutandis* to Directive 85/577.

4. Exception to the general rule: Case-law on Directives 93/13/EEC and 87/102/EEC

(a) Case-law on Directive 93/13/EEC

63. The relevant case-law as regards Directive 93/13 comprises the judgments in *Océano Grupo*, [58] *Cofidis* [59] and *Mostaza Claro*. [60]

64. The Court noted in *Océano Grupo* that the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms. [61] The Court held that the aim of Article 6 of the Directive, which requires

58 — See *Océano Grupo* (cited in footnote 13).

59 — See *Cofidis* (cited in footnote 14).

60 — See *Mostaza Claro* (cited in footnote 15).

61 — See *Océano Grupo* (cited in footnote 13, at paragraph 25).

Member States to lay down that unfair terms are not binding on the consumer, could not be achieved if the consumer were himself obliged to assert the unfair nature of such terms. [62] It pointed to there being a risk that the consumer, particularly because of ignorance of the law, will not challenge the term on the ground that it is unfair, and that effective protection of the consumer may consequently be attained only if the national court is given the power to evaluate terms of this kind of its own motion. [63]

65. In *Océano Grupo* the Court also raised the point that the courts' power to determine of their own motion whether a term is unfair is a proper means both of achieving the result sought by Article 6 of the directive, namely to prevent an individual consumer from being bound by an unfair term, and of contributing to achieving the aim of Article 7 [64] of the directive, since such an undertaking may act as a deterrent and therefore contribute to preventing unfair terms in contracts concluded with consumers. [65]

66. The Court accordingly ruled in *Océano Grupo* that the protection provided for consumers by Directive 93/13 requires that the national court be able to determine of its own motion whether a term of a contract is unfair. [66]

67. The Court similarly noted in *Cofidis* that the power of the court to determine of its own motion whether a contractual term is unfair is necessary for ensuring that the consumer enjoys effective protection, in view in particular of the real risk that he may be unaware of his rights or may encounter difficulties in asserting them. [67] In that judgment the Court therefore ruled that Directive 93/13 precludes a national provision which, in proceedings brought by a seller or supplier against a consumer on the basis of a contract concluded between them, prohibits the national court, on expiry of a limitation period, from finding, of its own motion or following a plea raised by the consumer, that a term of the contract is unfair. [68]

68. The Court reaffirmed the principles cited in its judgment in *Mostaza Claro,* in which it ruled that Directive 93/13 must be interpreted as meaning that a national court seized of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award

62 — Ibid. (paragraph 26).

63 — Ibid. (paragraph 26). That point was subsequently borne out in the Court's judgments in *Cofidis* (cited in footnote 14, at paragraph 33) and *Mostaza Claro* (cited in footnote 15, at paragraph 28).

64 — Under Article 7(1) of Directive 93/13 Member States must ensure that 'adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers'; under Article 7(2) those means must 'include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms... are unfair'. The aim of Article 7 is, therefore, to make it possible for persons who are not parties to the contract to take action to ensure consumer protection.

65 — See *Océano Grupo* (cited in footnote 13, at paragraph 28). That point was subsequently confirmed in the Court's judgments in *Cofidis* (cited in footnote 14, at paragraph 32) and *Mostaza Claro* (cited in footnote 15, at paragraph 27).

66 — See *Océano Grupo* (cited in footnote 13, at point 1 of the operative part).

67 — See *Cofidis* (cited in footnote 14, at paragraph 33).

68 — See *Cofidis* (cited in footnote 14, at paragraph 38 and in the operative part).

where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment. [69]

(b) Case-law on Directive 87/102/EEC

69. As the Commission points out, the Court has already applied the case-law in *Océano Grupo*, *Cofidis* and *Mostaza Claro* to another consumer protection directive, that is to say Directive 87/102. In *Rampion and Godard* [70] the Court ruled that Directive 87/102 must be interpreted as *allowing national courts to apply of their own motion the provisions transposing Article 11(2) of the directive into national law*. [71] That article of Directive 87/102 provides that the consumer may, under certain conditions, [72] pursue remedies against the grantor of credit and Member States are to determine to what extent and under what conditions those remedies are to be exercisable.

