# OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 31 January 2002 [1]

## I — Introduction

1. By the present action for failure to fulfil obligations, the Commission claims that the Court should declare that the Kingdom of Sweden has failed to fulfil its obligations under Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (hereinafter: 'the Directive' or 'the directive on unfair terms'). [2] The parties are in dispute as to whether it is necessary to implement through a provision of law the 'indicative, non-exhaustive' list in the annex to the Directive of terms that may be regarded as unfair. The Swedish Government takes the view that it is sufficient for the list to be reproduced in the explanatory note to the implementing law. The Republic of Finland and the Kingdom of Denmark, which have not incorporated the text into their legislation either, support the position of the Swedish Government.

1 — Original language: Dutch.
2 — OJ 1993 L 95, p. 29.

## II — Legal background

### A — *The directive on unfair terms*

2. Under Article 1 of the Directive, the purpose of the Directive is 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. Article 6(1) provides that Member States are to lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier is, as provided for under their national law, not to be binding on the consumer and that the contract is to continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

3. Under Article 2(a) 'unfair terms' within the meaning of the Directive means the

contractual terms defined in Article 3. Article 3 of the Directive reads as follows:

'1. 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.

2. ...

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.'

4. Article 4 of the Directive reads as follows:

'1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

2. ...'

5. Article 5 of the Directive provides as follows:

'In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7(2).'

6. The directive provides for minimal harmonisation. Under Article 8 of the Directive Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by the Directive, to ensure a maximum degree of protection for the consumer.

7. The Directive contains an annex entitled 'Terms referred to in Article 3(3)' which, in paragraph 1, sets out 17 different types of contractual terms. The scope of some of

these is clarified in paragraph 2. In this regard the 17th recital states:

'Whereas, for the purposes of this Directive, the annexed list of terms can be of indicative value only and, because of... the minimal character of the Directive, the scope of these terms may be the subject of amplification or more restrictive editing by the Member States in their national laws.'

8. Under Article 10 of the Directive, Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive no later than 31 December 1994.

B — *The national legislation*

9. The Directive has been transposed into Swedish law by the lagen (1994:1512) om avtalsvillkor i konsumentforhållanden (Law on terms of contract in relations with consumers) and by the lagen (1994:1513) om ändring i lagen (1915:218) om avtal (Law amending the Law on terms of contract).

10. The annex to the directive has not been incorporated in that legislation. It is reproduced with a commentary in the explanatory note to lagen 1994:1512.

**III — Procedure**

11. The procedure ran its normal course under Article 169 of the EC Treaty (now Article 226 EC). The application made by the Commission was received at the Court Registry on 16 December 1999.

The applicant claims that the Court should:

— declare that, by failing to adopt the laws, regulations and administrative provisions necessary to transpose the annex referred to in Article 3(3) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts into its national law, the Kingdom of Sweden has failed to fulfil its obligations under that directive;

— order the Kingdom of Sweden to pay the costs.

The Kingdom of Sweden claims that the Court should dismiss the action and order the Commission to pay the costs.

12. The President of the Court granted the Republic of Finland and the Kingdom of Denmark leave to intervene in the case in support of the form of order sought by the Kingdom of Sweden. The Commission and the Governments of the three Member States were represented at the hearing of 25 October 2001.

## IV — The Commission's complaint and the position of the Kingdom of Sweden

13. The Commission claims that, under Article 249 EC, the annex to the Directive must be implemented in Swedish law by being reproduced in the national legislation. The Court has consistently held that it is particularly important, in order to satisfy the requirement for legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights. [3]

14. The Commission states that the Directive, which is based on Article 100a of the Treaty (now, after amendment, Article 95 EC), has two objectives. First, the Directive seeks to harmonise the existing legislation of the Member States on unfair terms in contracts between consumers and sellers or suppliers of goods or services. [4] Article 100a(3) of the EC Treaty (now, after amendment, Article 95(3) EC) states that, in the adoption of measures which have as their object the establishment of the internal market, consumer protection will take as a base a high level of protection. Secondly, the Directive seeks to improve consumer information regarding applicable provisions. [5] The idea that the effectiveness of consumer protection is largely dependent on the consumers' right to information also follows from Article 153 EC (consumer protection), which can also be regarded as one of the bases of the Directive.

