JUDGMENT OF THE COURT

27 June 2000 *

In Joined Cases C-240/98 to C-244/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Juzgado de Primera Instancia No 35 de Barcelona, Spain, for a preliminary ruling in the proceedings pending before that court between

Océano Grupo Editorial SA

and

Rocío Murciano Quintero (C-240/98)

and between

Salvat Editores SA

and

José M. Sánchez Alcón Prades (C-241/98),

José Luis Copano Badillo (C-242/98),

Mohammed Berroane (C-243/98),

Emilio Viñas Feliú (C-244/98),

* Language of the case: Spanish.

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

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, L. Sevón (President of Chamber), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, G. Hirsch, P. Jann (Rapporteur), H. Ragnemalm, M. Wathelet, V. Skouris and F. Macken, Judges,

Advocate General: A. Saggio,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Océano Grupo Editorial SA and Salvat Editores SA, by A. Estany Segalas, of the Barcelona Bar,

— the Spanish Government, by S. Ortíz Vaamonde, Abogado del Estado, acting as Agent,

— the French Government, by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Directorate of the Ministry of Foreign Affairs, and R. Loosli-Surrans, Chargé de Mission in that Directorate, acting as Agents,

— Commission of the European Communities, by J.L. Iglesias Buhigues, Legal Adviser, and M. Desantes Real, a national civil servant on secondment to the Commission's Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Océano Grupo Editorial SA, Salvat Editores SA, the Spanish Government, the French Government and the Commission at the hearing on 26 October 1999,

after hearing the Opinion of the Advocate General at the sitting on 16 December 1999,

gives the following

Judgment

1 By orders of 31 March 1998 (C-240/98 and C-241/98) and 1 April 1998 (C-242/98, C-243/98 and C244/98) received at the Court on 8 July 1998, the Juzgado de Primera Instancia (Court of First Instance) No 35, Barcelona, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now

Article 234 EC) a question on the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29, 'the Directive').

2 The question was raised in two sets of proceedings, between (i) Océano Grupo Editorial SA and Ms Murciana Quintero and (ii) Salvat Editores SA and Mr Sánchez Alcón Prades, Mr Copano Badillo, Mr Berroane and Mr Viñas Feliú. The proceedings concerned the payment of sums due under contracts concluded between the companies and the defendants in the main proceedings for the sale on deferred payment terms of encyclopaedias.

The legal framework

Community law

3 The purpose of the Directive is, according to Article 1(1), 'to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer'.

4 Article 2 of the Directive provides:

'For the purposes of this Directive:

...

(b) "consumer" means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;

(c) "seller or supplier" means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.'

5 Article 3(1) of the Directive provides:

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

6 Article 3(3) of the Directive refers to the Annex to the Directive which is to contain an 'indicative and non-exhaustive list of the terms which may be regarded as unfair'. Paragraph 1 of the Annex refers to 'Terms which have the object or effect of:

...

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy...'

7 Under Article 6(1) of the Directive:

'Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.'

8 Article 7 of the Directive provides:

'1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

2. The means referred to in paragraph 1 shall 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 drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.'

9 Article 10(1) of the Directive provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive no later than 31 December 1994.

National law

10 Under Spanish law consumers were initially protected against unfair terms inserted in contracts by sellers and suppliers by the Ley General 26/1984, de 19 de julio, para la Defensa de los Consumidores y Usuarios (General Law No 26/1984 of 19 July 1984 for the Protection of Consumers and Users, *Boletín Oficial del Estado* No 176, of 24 July 1984, 'Law No 26/1984').

11 Article 10(1)(c) of Law No 26/1984 provides that terms, conditions or clauses which apply generally in relation to the sale or promotion of products or services must be consistent with the requirement of good faith and must maintain a proper balance between the rights and obligations of the parties, which in any event precludes the use of unfair terms. By virtue of Article 10(4) of Law No 26/1984, unfair terms, which are defined as terms adversely affecting the

consumer in a disproportionate or inequitable manner or causing an imbalance in the parties' rights and obligations to the detriment of the consumer, are automatically void.

12 The Directive was fully transposed by Ley 7/1998, de 13 de abril, sobre Condiciones Generales de la Contratación (Law No 7/1998 of 13 April 1998 on General Contractual Conditions, *Boletín Oficial del Estado* No 89 of 14 April 1998, 'Law No 7/1998').

13 Article 8 of Law No 7/1998 provides that general conditions which, to the detriment of a party to the contract, infringe the provisions of the Law and, in particular, unfair general conditions in consumer contracts within the meaning of Law No 26/1984 are automatically void.

14 Law No 7/1998 supplements Law No 26/1984 by adding, in particular, Article 10a, paragraph 1 of which substantially reproduces Article 3(1) of the Directive, and an additional provision which essentially sets out the list in the Annex to the Directive of terms which may be regarded as unfair, while indicating that the provision is minimal in character. Under paragraph 27 of the additional provision, a term of a contract expressly conferring jurisdiction on a court or tribunal other than that corresponding to the consumer's domicile or the place of performance of the contract is regarded as unfair.

The main proceedings and the question submitted for a preliminary ruling

15 Between 4 May 1995 and 16 October 1996, each of the defendants in the main proceedings, all of whom are resident in Spain, entered into a contract for the

purchase by instalments of an encyclopaedia for personal use. The plaintiffs in the main proceedings are the sellers of the encyclopaedias.

16 The contracts contained a term conferring jurisdiction on the courts in Barcelona (Spain), a city in which none of the defendants in the main proceedings is domiciled but where the plaintiffs in those proceedings have their principal place of business.

17 The purchasers of the encyclopaedias did not pay the sums due on the agreed dates, and, between 25 July and 19 December 1997, the sellers brought actions ('juicio de cognición' — a summary procedure available only for actions involving limited amounts of money) in the Juzgado de Primera Instancia No 35 de Barcelona to obtain an order that the defendants in the main proceedings should pay the sums due.