70. In the grounds of the judgment in *Rampion and Godard* the Court pointed out that Directive 87/102 pursues a dual aim, namely the creation of a common consumer credit market and the protection of consumers who avail themselves of such credit. [73] The aim of Article 11(2) of the directive is, therefore, to confer on the consumer rights vis-à-vis the grantor of credit over and above the consumer's normal contractual rights against the grantor of credit and against the supplier of the goods or services. [74] The Court took the view that the aim could not be effectively achieved if the consumer were himself obliged to pursue remedies against the grantor of credit, in particular because of the risk that the consumer may be unaware of his rights or may encounter difficulties in exercising them. [75]

5. Applying the case-law on Directives 93/13/EEC and 87/102/EEC to the present case

71. The case-law cited can, in my view, be applied to this case, but it is important that it is sensible to do so and is not contrary to the objectives and individual provisions of Directive 85/577.

69 — See *Mostaza Claro* (cited in footnote 15, at paragraph 39 and in the operative part).

70 — See *Rampion and Godard* (cited in footnote 22).

71 — Ibid. (paragraph 69 and operative part).

72 — The following conditions are listed in Article 11(2) of Directive 87/102: '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...'

73 — See *Rampion and Godard* (cited in footnote 22, at paragraph 59).

74 — Ibid. (paragraph 64).

75 — Ibid. (paragraph 65).

72. First, the reasoning underlying that case-law and the grounds of the judgments cited can without doubt be applied to the present case. The case-law in *Océano Grupo*, *Cofidis*, *Mostaza Claro* and *Rampion and Godard* is based on the assumption that the consumer is in a weak position vis-à-vis the seller or supplier [76] and that there is a risk that the consumer may be unaware of his rights or may encounter difficulties in exercising them. [77] The system created by Directive 85/577 is also based on the fact that the consumer is the weaker party to the contract, hence the need to confer special protection on him, which is especially apparent from the requirement that he be informed in writing of his right of cancellation — it is therefore assumed that the consumer will be unaware of that right if he has not been informed of it — and from the requirement that Member States lay down appropriate measures where such information is not supplied. [78] The aim of a high level of consumer protection is therefore the same in the case of Directives 93/13 and 87/102 as in the case of Directive 85/577. [79] All the directives are based on there being a risk that the consumer may be unaware of his rights. That imbalance between the consumer and the seller or supplier may be corrected only by positive action by persons unconnected with the actual parties to the contract. [80]

73. Moreover, in transposing the case-law a clear distinction must be made between what the national court *establishes* of its own motion and what the *consequence* of that finding is. The essence of the case-law on Directive 93/13 is that the national court establishes of its own motion whether a contractual term is unfair and not that it can establish that a contractual term of that nature is not binding on the consumer; the latter possibility is simply the consequence of the finding that a contractual term is unfair. [81] In connection with Directive 87/102 too, the national court applies of its own motion provisions transposing Article 11(2) of the directive into domestic law; however, the consequences themselves are laid down in the national provisions and may differ from one Member State to another. If, accordingly, a distinction is made between the ex officio

76 — For example, *Océano Grupo* (cited in footnote 13, at paragraph 25) and *Mostaza Claro* (cited in footnote 15, at paragraph 26) refer to the consumer's weak position in relation to the seller or supplier.

77 — Cf. *Océano Grupo* (cited in footnote 13, at paragraph 26), *Cofidis* (cited in footnote 14, at paragraph 33), *Mostaza Claro* (cited in footnote 15, at paragraph 28) and *Rampion and Godard* (cited in footnote 22, at paragraph 65).

78 — The Court has pointed out that Directive 85/577 is principally designed to protect consumers against the risks arising from the conclusion of consumer contracts away from business premises and that the protection of the consumer is assured by the introduction of a right of cancellation; cf. *Heininger* (cited in footnote 17, at paragraph 38) and Case C-350/03 *Schulte* [2005] ECR I-9215, paragraph 66. See also *Hamilton* (cited in footnote 23, at paragraph 32).

79 — It should be added that the need for a high level of consumer protection is also set out in Article 38 of the Union's Charter of Fundamental Rights (cited above in footnote 5) under which Union policies are to ensure a high level of consumer protection.

80 — See, by analogy, *Océano Grupo* (cited in footnote 13, at paragraph 27) and *Mostaza Claro* (cited in footnote 15, at paragraph 26).

