JUDGMENT OF THE COURT (First Chamber)

17 December 2009 *

In Case C-227/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Audiencia Provincial de Salamanca (Spain), made by decision of 20 May 2008, received at the Court on 26 May 2008, in the proceedings

Eva Martín Martín

v

EDP Editores, SL,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet and M. Ilešič, Judges,

* Language of the case: Spanish.

Advocate General: V. Trstenjak,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 March 2009,

after considering the observations submitted on behalf of:

— EDP Editores SL, by J.M. Sanchez Garcia, abogado,

— the Spanish Government, by B. Plaza Cruz and J. López-Medel Bascones, acting as Agents,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the European Commission, by R. Vidal Puig and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 May 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation 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 (OJ 1985 L 372, p. 31; 'the Directive').

2 The reference has been made in the course of proceedings between EDP Editores SL ('EDP') and Ms Martín Martín following the refusal of Ms Martín Martín to respect the commitments undertaken at the signing of a contract agreed, at her home, with an EDP representative.

Legal context

Community legislation

3 Recitals 4 to 6 of the preamble to the Directive state:

'… 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]; … the consumer is often unable to compare the quality and price of the offer with other offers; …

… 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;

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

4 Article 1(1) of the Directive provides:

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

…

— 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.'

5 Under Article 4 of the Directive:

'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;

…

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.'

6 Article 5 of the Directive states:

‘1. The consumer shall have the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from receipt by the consumer of the notice referred to in Article 4, in accordance with the procedure laid down by national law. …

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

7 Article 8 of the Directive provides:

‘This Directive shall not prevent Member States from adopting or maintaining more favourable provisions to protect consumers in the field which it covers.’

National legislation

8 Law 26/1991 of 21 November 1991 concerning contracts concluded away from business premises (BOE No 283 of 26 November 1991) transposes the Directive into Spanish law.

9 Article 3 of that law provides:

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

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

3. The cancellation notice shall include in a clearly visible form the words 'cancellation notice' and shall state the name and address of the individual to whom it is to be sent and the particulars of the contract and the contracting parties.

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 laid down in this article have been complied with.'

10 Article 4 of Law 26/1991 sets out the effects of non-compliance with the conditions listed in Article 3 of that law, 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 exclusively on the part of the consumer.'

11 Article 9 of that law states:

'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.'

The dispute in the main proceedings and the question referred for a preliminary ruling

12 On 20 May 2003, Ms Martín Martín signed, at her home, a contract with a representative of EDP for the purchase of 15 books, 5 DVDs and a DVD player. Those goods were delivered to her on 2 June 2003.

13 As it did not receive payment for the goods, EDP applied to the Juzgado de Primera Instancia No 1 de Salamanca (First Chamber of the Salamanca Court of First Instance) to commence an order for payment procedure against Ms Martín Martín claiming the amount of EUR 1 861.52 plus default interest and costs.

14 Since the defendant was ordered, by decision of 14 June 2007, to pay the amount claimed, she brought an appeal before the Audencia Provincial de Salamanca (Salamanca Regional High Court).

15 In its order for reference, the Audiencia Provincial de Salamanca considers, first, that the contract in question may be declared void inasmuch as the defendant was not duly informed of her right to withdraw her consent within a period of seven days from delivery of the goods, nor of the conditions for and consequences of the exercise of that right. That court points out, however, that no plea of nullity was submitted by Ms Martín Martín before the court at first instance or during the appeal proceedings.

16 Taking account of the fact that under Article 4 of Law 26/1991 it is for the consumer to request cancellation of a contract concluded in breach of the conditions laid down in Article 3 of that law, and that, under Spanish law, civil actions are generally governed by the '*principio de justicia rogada*', a principle on the basis of which the court cannot assess, of its own motion, facts, evidence and claims which the parties have not raised, the Audiencia Provincial de Salamanca is uncertain whether, in order to give judgment on the appeal brought against the decision at first instance, it must take into account solely the pleas submitted in the course of the action at first instance and the appeal, or whether, on the contrary, the provisions of the Directive allow it to rule, of its own motion, on the possibility that the contract is void.

17 In those circumstances, the Audiencia Provincial de Salamanca decided to stay the proceedings and to refer 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 [proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1), and the [Directive], specifically [with] Article 4 thereof, be interpreted as meaning that a court seised 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?'

The question referred for a preliminary ruling

18 By its question, the Audiencia Provincial de Salamanca asks, in essence, whether Article 4 of the Directive must be interpreted as meaning that it allows a national court to raise, of its own motion, an infringement of that provision and to declare a contract falling within the scope of that directive void on the ground that the consumer was not informed of his right of cancellation, even though the consumer, at no stage, pleaded that the contract was void before the competent national courts.

19 In order to reply to that question, it should at the outset be recalled that Community law does not, in principle, require national courts to raise of their own motion an issue concerning the breach of provisions of Community law, where examination of that issue would oblige them to go beyond the ambit of the dispute defined by the parties themselves and rely on facts and circumstances other than those on which the party with an interest in application of those provisions has based his claim (see, to that effect, inter alia, Case C-430/93 *van Schijndel and van Veen* [1995] ECR I-4705, paragraph 22 and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 36).

20 That limitation on the power of the national court is justified by the principle that, in a civil suit, it is for the parties to take the initiative, and that, as a result, the court is able to act of its own motion only in exceptional cases where the public interest requires its intervention (see *van Schijndel and van Veen*, paragraph 21 and *van der Weerd and Others*, paragraph 35).