15. Article 8 of the Directive states that the provisions of the Directive are of minimal character, whilst Article 3(3) refers to an indicative list in the annex. Bearing in mind that the provisions of the Directive are of minimal character, it is logical, in the opinion of the Commission, that the 17th recital specifies that the Member States may, in their legislation, add new terms, formulate more rigorous ones (which restrict further the freedom of sellers or suppliers) or modify 'the scope' within the meaning of paragraph 2 of the Annex. On the other hand, in their national legislation the Member States may not exclude certain

3 — Case C-236/95 *Commission* v *Greece* [1996] ECR I-4459, paragraph 13.

4 — See Article 1(1) and the second recital, first sentence.

5 — See fifth and eighth recitals.

terms or formulate them in a way less favourable for consumers. It would be illogical to provide that the list may be 'the subject of amplification or more restrictive editing by the Member States in their national laws' if it were not already reproduced in the text of the national provisions.

16. In the view of the Commission, it follows that the list in the Annex to the Directive seeks to establish an effective internal market and greater consumer protection through better information. This result can be achieved by giving more precise and specific substance to the general criteria laid down in Article 3(1) of the Directive. Legal certainty is thus increased both for Swedish and foreign economic operators and consumers, whilst the various competent authorities apply legislation in a more uniform manner. The list constitutes a very useful tool for sellers and suppliers when they draw up their standard agreements. In this way many disputes can be avoided. The Commission considers that those aims, particularly the criteria regarding precision and information, can be achieved only if the list in the Annex to the Directive is made generally known by publication of it in the implementing legislation.

17. A mere reference to the list in the explanatory note to the law is insufficient. In that respect, the fact that the list is of an indicative character is irrelevant. In the view of the Commission, it means only that the contractual terms set out are not automatically unfair, but that the national court or competent authority must be free to assess the character of the terms in the light of the general criteria of Article 3(1) and Article 4 of the Directive. However, the list is not intended only to provide examples and indications for the application of the law, but its role is also to serve as a source of information. The Commission doubts that the public, whether affected or not — including consumers, domestic and foreign sellers and suppliers, and the national authorities which are competent to apply the measures transposing the Directive — always have easy access to the explanatory note.

18. In support of its point of view, the Commission makes reference to the judgment in *Commission* v *Denmark* from which it draws the conclusion that a statement in the explanatory note to a draft law is not an acceptable method of transposition. [6] The Commission also makes reference to Swedish legal literature according to which the importance of the explanatory note in interpreting legislation has declined as a result of Sweden's accession to the European Union. [7]

19. The Swedish Government, which is supported in all its pleas and arguments by the Danish and Finnish Governments,

6 — Case 143/83 *Commission* v *Denmark* [1985] ECR 427, paragraph 11.

7 — The Commission refers to Norstedts Juridiska Handbok, 16th edition, pp. 6 and 11.

contests the view taken by the Commission and claims that Community law does not require the list in the annex to be implemented by a law, regulation or administrative provision. It essentially asserts that the list serves only as an instrument for the interpretation by the national courts and authorities of the general criteria defined in Article 3(1) and Article 4 of the Directive. It considers that the list is not binding and nor is it intended to create rights and obligations for individuals. Furthermore, the Swedish Government takes the view that information for the public on unfair terms is guaranteed in many ways and to a satisfactory degree.

## V — Assessment

20. The central issue in this case is not so much whether it is useful or even desirable to reproduce the list of unfair terms in the Annex to the Directive in the national legislation. What is at issue in the present action for failure to fulfil obligations, is the question whether under Community law the Kingdom of Sweden has an *obligation* to do so.

21. The nature and the content of the obligations imposed on the Member States by the third paragraph of Article 249 EC are determined by the content, scope and characteristics of the directives, or parts of them, which the Member States are required to transpose with their national legislation or implement in some other way. In its case-law the Court habitually shows itself to be very demanding as regards the implementation of provisions of directives by which rights are conferred on individuals.

22. The main question in the present case is whether it was sufficient, in order for the list in the Annex to the Directive to be implemented, for the Swedish Government to make reference, in the legislation by which the Directive itself was transposed, to the preparatory work in which the annex is reproduced in its entirety and accompanied by a commentary. In order to answer that question it is necessary to analyse the character and legal significance of the Annex. In the light of that assessment, it is then possible to examine whether, in implementing the Directive, the Kingdom of Sweden has failed to fulfil its obligations under the third paragraph of Article 249 EC.