81 — The consequence that the inclusion of an unfair term in a contract has under Directive 93/13 differs from the consequence that a failure to inform the consumer of his right to cancel the contract has under Directive 85/577. Article 6(1) of Directive 93/13 expressly requires Member States to lay down that 'unfair terms used in a contract concluded with a consumer by a seller or supplier *shall... not be binding on the consumer...*' (emphasis added). The third paragraph of Article 4 of Directive 85/577 in contrast provides only that 'Member States shall ensure that their national legislation *lays down appropriate* consumer protection *measures* in cases where the information referred to in this Article is not supplied' (emphasis added). The difference between the respective consequences is that in the case of Directive 93/13 the consequence of the unfair term is laid down in Community law, whereas the consequences of failing to inform the consumer of his right of cancellation are laid down in national law.

finding and the consequence of that finding, it makes clear sense that, in the context of Directive 85/577, the national court should establish of its own motion *whether the consumer has been informed of his right to cancel the contract.*

74. Then, of course, the issue of the consequences of that finding is immediately raised. The referring court takes the view that in these circumstances the absolute nullity of the contract, considered to be a more stringent measure as compared with the relative nullity provided for in Spanish law, is an appropriate consumer protection measure. However, the issue remains whether absolute nullity as a consequence of the failure to inform the consumer is a measure which meets the objectives of Directive 85/577; it must therefore be examined — as is also the case with regard to relative nullity — whether absolute nullity of the contract, which the national court establishes of its own motion, is an appropriate consumer protection measure for the purposes of the third paragraph of Article 4 of the directive.

75. As regards whether absolute nullity is appropriate, I should like first to draw a parallel between the consumer's right to cancel the contract and his right to decide whether to maintain in force a contract negotiated without such information. It must be borne in mind that the exercise of the right to cancel a contract concluded away from business premises is dependent on the intention of the consumer. Article 5(1) of Directive 85/577 provides: 'The consumer *shall have the right* [82] to renounce the effects of his undertaking...' The essence of that provision is, therefore, that the consumer decides for himself whether or not he will cancel the contract. It follows from Article 5(2) of Directive 85/577 that the consumer is released from any obligations under the cancelled contract only once he has sent notice of the cancellation to the other party to the contract. For the contract to cease to be binding on the consumer, he must therefore make a decision and act upon it by sending notice of the cancellation to the other contracting party.

76. Just as the consumer must have the possibility of exercising personally his right to cancel the contract, he must also have the possibility of deciding for himself whether or not he will maintain in force the contract negotiated in the absence of such information. There is the possibility, of course, that he will seek to maintain the contract in force, even though he was not informed of his right of cancellation. Where the contract has been declared void, the consumer will, in these circumstances, in accordance with Spanish

82 — Emphasis added. Compare also other language versions of this part of the provision: the French reads '*[l]e consommateur a le droit*', the German reads '*[d]er Verbraucher besitzt das Recht*', the Italian reads '*[i]l consumatore ha il diritto*', and the Spanish reads '*[e]l consumidor tendrá el derecho*'.

law and on the basis of the *quod nullum est, nullum producit effectum* principle, [83] return the goods received to the seller or supplier and will be refunded the purchase price already paid. [84] However, that may not be to the benefit of the consumer; on the contrary, the nullity of such a contract may even be to his detriment. [85] As the Latin maxim *summum jus, summa injuria* makes clear, endeavours to overprotect the consumer can actually be to his detriment.

77. It is important, moreover, to bear in mind that assuming absolute nullity would be a step beyond what is permitted under the case-law on Directive 93/13. Under Article 6(1) of Directive 93/13,'the contract shall continue to bind the parties... if it is capable of continuing in existence without the unfair terms.' The national court therefore establishes of its own motion, in connection with Directive 93/13, only whether individual contractual terms are unfair; the contract as a whole continues to be valid, however, if it can continue to exist without the unfair terms. In the present case the referring court would like to declare the entire contract void, a measure that would give rise to more serious consequences for the contract than under Directive 93/13.

78. I consequently take the view that absolute nullity of the contract, which the national court declares of its own motion if the consumer has not been informed of his right of cancellation, is not an appropriate consumer protection measure for the purposes of the third paragraph of Article 4 of Directive 85/577.