18 Notice of the claims was not served on the defendants since the national court had doubts as to whether it had jurisdiction over the actions in question. The national court points out that on several occasions the Tribunal Supremo (Supreme Court) has held jurisdiction clauses of the kind at issue in these proceedings to be unfair. However, according to the court making the reference, the decisions of the national courts are inconsistent on the question of whether the court may, in proceedings concerning consumer protection, determine of its own motion whether an unfair term is void.

19 In those circumstances the Juzgado de Primera Instancia No 35 de Barcelona took the view that an interpretation of the Directive was necessary to enable it to

reach a decision in the proceedings before it. It decided to stay the proceedings and to refer to the Court of Justice for a preliminary ruling the following question, which is identically worded in the five orders for reference:

'Is the scope of the consumer protection provided by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts such that the national court may determine of its own motion whether a term of a contract is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the ordinary courts?'

20 By order of the President of the Court of Justice of 20 July 1998, the five cases C-240/98 to C-244/98 were joined for the purposes of the written and oral procedure and the judgment.

21 First, it should be noted that, where a term of the kind at issue in the main proceedings has been included in a contract concluded between a consumer and a seller or supplier within the meaning of the Directive without being individually negotiated, it satisfies all the criteria enabling it to be classed as unfair for the purposes of the Directive.

22 A term of this kind, the purpose of which is to confer jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business, obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile. This may make it difficult for him to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence. Such a term thus falls within the category of terms which have the object or effect of excluding or hindering the consumer's

right to take legal action, a category referred to in subparagraph (q) of paragraph 1 of the Annex to the Directive.

23 By contrast, the term enables the seller or supplier to deal with all the litigation relating to his trade, business or profession in the court in the jurisdiction of which he has his principal place of business. This makes it easier for the seller or supplier to arrange to enter an appearance and makes it less onerous for him to do so.

24 It follows that where a jurisdiction clause is included, without being individually negotiated, in a contract between a consumer and a seller or supplier within the meaning of the Directive and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, it must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

25 As to the question of whether a court seised of a dispute concerning a contract between a seller or supplier and a consumer may determine of its own motion whether a term of the contract is unfair, it should be noted that the system of protection introduced by the Directive 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.

26 The aim of Article 6 of the Directive, which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. In disputes where the amounts involved are often limited, the lawyers' fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term. While it is the case that, in a number of

Member States, procedural rules enable individuals to defend themselves in such proceedings, there is a real risk that the consumer, particularly because of ignorance of the law, will not challenge the term pleaded against him on the grounds that it is unfair. It follows that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion.

27 Moreover, as the Advocate General pointed out in paragraph 24 of his Opinion, the system of protection laid down by the Directive is based on the notion that the imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract. That is why Article 7 of the Directive, paragraph 1 of which requires Member States to implement adequate and effective means to prevent the continued use of unfair terms, specifies in paragraph 2 that those means are to include allowing authorised consumer associations to take action in order to obtain a decision as to whether contractual terms drawn up for general use are unfair and, if need be, to have them prohibited, even if they have not been used in specific contracts.

28 As the French Government has pointed out, it is hardly conceivable that, in a system requiring the implementation of specific group actions of a preventive nature intended to put a stop to unfair terms detrimental to consumers' interests, a court hearing a dispute on a specific contract containing an unfair term should not be able to set aside application of the relevant term solely because the consumer has not raised the fact that it is unfair. On the contrary, the court's power to determine of its own motion whether a term is unfair must be regarded as constituting a proper means both of achieving the result sought by Article 6 of the Directive, namely, preventing an individual consumer from being bound by an unfair term, and of contributing to achieving the aim of Article 7, since if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers.

29 It follows from the above that the protection provided for consumers by the Directive entails the national court being able to determine of its own motion

whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts.

30 As regards the position where a directive has not been transposed, it must be noted that it is settled case-law (Case C-106/89 *Marleasing* v *La Comercial Internacional de Alimentación* [1990] ECR I-4135, paragraph 8, Case C-334/92 *Wagner Miret* v *Fondo de Garantía Salarial* [1993] ECR I-6911, paragraph 20, and Case C-91/92 *Faccini Dori* v *Recreb* [1994] ECR I-3325, paragraph 26) that, when applying national law, whether adopted before or after the directive, the national court called upon to interpret that law must do so, as far as possible, in the light of the wording and purpose of the directive so as to achieve the result pursued by the directive and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC).

31 Since the court making the reference is seised of a case falling within the scope of the Directive and the facts giving rise to the case postdate the expiry of the period allowed for transposing the Directive, it therefore falls to that court, when it applies the provisions of national law outlined in paragraphs 10 and 11 above which were in force at the material time, to interpret them, as far as possible, in accordance with the Directive and in such a way that they are applied of the court's own motion.

32 It is apparent from the above considerations that the national court is obliged, when it applies national law provisions predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive. The requirement for an interpretation in conformity with the Directive requires the national court, in particular, to favour the interpretation that would allow it to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the Juzgado de Primera Instancia No 35 de Barcelona by orders of 31 March and 1 April 1998, hereby rules:

1. **The protection provided for consumers by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts.**

2. **The national court is obliged, when it applies national law provisions predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive. The requirement for an interpretation in conformity with the Directive requires the national court, in particular, to favour the interpretation that would allow it to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term.**

Rodríguez Iglesias Sevón Kapteyn

Gulmann Puissochet

Hirsch Jann Ragnemalm

Wathelet Skouris Macken

Delivered in open court in Luxembourg on 27 June 2000.

R. Grass G.C. Rodríguez Iglesias

Registrar President