### A — *The character of the Annex to the Directive*

23. The Directive is intended not only to facilitate the establishment of the internal market but also to ensure protection for individuals in their capacity as consumers when they purchase goods or services under

a contract. For that purpose, the Member States are required by Article 6(1) to provide that unfair terms 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.

24. It is stated in the preamble to the Directive that the criteria for assessing the unfair character of contract terms must be fixed in a general way, taking account of the requirement of good faith. [8] Under Article 2(a), 'unfair terms' means the contractual terms defined in Article 3. The essence of the definition can be found in Article 3(1). It provides that a contractual term which has not been individually negotiated is to 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. Article 3(2) of the Directive states that the term must not have been individually negotiated. In assessing whether a term is unfair it is also necessary to analyse it against the background of Articles 4 and 5. Thus, under Article 4(1) the unfairness of a contractual term is to be assessed by referring 'to all the circumstances attending the conclusion of the contract' and to a certain number of other factors, such as the nature of the contract. Article 5 contains in particular the well-known rule on interpretation for cases of ambiguity.

8 — See 15th and 16th recitals in the preamble to the Directive.

25. The Directive further contains, in the words of Article 3(3), 'an indicative and non-exhaustive list of the terms which may be regarded as unfair'.

26. Unlike in the national law of certain Member States, [9] no distinction is made in the Annex to the Directive between a so-called 'black list', with terms which are regarded as unfair and in relation to which courts or competent administrative authorities do not have any discretionary power, and a 'grey list', with terms which are presumed to be unfair, but for which the burden of proof is in fact reversed. On the other hand, paragraph 1 of the Annex contains a list of 17 types of terms worded in various ways, which for the most part leave some measure of discretion to the person assessing them and which are not presumed to be unfair under the Directive. [10] These include terms which, for example, 'inappropriately' exclude or limit the legal rights of the consumer (subparagraph b), which require any consumer who fails to fulfil his obligation to pay 'a disproportionately high sum in compensation' (subparagraph e), which 'unduly' restrict the evidence available to the consumer (subparagraph q) and which

9 — See, for example, Articles 6:236 and 6:237 of the Nederlands Burgerlijk Wetboek (Netherlands Civil Code).

10 — In the legal literature, the list in the annex is also referred to as the 'blue (European) list' [blauwe (Europese) lijst].

provide for the price of goods to be determined at the time of delivery without giving the consumer the corresponding right to cancel the contract if the final price is 'too high' in relation to the price agreed when the contract was concluded (paragraph 1). Paragraph 2 of the annex defines the scope of certain terms referred to in paragraph 1. [11]

27. During the preparatory work for the Directive, the legal character and legal effects of the list were discussed at length. The original proposal by the Commission contained a definition of the expression 'unfair terms' in Article 2(1). Article 2(2) provided that 'the Annex contains a list of types of unfair terms'. In the Annex itself the following wording could be found: 'the following types of terms are unfair if they have the object or effect of:... '. [12] It must be inferred from this that the authors of the proposal intended that the terms set out in the Annex should always be regarded as 'unfair' and therefore inadmissible. This also follows from the 12th recital of the Commission's original proposal, according to which 'it is desirable to identify certain types of terms which must not be used in contracts concluded with consumers'. In its amended proposal for a directive the Commission made clear that the list was binding in character. [13] However, the Council considered, notwithstanding the manifest preference of the Commission and Parliament [14] for a list that was binding in character, that it should be indicative.

28. It is apparent from this historical background that the list is not intended to be a binding list of terms which are unacceptable *per se*. The list contains an illustrative collection of terms that are potentially unfair. The list, to use the language of Article 3(3) of the Directive, is 'an indicative and non-exhaustive list of the terms which may be regarded as unfair'. The list is representative in so far as it reproduces the most typical and common binding terms, but terms which are not mentioned in the list may also be declared to be unfair in a specific case. On the other hand, the appearance of a term in the list is merely indicative and such terms do not necessarily have to be regarded as unfair, for example because the term that is detrimental to consumers is compensated for by other terms that are favourable to them. It will be for the court or competent administrative authority, having regard to all the relevant factors in the individual case, to ascertain

11 — The fact that the scope is sometimes illustrated in a remarkably detailed way can be seen from reading, for example, paragraph 1(g), paragraph 2(a) and 2(c) of the annex. It follows that terms which have the object or effect of 'enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so' are included in the terms mentioned in Article 3(3) (paragraph 1(g)). It does not, however, apply to certain specifically mentioned contractual terms and certain transactions (paragraph 2(c)). Paragraph 1(g) does not affect terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately (paragraph 2(a)).