79. For that reason, when determining the consequence of the national court's finding that the consumer has not been informed of

83 — That principle means that a void contract has no legal effect; reference is made to that principle in the context of Spanish law for example by Díez-Picazo, L., Gullón, A., in *Sistema de derecho civil*, *Vol. II*, 7th edition, Tecnos, Madrid 1995, p. 109. It should be mentioned with regard to comparative law that this principle is also acknowledged by the legal orders of the other Member States; cf., for example, on French law, Flour, J. et al., loc. cit. (footnote 30), p. 297, paragraph 361, and on Slovenian law Polajnar Pavčnik, A., loc. cit. (footnote 34), commentary on Article 86, p. 507.

84 — See Article 1.303 of the Spanish Código civil. In Spanish academic writings, see, with regard to the obligation to return the goods received on the basis of a void contract, Díez-Picazo, L., Gullón, A., loc. cit. (footnote 83), p. 111. The legislation is similar also in the legal orders of other Member States; see, for example, on German law, Larenz, K., Wolf, M., loc. cit. (footnote 32), p. 797, paragraph 8, where it is stated that, in the event of a void contract, it is essential to create a situation that would have existed if performance of the void contract had never taken place; on French law, see Flour, J. et al., loc. cit. (footnote 30), p. 298, paragraph 362; on Slovenian law, see Polajnar Pavčnik, A., loc. cit. (footnote 34), commentary on Article 87, p. 513 et seq.

85 — Take, for instance, a consumer who makes an advance purchase in a doorstep sale of an encyclopedia at a lower price for first customers: The consumer pays the purchase price but the seller does not deliver the item within the period prescribed, and thus the consumer brings an action against him. The court establishes that the consumer was not informed of his right of cancellation and declares the contract void. The seller refunds the purchase price to the consumer, but as the consumer still wishes to buy the encyclopedia, he orders it again but this time at a higher price because it can no longer be purchased at the advance sale price.

his right to cancel the contract, teleological interpretation must be used to find an alternative measure which better corresponds with the aim of Directive 85/577.

80. The objective of Directive 85/577 is, in my view, best achieved if the national court — where it declares of its own motion that the consumer has not been informed of his right of cancellation — *informs the consumer of the rights conferred on him in these circumstances by national law*. As a result, first, appropriate consumer protection is provided and, secondly, the consumer is able to decide for himself, in accordance with the principle of freedom of the parties to arrange their own affairs [private autonomy], [86] whether he will maintain the contract in force where he has not been informed of his right of cancellation.

81. Furthermore, the solution whereby the national court informs the consumer of his rights under national law ensures protection of the Member States' right under the third paragraph of Article 4 of Directive 85/577 to adopt appropriate measures themselves where the consumer has not been informed of his right to cancel the contract. If the national court were permitted to declare void of its own motion a contract negotiated in the absence of such information, the discretion afforded to Member States by the directive as regards the consequences for such a contract would be withdrawn from them. Indeed, an examination of comparative law shows that Member States have, in transposing the third paragraph of Article 4 of Directive 85/577 into their respective domestic legislation, in fact opted for very different measures for cases in which the consumer has not been informed of his right to cancel the contract. They can be divided, crudely, into two categories; for illustrative purposes, I will set out examples of some of the Member States below but will refrain from giving my opinion on whether the provisions of Directive 85/577 have been properly transposed into the relevant national law.

86 — See, for example, Basedow, J., 'Die Europäische Union zwischen Marktfreiheit und Überregulierung — Das Schicksal der Vertragsfreiheit', in: *Bitburger Gespräche Jahrbuch 2008/I*, Beck, Munich 2009, p. 86, which points out that freedom of contract is the most important expression of private autonomy. With regard to private autonomy, see, in comparative law, in German academic writings, Larenz, K., Wolf, M., loc. cit. (footnote 32), p. 2, paragraph 2; in Austrian academic writings, Koziol, H., Welser, R., *Grundriss des bürgerlichen Rechts. Band I: Allgemeiner Teil — Sachenrecht — Familienrecht,* 11th edition, Manzsche Verlags- u. Universitätsbuchhandlung, Vienna 2000, p. 84; in Spanish academic writings, Díez-Picazo, L., Gullón, A., *Sistema de derecho civil, Vol. I,* 10th edition, Tecnos, Madrid 2002, p. 369 et seq. 375; see, in French academic writings, Flour, J., et al., loc. cit. (footnote 30), p. 72, paragraph 99 et seq.

