OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 16 December 1999 *

1. By orders (which are identical in content) of 31 March and 1 April 1998, the Juzgado de Primera Instancia (Court of First Instance), Barcelona, Spain, has referred to the Court of Justice for a preliminary ruling a question concerning the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1] ('the Directive'). This is the first time that the Court has been called upon to give a ruling on the Directive. The national court is asking, in particular, whether the system of protection which the Directive guarantees to consumers implies that a court, in deciding a case concerning the alleged non-performance of a contract concluded between a seller or supplier and a consumer, may determine of its own motion whether a term inserted in that contract is unfair. The present case relates to a term which confers upon the court of the district where the undertaking has its principal place of business exclusive jurisdiction to adjudicate on disputes concerning the application of a contract of sale.

The Community legislation

2. 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 1(1)).

Under Article 2, 'seller or supplier' means any natural or legal person who is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned, and 'consumer' means any natural person who is acting for purposes which are outside his trade, business or profession.

3. The Directive aims to ensure that, in the legal systems of the Member States, the consumer is provided with a minimum level of protection while giving Member States the option to afford a higher level of protection through national provisions that are more stringent than those of the Directive (12th and 17th recitals; Article 8).

With regard to its sphere of application, the Directive governs only contractual terms that have not been individually negotiated: according to the first subparagraph of Article 3(2) '[A] term shall always be regarded as not individually negotiated where it has been drafted in advance and

* Original language: Italian.

1 — OJ 1995 L 95, p. 29.

the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract'. The following subparagraph specifies that '[T]he fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract'. The third subparagraph then adds that '[W]here any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him'.

4. The Directive contains a general definition of unfair terms. Article 3(1) states that '[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'.

Article 4 adds that '[W]ithout 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'. This assessment 'shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language'.

5. In order to determine specifically those terms that cause a significant imbalance to the detriment of the consumer, the Directive refers, in its Annex, to terms which may be regarded as unfair; this list is of a purely indicative and non-exhaustive nature and leaves it to the Member States to add to it or to formulate it in more restrictive terms under their laws (17th recital and Article 3(3)).

The terms provided for in the Annex include those which have the object or effect of 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract' [subparagraph q].

6. In accordance with Article 6(1), 'Member States shall 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'; this subpara-

graph further provides that the contract is to continue to bind the parties 'if it is capable of continuing in existence without the unfair terms'.

Member States must also 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' (Article 7(1)); in particular, those means are to include provisions whereby persons or organisations 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 (Article 7(2)). The Directive does not, however, expressly state whether or not the national court has the power to invoke of its own motion the unfairness of the term and hence its unenforceability against the consumer.

7. The Member States were required to transpose the Directive into national law by 31 December 1994. The provisions of the Directive are applicable to all contracts concluded after that date (Article 10(1)).

The national legislation

8. The Directive was transposed into Spanish law by Law No 7/1998 of 13 April 1998,[2] that is to say after the period prescribed for doing so. The purpose of the Law, as stated in its preamble, was to transpose the Community legislation on unfair terms in consumer contracts and to regulate general contractual terms. Pursuant to the third final provision, the Law entered into force following a *vacatio legis* of 20 days from the date of publication in the *Boletín Oficial del Estada*, that is on 3 May 1998.

9. The 1998 Law amended Law No 26/1984 of 9 July 1984 on consumer protection,[3] by introducing, *inter alia*, a new Article 10a containing the definition of 'unfair terms', which was to be understood as meaning all provisions not individually negotiated which, contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The second paragraph of that article provides that unfair terms, conditions and provisions are to be automatically void and deemed not to have formed part of the contract.

2 — Ley de 13 Abril 1998 de Condiciones Generales de la Contratacion (Law of 13 April 1998 on General Contractual Conditions, *BOE* of 14 April 1998).

3 — Ley General para la Defensa de los Consumidores y Usuarios (General Law for the Protection of Consumers and Users, *BOE* No 176 of 24 July 1984).

In accordance with and pursuant to Article 10a, terms laid down by the additional provision, which include, in paragraph 27, provisions granting jurisdiction to a court other than that corresponding to the consumer's domicile or the place of performance of the obligation, are to be regarded as unfair.

The actions provided for by the Law may be brought as from the date of its entry into force, even in respect of contracts concluded previously. However, in the case now before us the Law was not yet in force on the date on which the applicant companies brought actions against the consumers, in respect of whom the new provisions are not applicable in the circumstances in point here. Previously, protection of the consumer against unfair terms inserted in contracts concluded with a seller or supplier were governed by the above-mentioned Law No 26/1984. That Law required that the provisions inserted in the contracts referred to should, *inter alia*, be consistent with good faith and guarantee the proper balance between the various contractual obligations. Thus unfair terms — construed as meaning terms which adversely affect the consumer in a disproportionate or inequitable manner or cause an imbalance in the contract between the parties' rights and obligations, to the detriment of consumers or users — were accordingly deemed to be automatically void [Article 10(1)(c), point 3].