12 — See the Proposal for a Council Directive on unfair terms in consumer contracts presented by the Commission on 24 July 1990 (OJ 1990 C 243, p. 2).

13 — OJ 1992 C 73, p. 7. See Article 3(3) of the amended proposal.

14 — At the first reading the Parliament called for 'a binding but not exhaustive list of types of unfair terms'. See Amendment No 11 (OJ 1991 C 326, p. 111).

whether the contractual terms in question are also unfair de facto. The criterion to be applied is whether the balance between the rights and obligations under the contract is affected to the detriment of consumers and contrary to the requirement of good faith.

29. The list thus offers the courts and other competent bodies, affected groups and individual consumers, sellers and suppliers — including those from another Member State — a criterion for interpreting the expression 'unfair terms'. By thus giving concrete form to the 'open provision' contained in Article 3(1), that is to say the first criterion for determining whether a contractual term is unfair, their certainty is reinforced.

30. Furthermore, the Court itself has already used the list in the Annex as an aid to interpretation. In its judgment in *Océano Grupo Editorial* the Court found that a term 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 is unfair. Such a choice-of-forum clause thus falls under paragraph 1(q) of the Annex to the Directive as a term which has the object or effect of excluding or hindering the consumer's right to take legal action. In concluding that the choice-of-forum clause was unfair, the Court found that it was of decisive importance that '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'. [15]

B — *The obligation to implement the Annex in a provision of law*

31. As far as its main complaint is concerned, the Commission considers that in order to guarantee legal certainty the Annex must be adopted and published in national legislation. That is the only way to attain the objective of the Directive, effective consumer protection and better consumer information regarding the applicable provisions.

32. The view taken by the Commission must be assessed against the background of the third paragraph of Article 249 EC. Under that provision a directive must be binding as to the result to be achieved. The national authorities remain competent to determine the choice of the form and methods of implementation.

33. The Court has clarified the scope of the obligation imposed on the Member States

15 — Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial* [2000] ECR I-4941, paragraphs 22 and 24.

in closely reasoned case-law. Each Member State has an obligation to adopt, in its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues. [16] Member States must establish for that purpose a specific legal framework in the area in question. [17] The legal position under national law must be sufficiently precise and clear. The individuals affected must, for reasons of legal certainty, be in a position to be aware of all their rights and, where necessary, must be able to assert them before the national courts. The last-mentioned condition is of particular importance where the directive in question accords rights to nationals of other Member States, who will normally not be familiar with the principles of legal orders other than that of their own country. [18]

34. On the other hand, the Court has also consistently held that the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express and specific legislation. Thus, the existence of general principles of constitutional or administrative law may render implementation by specific legislation superfluous. Depending on the content of the directive, a general legal context may suffice provided that it effectively guarantees the full application of the directive in a sufficiently clear and precise manner. Should the directive be intended to create rights for individuals, the persons concerned must also be in a position to know the full extent of their rights in order that they may, if necessary, rely on them before the national courts. [19]

35. The degree to which the Member States are free to choose the form and methods for the purpose of achieving the result pursued by the directive therefore depends on the content of the directive. It can be seen from the scheme of the directive in question that it consists of two parts: one is normative and binding and the other is indicative and illustrative. In my view, this distinction is important in assessing the Member States' obligations in implementing the Directive.

36. The normative and binding part of the Directive is formed by the criterion defined in Article 3(1) EC together with the provisions of Article 3(2) and Articles 4 and 5, which clarify the 'open provision' and which are inseparably linked to it. Through those rules, the circumstances are specified under which a contractual term must be regarded as unfair, with the result that the consumer concerned is not bound by it. There is no doubt that rights are accorded to individuals, and in particular also to

16 — See in particular Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 15.

17 — See, for example, Case C-340/96 *Commission* v *United Kingdom* [1999] ECR I-2023, paragraph 27.

18 — See, for example, Case C-365/93 *Commission* v *Greece* [1995] ECR I-499, paragraph 9, and Case C-144/99 *Commission* v *Netherlands* [2001] ECR I-3541, paragraphs 17 and 18.