82. The first category comprises states whose national law provides, as a consequence of the

failure to inform the consumer, either for the nullity of such a contract (e.g. Belgium, [87] Luxembourg, [88] the Netherlands [89] and Spain [90]) or lays down that the contract is not binding on the consumer (e.g. Finland [91]) or that he cannot be required to perform the contract (e.g. Ireland [92] and the United Kingdom [93]). The second category comprises states in which the period allowed for cancelling the contract is extended because of the failure to inform the consumer [94] (for example, Austria, [95] the Czech Republic, [96] Italy, [97] Germany [98] and Slovenia [99]). In addition to the main consequences — e.g. nullity or extension of the time allowed for cancellation — some states also provide for a fine (for example, Belgium [100] and Italy [101]). In some circumstances that issue will be regulated in a uniform manner — *de lege ferenda* — by the

87 — See Article 88(3) of the Belgian Law of 14 July 1991 on commercial practices and the provision of information to and the protection of consumers, which provides for the nullity of the contract as a consequence of the failure to inform the consumer. It should be mentioned that the Law does not determine precisely whether relative or absolute nullity is involved, and even the Belgian courts do not concur in this matter; see, for example, the judgment of the Hof van beroep te Antwerpen (Court of Appeal, Antwerp) of 31 October 2005 (Rechtskundig Weekblad 2007-2008, No 22, 26.1.2008), in which the court held that absolute nullity was involved, and the judgment of the Hof van beroep te Gent (Court of Appeal, Ghent) of 21 February 2007 (Jaarboek Handelspraktijken & Mededinging 2007, p. 369), in which the court held that relative nullity was involved.

88 — See the fourth paragraph of Article 10 of the Luxembourg Law of 16 July 1987 'concernant le colportage, la vente ambulante, l'étalage de marchandises et la sollicitation de commandes', under which the contract is void and the consumer may invoke nullity, where he has not been informed of his right of cancellation.

89 — See Article 24(1) of the Netherlands Colportagewet, under which the nullity of the contract is the consequence of a failure to inform the consumer. Bearing in mind the general distinction between 'nullity' and 'voidability' in Netherlands law, this case concerns nullity which the courts establish of their own motion; see Hartkamp, A. S.,, loc. cit. (footnote 33), p. 484, paragraph 459.

90 — As stated at point 13 of this Opinion, it is apparent from Article 4 of the Spanish *Ley 26/1991, de 21 de noviembre, sobre contratos celebrados fuera de los establecimientos mercantiles* that contracts concluded or offers made without the consumer having been informed of his right to cancel the contract are to be declared void upon the application of the consumer.

91 — See Chapter 6, § 20 of the Finnish Kuluttajansuojalaki 38/1978, under which the contract is not binding on the consumer but he must invoke the nullity thereof.

92 — See Article 4(1)(b) of the European Communities (Cancellation of Contracts Negotiated Away from Business Premises) Regulations, 1989, under which the consumer cannot be required to perform the contract *('[a] contract... shall not be enforceable')* if he has not been informed of his right to cancel it.

93 — See Section 7(6) of the United Kingdom's The Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008, under which the consumer cannot be required to perform the contract (*'[a] contract... shall not be enforceable')* if he has not been informed of his right of cancellation.

94 — In this regard I shall not be examining whether the provisions of those Member States which still impose a time-limit on the period accordingly extended are in accordance with the decision of the Court in *Heininger* (cited in footnote 17).

95 — See § 3(1) of the Austrian Konsumentenschutzgesetz, under which the period allowed for rescinding the contract commences upon the consumer being informed of his right to cancel the contract.

96 — See Article 57(3) of the Czech Občiansky zákonník — Zákon č. 40/1964, under which the consumer may cancel the contract within one year from the date of conclusion of the contract, if he has not been informed of his right of cancellation.

97 — See Article 65(3) of the Italian Codice del Consumo, under which the period allowed for cancelling the contract — where the consumer has not been informed of his right of cancellation — is extended to 60 days and commences, in the case of a contract for the purchase of goods, from the date on which the consumer takes delivery of the goods, and, in the case of a contract for services, from the date of conclusion of the contract.

98 — See Paragraph 355(3) of the German Bürgerliches Gesetzbuch (BGB), under which the consumer's right to cancel the contract does not cease to be valid, where the consumer has not been properly informed of that right.