21 It must, therefore, be ascertained, in the first place, whether the Community law provision at issue in the main proceedings, namely Article 4 of the Directive, can be considered to be founded on such a public interest.

22 In that regard, it should be noted that the Directive, as is apparent from recitals 4 and 5, is designed to protect consumers against the risks inherent in the conclusion of contracts away from business premises (Case C-412/06 *Hamilton* [2008] ECR I-2383, paragraph 32), as the special feature of those contracts is that as a rule it is the trader who initiates the contract negotiations, and the consumer has not prepared for such door-to-door selling by, inter alia, comparing the price and quality of the different offers available.

23 It is on account of that imbalance that the directive ensures consumer protection by granting, first of all, a right of cancellation to the consumer. Such a right seeks specifically to offset the disadvantage, for the consumer, of sales which take place away from business premises, to enable him over a period of at least seven days to assess the obligations arising under the contract (see, to that effect, *Hamilton*, paragraph 33).

24 In order to strengthen consumer protection in situations where consumers finds themselves caught unawares, Article 4 of the Directive also requires traders to give consumers written notice of their right to cancel the contract and the conditions for and means of exercising such a right.

25 Lastly, it is apparent from Article 5(1) of the Directive that the minimum period of seven days must be calculated from the date of receipt of that notice from the trader. That provision is explained, as the Court has previously indicated, by the fact that if the consumer is not aware of the existence of the right of cancellation, he will not be able to exercise that right (Case C-481/99 *Heininger* [2001] ECR I-9945, paragraph 45).

26 In other words, the system of protection established by the Directive assumes not only that the consumer, as the weaker party, has the right to cancel the contract, but also that he is made aware of his rights by being specifically informed of them in writing.

27 It must therefore be held that the obligation to give notice of the right of cancellation laid down in Article 4 of the Directive plays a central role in the overall scheme of that directive, as an essential guarantee, as the Advocate General stated in points 55 and 56 of her Opinion, for the effective exercise of that right and, therefore, for the effectiveness of consumer protection sought by the Community legislature.

28 Such a provision, therefore, comes under the public interest justifying — within the meaning of the case-law cited in paragraph 20 of this judgment — a positive intervention by the national court in order to compensate for the imbalance between the consumer and the trader in the context of contracts concluded away from business premises.

29 In those circumstances, it must be held that, in the event that the consumer has not been duly informed of her right of cancellation, the national court seised may raise, of its own motion, an infringement of the requirements laid down in Article 4 of the Directive.

30 That being the case, in order to reply to the question referred by the Audiencia Provincial de Salamanca, it is necessary, in the second place, to clarify the consequences which may follow such an infringement and, more specifically, whether the national court seised can declare the contract void for the failure to comply with the obligation to give notice which is at issue.

31 In that regard, the Court has previously stated that, while the third paragraph of Article 4 leaves it to the Member States to legislate as regards the legal effects of a failure to comply with the obligation to give notice, the national courts, when hearing a case between individuals, must, for their part, interpret the whole body of rules of national law so far as possible in the light of the wording and purpose of the Directive in order to achieve an outcome consistent with the objective pursued by that directive (see, inter alia, to that effect, Case C-350/03 *Schulte* [2005] ECR I-9215, paragraphs 69, 71 and 102).

32 In that context, it must be pointed out, first, that the concept of 'appropriate consumer protection measures' in the third paragraph of Article 4 of the Directive, affords to the national authorities a discretion in determining the consequences which should follow a failure to give notice, provided that that discretion is exercised in conformity with the Directive's aim of safeguarding the protection granted to consumers under appropriate conditions with regard to the particular circumstances of the case.

33 Second, it must also be borne in mind that the Directive provides for a minimum level of harmonisation inasmuch as, under Article 8, the Directive does not prevent Member States from adopting or maintaining more favourable provisions to protect consumers in the field which it covers (see, to that effect, *Hamilton*, paragraph 48).

34 In those circumstances, a measure, such as that envisaged by the referring court, which consists in declaring the contract in dispute void can be categorised as 'appropriate' within the meaning of the third paragraph of Article 4 of the Directive, in that it penalises the failure to comply with an obligation which is essential, as stated in

paragraphs 26 and 27 of the present judgment, to create binding intent on the part of the consumer and to attain the level of protection sought by the Community legislature.

35 It should lastly be pointed out that, first, that finding does not rule out the possibility that other measures might also ensure that level of protection, such as, for example, the resetting of the relevant time-limits relating to the cancellation of the contract, thus placing the consumer in a position to exercise the right which is granted to him by Article 5(1) of the Directive. Second, the national court seised may also have to take account, in certain circumstances, of the consumer's wish not to have the contract at issue cancelled (see, by analogy, Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraph 33).

36 In the light of all of the foregoing considerations, the reply to the question referred is that Article 4 of the Directive does not preclude a national court from declaring, of its own motion, that a contract falling within the scope of that directive is void on the ground that the consumer was not informed of his right of cancellation, even though the consumer at no stage pleaded that the contract was void before the competent national courts.

Costs

37 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

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 does not preclude a national court from declaring, of its own motion, that a contract falling within the scope of that directive is void on the ground that the consumer was not informed of his right of cancellation, even though the consumer at no stage pleaded that the contract was void before the competent national courts.

[Signatures]