19 — See, for example, Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23, and Case C-190/90 *Commission* v *Netherlands* [1992] ECR I-3265, paragraph 17.

nationals of other Member States, by these provisions of the Directive.[20] The transposition of these provisions must be consistent with the strict requirements laid down by the Court in this regard. In practice, this means that the 'form and methods' must consist in laws, regulations or administrative provisions, since it is difficult to imagine that a general legal context would be sufficient.[21] That the Swedish legislation is in conformity with these provisions is not in dispute.

37. The non-binding part of the Directive consists of the Annex. On the basis of the Directive, the list in the Annex must be disassociated from the criterion in Article 3(1). The Swedish, Danish and Finnish Governments have rightly pointed out that the rights and obligations accorded to individuals by the Directive do not stem from the list in the Annex. The list is not binding on either the national authorities or individuals. An individual can therefore never plead purely on the basis of the list that a term in it is in a specific case unfair because such an interpretation would conflict with the wording and scope of Article 3(3) of the Directive.[22] The Directive itself does not provide that the appearance in a contract of a term in the list creates a presumption that the term is unfair. Even though too great importance cannot, in that regard, be attached to the historical background to the Directive, it is possible to conclude that the Community legislature did not intend to require the Member States to transpose the list into their national legislation either. The list is indicative in character and the assessment of the unfairness of a term requires account to be taken of all circumstances in the case, and of the requirement of good faith.

38. The Member States are not required by any provision of the Directive to provide that a term referred to in the list in the Annex must be declared to be unfair.[23] Therefore, in my opinion, a Member State cannot be required to transpose the Annex to the Directive on unfair terms verbatim into its national legislation. In that case, the Member State would be obliged to guarantee a result that is not prescribed in the Directive. The Annex does not form part of the enacting part of the Directive, from which individuals may derive rights, but merely provides interpretative assistance for the individuals and for the authorities where the application of enacting part of the Directive is concerned. A reference in the enacting part of a directive to a non-binding annex, which is the case as regards Article 3(3) of the Directive on unfair terms, does not thereby confer such character on the annex. I consider that that distinction which the Directive itself makes

20 — See the sixth recital in the preamble to the Directive. See also Case C-144/99 *Commission* v *Netherlands* (cited above, footnote 18), paragraph 18.

21 — See in this regard Case C-144/99 *Commission* v *Netherlands* (cited above, footnote 18) which concerned the implementation of Article 4(2) and Article 5 of the Directive. The Court stated that the implementation of those provisions in Netherlands law was insufficient. The Netherlands Government had claimed that the aims pursued had been attained through a schematic interpretation by the national courts of the Netherlands Burgerlijk Wetboek (Civil Code).

22 — The detailed nature of the list, and in particular the clarifications in paragraph 2 of the Annex concerning the scope of certain terms, cannot, for that reason, lead to the conclusion that all terms which satisfy the conditions set out must be regarded as unfair and therefore invalid.

23 — In this regard, I believe that the argument put forward by the Swedish Government that reproduction of the list in the legislation is likely to lead to *a contrario* interpretations on the ground that terms that are not referred to cannot normally be regarded as unfair is irrelevant. That argument actually calls into question the value of the list in the Annex or, in other words, the contents of the Directive and is out of place in an action for failure to fulfil obligations.

between the binding part and the non-binding part is decisive. If the Council had adopted a text in which the list was binding in nature, the Member States would have been required in principle to reproduce it in national legislation. That would obviously also have been the case if the binding list had ranked among the actual provisions of the Directive. [24]

39. Furthermore, I am of the opinion that an indicative, non-binding list of examples does not normally find its proper place in a legislative text. I consider that it would have been better if the Community legislature had opted to adopt the indicative list in the form of a recommendation or, possibly, opted for another non-binding instrument such as an interpretative communication. Such a solution would have been more in keeping with the common guidelines for the quality of drafting of Community legislation. [25]

40. On the basis of the foregoing considerations, I am of the opinion that the Commission is wrong in concluding, in reliance on the purpose of the Directive and the principle of legal certainty, that the Annex to the Directive must be transposed by means of binding national legislation.

41. In support of its view, the Commission also puts forward a number of other arguments which I do not find convincing either.

42. First, the Commission points out that the Directive lays down a minimal harmonisation, which can be seen *inter alia* from its 17th recital. The Commission's contention amounts to saying that it would be illogical to prescribe that the list 'may be the subject of amplification' by the Member States if it were not yet reproduced in their legislation.