99 — See Article 43č(4) of the Slovenian Zakon o varstvu potrošnikov, under which the period allowed for cancelling the contract is three months, where the consumer has not been informed of his right of cancellation. Although Article 43č governs cancellation in the case of distance contracts, it is Article 46c(4) of the Law which applies by analogy to contracts negotiated away from business premises.

100 — A fine for failure to supply information is provided for in Article 102(7) of the Belgian Law of 14 July 1991 on commercial practices and the provision of information to and the protection of consumers.

101 — The threat of a fine is set out in Article 62 of the Italian Codice del Consumo.

directive on consumer rights which currently exists only in the form of a proposal [102] and provides that — where the consumer has not been provided with the information on his right of withdrawal from the contract — the withdrawal period expires three months after the trader has performed his other contractual obligations in full. [103]

83. It remains to be examined whether the provisions of Directive 85/577 come under public policy. In *Mostaza Claro* [104] the Court has implicitly categorised the provisions of Directive 93/13 as being capable of coming under public policy, [105] in which regard it argued in particular that Article 6(1) of the directive is a mandatory provision. It can also be stated with regard to Directive 85/577 that Article 4 thereof, which requires traders to give consumers written notice of their right to cancel the contract, is a mandatory provision which aims, because of the weaker position of one of the parties to the contract, to replace the merely formal balance between the rights and obligations of the parties with a de facto balance between them. As the Court has already pointed out with regard to Directive 93/13 in *Mostaza Claro*, it can also be established with regard to Directive 85/577 that, as the aim of the directive is to strengthen consumer protection, it constitutes, according to Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory. [106]

84. Even if the Court does not adopt the line of reasoning presented in the preceding point with regard to public policy, I should like to point out that it did not invoke public policy in *Océano Grupo* and *Cofidis* to justify the national courts' acting of their own motion; it *merely cited the effective protection of the consumer,* which, in view of the risk that the consumer may not be aware of his rights, may be attained only if the national courts act of their own motion. [107] Likewise in the present case, it is without doubt essential to ensure effective consumer protection and, for that

102 — Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614 final. The Directive on consumer rights is intended to replace Directive 85/577, Directive 93/13, Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19) and Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12). See Article 47 of the proposal cited and page 3 of the Explanatory Memorandum on the Proposal.

103 — See Article 13 of the proposal cited in footnote 102.

104 — See *Mostaza Claro* (cited in footnote 15, at paragraphs 35 to 38).

105 — See to that effect also Jordans, R.,'Anmerkung zu EuGH Rs. C-168/05 — Elisa Maria Mostaza Claro gegen Centro Móvil Milenium SL', in: *Zeitschrift für Gemeinschaftsprivatrecht*, No 1/2007, p. 50; Courbe, P., Brière, C., Dionisi-Peyrusse, A., Jault-Seseke, F., Legros, C., 'Clause compromissoire et réglementation des clauses abusives: CJCE, 26 octobre 2006', in: *Petites affiches*, No 152/2007, p. 14; Poissonnier, G., Tricoit, J.-P.,'La CJCE confirme sa volonté de voir le juge national mettre en oeuvre le droit communautaire de la consommation', in: *Petites affiches*, No 189/2007, p. 15.

106 — See *Mostaza Claro* (cited in footnote 15, at paragraph 37).

107 — Cf. *Océano Grupo* (cited in footnote 13, at paragraph 26) and *Cofidis* (cited in footnote 14, at paragraph 33). Advocate General Mengozzi has regard to this point in his Opinion of 29 March 2007 in *Rampion and Godard* (cited in footnote 22, at point 61).

reason, that requirement can be sufficient, in my view, to justify ex officio action by the national court, even if no recourse is had to the public policy argument.

85. The solution whereby the national court — where it establishes of its own motion that the consumer was not informed of his right of cancellation — informs the consumer of the rights conferred on him in these circumstances by national law is not, in my view, contrary to the Court's decision in *Hamilton* either. [108] In *Hamilton*, in which the Court ruled whether a measure, under which the consumer's right of cancellation expires one month after both parties have performed in full their obligations under a long-term loan contract, is an appropriate consumer protection measure, the Court pointed out that the term 'appropriate' in the third paragraph of Article 4 of Directive 85/577 indicates that such measures do not seek to provide absolute protection for consumers [109] and that the general structure of that directive and the wording of several of its provisions indicate that such protection is subject to certain limits. [110] However, it must be borne in mind that those limits relate to the special circumstances of the case in question, in which the obligations of both parties under the contract had been performed in full. [111]

86. In the main proceedings it is apparent, however, from the description of the facts in the order for reference that the obligations arising under the contract have not as yet been performed in full. The item purchased was delivered to the consumer, and the total purchase price was EUR 1 909, of which the consumer paid EUR 47.48, that is to say, a relatively small proportion of the full amount. The supplier brought proceedings against the consumer on the specific ground that the consumer had not performed in full its obligations arising under the contract. The restrictions on consumer protection which the Court introduced in *Hamilton* are, therefore, irrelevant in this case since both parties' obligations arising under the contract had not yet been performed in full.

108 — *Hamilton* (cited in footnote 23).

109 — Ibid. (paragraph 39). This is also pointed out in academic writing; see, for example, Mankowski, P., 'Die gemeinschaftsrechtliche Kontrolle von Erlöschenstatbeständen für verbraucherschützende Widerrufsrechte', in: *Juristenzeitung*, No 23/2008, p. 1143.

110 — *Hamilton* (cited in footnote 23, at paragraph 40).

111 — That is pointed out in academic writing by, for example, Kroll, K., 'Vertragserfüllung als zeitliche Grenze des verbraucherschützenden Widerrufsrechts', in: *Neue Juristische Wochenschrift*, No 28/2008, p. 2000. See, to that effect, also Edelmann, H., 'EuGH: Kein grenzenloser Verbraucherschutz', in: *Betriebs-Berater*, No 19/2008, p. 970; Raynouard, A., 'CJCE, 10 avril 2008, C-412/06, Annelore Hamilton c/Volksbank Filder eG', in: *Revue de jurisprudence commerciale*, No 4/2008, p. 305. It should be added that, according to the Court in *Hamilton*, the reference to the concept of 'obligations arising under the contract' in the fifth recital in the preamble to Directive 85/577 indicates that the consumer may cancel such a contract *during the time that it is in effect* (*Hamilton*, cited in footnote 23, at paragraph 41, emphasis added) — of course only where he has not been informed of his right of cancellation. That by no means indicates a restriction of consumer protection, so long as the obligations arising under the contract have not as yet been fulfilled.

6. Whether the national court is entitled or obliged to act of its own motion

87. Although the referring court has not raised the question whether, under Article 4 of Directive 85/577, it has an *obligation* to act of its own motion where the consumer has not been informed of his right of cancellation, but asks whether it is *allowed* to do so by that provision, it must be clarified whether this case is concerned with a right enjoyed by or an obligation incumbent on the national court to act of its own motion. This matter is of particular importance as, in this case, the Commission takes the view that the national courts are obliged in this case to act of their own motion, [112] whereas the Austrian Government considers that the national courts are not subject to such an obligation. [113]

88. First it should be mentioned that the question raised by the referring court must be understood in the context of Spanish law. Spanish law does not, after all, permit the referring court in this case to act of its own motion, and for that reason the court raises the question whether Community law permits it to do so. [114] Ultimately, it is clear from the question as it is worded that the referring court is seeking to find in Community law a legal basis for acting of its own motion.

89. By way of comparison, it must also be pointed out that the Court ruled in relation to Directive 93/13 in *Océano Grupo* [115] that the national court *may* determine of its own motion whether a contractual term is unfair. Similarly, in *Cofidis* the Court referred to the *power* [116] of the national court to determine

112 — See point 31 of this Opinion.

113 — To be more specific, the Austrian Government submits that Article 4 of Directive 85/577 does not require from Member States that they oblige their courts to act of their own motion. See point 27 of this Opinion.

114 — The question referred to and the answer given by the Court in *Océano Grupo* (cited in footnote 13) can also be understood from this viewpoint. See, to this effect, Van Huffel, M., 'La condition procédurale des règles de protection des consommateurs: les enseignements des arrêts Océano, Heininger et Cofidis de la Cour de justice', in: *Revue européenne de droit de la consommation*, No 2/2003, p. 94.