43. The minimal character of the Directive can be seen unequivocally from Article 8. Under that provision, Member States may, in the area covered by the Directive, adopt or retain more stringent provisions which afford a higher degree of protection for the consumer. If the list is transposed by means of legislation, the Member States may, given the minimal character of the indicative list in the Annex, opt for a more rigorous formulation of the terms and/or increase the number of terms. That option is referred to expressly in the 17th recital of the Directive. On account of the minimal

24 — By way of comparison, mention can be made of the method used in Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising (OJ 1997 L 290, p. 18). Under the directive, comparative advertising is permitted if it meets a cumulative list of conditions. This binding and exhaustive list is not contained in an annex, but in Article 3a of the directive.

25 — See the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ 1999 C 73, p. 1). See in particular paragraph 2 (the drafting of Community acts shall be appropriate to the type of act concerned and, in particular, to whether or not it is binding), paragraph 12 (the enacting terms of a binding act shall not include provisions of a non-normative nature) and paragraph 17 (should the drafters wish to render binding the whole or part of the content of the non-binding act, its terms should as far as possible be set forth as part of the binding act).

character of the Directive, Member States are also given still further alternatives. They may thus opt for the indicative list to be made binding in their legislation. [26] The Directive also gives national courts, as part of the organisation of the Member States, the option to offer greater protection to consumers. As the Finnish Government points out, in practice it will often be the national courts or the consumer ombudsman that supplement or clarify the indicative list in the Annex to the Directive. [27]

44. Against that background I do not consider that the Commission's strict interpretation of the 17th recital is appropriate. The Commission disregards the fact that the Member States have methods other than legislation available to increase the level of protection laid down in the Directive. As regards its scope, it is clear from the abovementioned recital that the list in the Annex is indicative and that it may be the subject of amplification or more restrictive editing by the Member States in their national legal orders. This may, but does not have to, be done through legislation.

45. Secondly, the Commission relies in more general terms on the abovementioned judgment in *Commission* v *Denmark*. That case concerned the implementation in Denmark of Article 1(1) of Directive 75/117/EEC, [28] under which workers are granted an unconditional right to equal pay 'for the same work or for work to which equal value is attributed'. The Commission's criticism related to the claim that Denmark had implemented the principle of equal pay in its legislation only as regards same work and not as regards work of equal value. The Court rejected the argument put forward by the Danish Government that in the preamble to the draft law the expression 'same work' was interpreted in so broad a sense that that expression also covered work of equal value. A declaration to that effect in the explanatory note to the draft law was not sufficient to ensure that the persons concerned are adequately informed. [29]

46. As the Danish Government points out, the circumstances in that case were not the same as those in the present case. Article 1 of Directive 75/117/EEC formed part of the enacting terms of the directive. Through the provision, workers are granted the fundamental right to equal pay. The principle of legal certainty and protection for individuals in that case required an unambiguous wording which gave the persons concerned the possibility to become aware

26 — In the Report on the implementation of the Directive published by the Commission in 2000 it is mentioned that five Member States have introduced 'black lists' of terms in their laws. Four Member States have adopted 'black' and 'grey lists', whilst three have opted for an indicative list as in the Directive (COM(2000) 248 final, p. 17).

27 — The Finnish Government makes reference, by way of illustration, to the Commission report (cited above, footnote 26). It appears that, when the report was drafted, the CLAB database, which compiles decisions by the Member States' courts and authorities concerning unfair contractual terms, contained 7 649 cases. 41% of these concerned terms which do not appear in the list in the Directive (see figure in Annex III, Section 8).

28 — Council Directive No 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19).

29 — Case 143/83 *Commission* v *Denmark* (see footnote 6 above), paragraph 10.

of their obligations and rights and the courts the opportunity to guarantee that they are observed. A reference made in the explanatory note to the law is not therefore sufficient.

47. In the present case the Annex to the Directive on unfair terms constitutes a non-binding part. It concerns the transposition of the non-exhaustive and indicative list of unfair terms, and in that case, less strict requirements for implementation are sufficient. Consumers' rights do not stem from the Annex, but from the enacting part of the Directive.

C — *Transposition of the Annex in Sweden*

48. The foregoing considerations do not detract from the Member States' duty to make known the list in the Annex and its status. The Commission rightly observes that the list is an important source of information, particularly for sellers and suppliers. Therefore, the list helps to attain the objective of the Directive by informing consumers and domestic and foreign sellers and suppliers about their rights and obligations. The Member States that have not transposed the list into a legislative text must, in order to achieve the result envisaged by the Directive within the meaning of the third paragraph of Article 249 EC, choose the form and methods which provide sufficient guarantees that the public will be able to acquaint themselves with the list. It is necessary to examine whether the Kingdom of Sweden has satisfied that obligation.

49. The Swedish Government has stated that the issue of the list in the Annex to the Directive was discussed in depth during the preparation of lagen 1994:1512. Eventually, the Swedish legislature chose not to incorporate the list in the legislation, but to reproduce its contents in the explanatory note in order to facilitate the application of the law. According to the Swedish Government, this is the usual legislative technique in Sweden and legislative texts generally do not contain lists of examples.

50. An individual who wishes to know which terms may be unfair and for that purpose consults lagen 1994:1512 and lagen 1994:1513 will find in both a reference to the explanatory note. [30] In that note the list in the Annex to the Directive is reproduced in its entirety. The note also contains a commentary which clarifies the scope and significance of the list. [31] The explanatory note is published officially and can also be consulted free of charge on the internet.

51. According to long-established legal tradition in Sweden, in common with all the Nordic countries, the preparatory work

30 — Proposition 1994/95:17.

31 — See, in particular, Proposition 1994/95:17, pp. 92 to 94.

is an important instrument in the interpretation of laws. After the text of the law, it constitutes one of the most important sources for the interpretation and application of that law. [32] According to the Swedish Government, most of the terms referred to in the Annex to the Directive (to be precise 14 out of 17) have already been declared to be unfair in Swedish case-law and the Marknadsdomstolen (Market Court) made express reference to the list in a judgment delivered in 1997.

52. The Swedish Government has further contended that information to the general public is guaranteed in several ways. Apart from the explanatory note, other preparatory documents such as the opinions of parliamentary committees, are available free of charge on the internet. Furthermore, the Konsumentverket (National Board for Consumer Policies) has issued various publications which are directed at sellers and suppliers and consumers and which describe contractual terms that are regarded or may be regarded as unfair by Swedish courts. The Konsumentverket is the competent national administrative authority for consumer protection and, in that capacity, forms part of Sweden's organisation as a Member State.

53. The Commission has not really called into question the accuracy of the facts put forward by the Swedish Government on the publication and dissemination of the list. It has merely stated that this method may be insufficient for informing nationals of other Member States, because the list is not contained in the Swedish legislation itself.

54. In the light of the above considerations, however, I consider that the Swedish rules give the courts, the economic operators concerned and the public the possibility to gain a sufficient degree of knowledge of the text of the list in the Annex to the Directive. The list can be consulted with ease in official and semi-official sources. Furthermore, the indicative and non-exhaustive nature of the list is also evident. The objective of the list, to provide an aid to interpretation in ascertaining whether a contractual term is unfair, is attained together with the result to be achieved within the meaning of the third paragraph of Article 249 EC.

55. I consider that reproduction in the explanatory note and the implied or express reference to the list in other documents and brochures available to the public is sufficient. Because that information is also available on the internet it is also sufficiently accessible for individuals from other Member States. [33]

32 — The Commission claims that the importance of the preparatory work has declined as a result of Sweden's accession to the European Union, but the Swedish Government contests that assertion. It is possible that the preparatory work for a law is still an important source of law in the Nordic countries.

33 — It may be considered whether information to consumers regarding their rights is better guaranteed by such a method than by the indicative list being merely reproduced in the legislative text.

56. The Commission has not, in my view, succeeded in proving its contention that the Kingdom of Sweden has failed to fulfil its obligations in implementing the Directive. It is significant, but irrelevant, that during the proceedings the Commission has not given a single example to show that, on the basis of the available information, Swedish courts and other public authorities have been wrong in not designating terms in consumer contracts as unfair. The Commission has not shown either that there exists an actual risk that this may yet occur.

## VI — Conclusion

57. I therefore propose that the Court should:

(1) dismiss the application;

(2) order the Commission of the European Communities to pay the costs in accordance with Article 69(2) of the Rules of Procedure;

(3) order the Republic of Finland and the Kingdom of Denmark to bear their own costs in accordance with Article 69(4) of the Rules of Procedure.