115 — That is apparent from most language versions of point 1 of the operative part of the judgment in *Océano Grupo* (cited in footnote 13). Cf., for example, the French ('le juge national *puisse* apprécier d'office'), English ('the national court *being able* to determine of its own motion'), German ('das nationale Gericht von Amts wegen prüfen *kann*'), Italian ('il giudice nazionale … *possa* valutare d'ufficio'), Spanish ('el Juez nacional *pueda* apreciar de oficio'), Portuguese ('o juiz nacional *possa* apreciar oficiosamente') and Dutch ('dat de nationale rechter … ambtshalve *kan* toetsen') versions.

116 — See *Cofidis* (cited in footnote 14, at paragraphs 32, 33 and 35). Some language versions use two different terms in those paragraphs, e.g. the French ('faculté' and 'pouvoir'), the Italian ('facoltà' and 'potere') and the Portuguese ('faculdade' and 'poder') versions. Other languages, by contrast, use the same term, e.g. the English ('power'), the German ('Befugnis'), the Spanish ('facultad') and the Dutch ('bevoegdheid') versions.

matters on that basis. In *Mostaza Claro*, however, the Court went a step further, ruling that the national court *must* determine of its own motion whether a contractual term is unfair. [117]

90. I consider that the national court is obliged to act of its own motion in this case too, as this is the only way to ensure the effective protection of consumers, which is the objective of Directive 85/577. [118] If that assessment were left to the discretion of the national courts, the criteria on which basis the courts would act of their own motion in some circumstances and not in others would be unclear. The obligation incumbent on the national courts to act of their own motion is also important, given that such a systematic measure will act as a deterrent since it will deter traders from omitting to inform consumers of their right to cancel the contract. [119]

91. The national courts are therefore, in my view, obliged, not merely entitled, to establish of their own motion whether the consumer has been informed of his right to cancel the contract and, where such information is not supplied, to inform him of the rights afforded to him in these circumstances by national law.

C — *Conclusion*

92. In the light of the foregoing considerations, the answer to the question referred should, in my view, be that Article 153 EC, in conjunction with Article 3(1)(t) EC and the third paragraph of Article 4 of Directive 85/577, must be interpreted as not allowing a national court, in circumstances such as those arising in this case, to declare of its own motion a contract void where the consumer has not invoked nullity in the proceedings before that court; however, the national court must determine of its own motion whether the consumer was informed of his right to cancel the contract and, where such information was not supplied, inform him of the rights afforded to him in these circumstances by national law.

117 — In this regard I should like to mention that in the operative part of *Mostaza Claro* (cited in footnote 15) only some language versions expressly use the imperative — thus, for example, the English ('*must* determine whether the arbitration agreement is void') or the Slovenian ('*mora* … presojati ničnost arbitražnega dogovora') — whereas other language versions use the indicative in the operative part, e.g. the French ('apprécie la nullité de la convention d'arbitrage') or the German ('die Nichtigkeit der Schiedsvereinbarung prüft'). Nevertheless, the obligation of ex officio assessment emerges clearly from paragraph 38 of that judgment; cf. various language versions of that paragraph of the judgment, e.g. the French ('*soit tenu* d'apprécier d'office'), the English ('*being required* to assess of its own motion'), the German ('von Amts wegen … prüfen *muss*'), the Italian ('*sia tenuto* a valutare d'ufficio'), the Spanish ('*deba* apreciar de oficio'), the Portuguese ('*deva apreciar oficiosamente'), the Slovenian ('dolžnost* …, da po uradni dolžnosti presoja') and the Dutch ('ambtshalve *dient* te beoordelen') versions.

118 — Van Huffel underlines that point by way of comparison with Directive 93/13, loc. cit. (footnote 114), p. 97.

119 — Ibid. (paragraph 77).

VII — Conclusion

93. In the light of all the foregoing considerations, I propose that the Court should answer the question referred by the Audiencia Provincial de Salamanca as follows:

Article 153 EC, in conjunction with Article 3(1)(t) EC and the third paragraph of Article 4 of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, must be interpreted as not allowing a national court, in circumstances such as those arising in this case, to declare of its own motion a contract void where the consumer has not invoked nullity in the proceedings before that court; however, the national court must determine of its own motion whether the consumer was informed of his right to cancel the contract and, where such information was not supplied, inform him of the rights afforded to him in these circumstances by national law.