10. It should be added, finally, that the Spanish consumer-protection provisions, including those contained in the Law transposing the Directive, do not expressly govern the question whether a court may of its own motion raise the issue of the nullity of unfair terms. In Spanish law there does not appear to be any legal basis which could clearly serve as a foundation for a court's power to examine that issue in the absence of an initiative taken by a party. In Spanish case-law this problem has hitherto been the subject of contradictory solutions, some courts taking the view that they were able to derive that power expressly from the Directive.

The facts and the questions referred for a preliminary ruling

11. On various dates between May 1995 and April 1996 Océano Grupo Editorial SA and Ms R. Murciano Quintero, of El Ejido, Almería, and Salvat Editores SA and Mr J. M. Sánchez-Alcón Prades, Mr J. L. Copano Badillo, Mr M. Berroane and Mr E. Viñas Feliu, all residing in various parts of Spain, entered into contracts for the purchase by instalments of an encyclopedia.

12. In the contracts for sale on deferred payment terms, which had been drawn up in advance by the sellers in a standard form, the parties agreed that, in the event of a dispute, the court of Barcelona, the city in which the abovementioned companies have their principal place of business, would have exclusive jurisdiction.

13. Following the buyers' failure to pay the agreed instalments, on 25 July Océano Grupo Editorial SA and on 18 September, 16 December and 19 December 1997 Salvat Editores SA brought actions before the Juzgado de Primera Instancia de Barcelona, for an order for payment of the agreed amounts.

When those actions were brought, the Directive had not yet been transposed into Spanish law. The national court, however, doubts whether the jurisdiction clause in the contract is valid inasmuch as, under the terms of the Directive, it should be regarded as 'unfair'. In its view the court of competent jurisdiction should be that of the place of residence of the defendants. On 9 September 1997 the Barcelona court forwarded the file to the Public Ministero (State Counsel's Office), requesting it to give its opinion on the possibility of that court's declaring, of its own motion, the jurisdiction clause to be void. The Publico Ministere Counsel's Office replied that, in the context of the '*juicio de cognición*',[4] the procedure applicable in this case, it is not possible if the court designated by the parties to a contract is that of the place of residence of at least one of them,[5] for that court to raise the issue of lack of jurisdiction of its own motion.

14. By orders of 31 March 1998 (C-240/98 and C-241/98) and 1 April 1998 (C-242/98, C-243/98 and C-244/98), the Juzgado de Primera Instancia de Barcelona therefore decided to seek a preliminary ruling from the Court on the question

'whether the scope of the consumer protection provided by Council Directive No 93/13/EEC on unfair terms in consumer contracts is such that the national court may consider of its own motion whether a term is unfair when making its preliminary assessment as to whether leave should be granted for a claim to proceed before the ordinary courts.'

15. By order of the President of the Court of 20 July 1998, the cases were joined for the purposes of the written and oral procedure and the judgment.

Substance

16. The national court, in submitting this question for a preliminary ruling, seeks to ascertain whether, in view of the failure to transpose the Directive within the prescribed period, it is authorised to decline jurisdiction of its own motion if such jurisdiction is conferred upon it by a contractual term which it considers 'unfair' within the meaning of the Directive.

4 — A summary procedure which the applicant may use for disputes involving claims of limited value (between ESP 80 000 and ESP 800 000.

5 — See Article 1 of the Law of 17 July 1948 on the jurisdiction of municipal courts (*BOE* No 200 of 18 July 1948) and Article 32 of the Decree of 21 November 1952, which governs the '*cognición*' procedure (*BOE* No 337 of 2 December 1952).

In dealing with this question and in order to provide the national court with a helpful reply, I consider it necessary to undertake two consecutive operations. First, it is necessary to interpret the provisions of the Directive in order to ascertain whether the term conferring jurisdiction on the court for the district in which the company has its principal place of business is an unfair term and, if so, whether the Directive or other rules of Community law require the national court to invoke of its own motion its lack of jurisdiction if it has to adjudicate on the basis of a term of this kind, even if this means disapplying a procedural rule of domestic law which would lead to a different outcome in terms of territorial jurisdiction. Second, it is necessary to determine whether that disapplication may possibly arise in a dispute such that in point in the cases in the main proceedings, where the parties are two private persons, even if the Community rule, which differs in substance from the requirement of domestic procedural law, is included in a directive that has not been transposed.

17. With regard to the characterisation of the contractual term in point here, I would say at once that it must be regarded as an 'unfair term' from the point of view of the Directive. I would remind the Court that this is a term, contained in a contract between a seller or supplier and a consumer, which indicates as the court having exclusive jurisdiction in respect of disputes arising from the contract, the court of the district in which the company has its principal place of business. As the French Government has observed, the fact that a term of this type is not expressly included in the list of 'unfair terms' set out to in the Annex to the Directive cannot, for a number of reasons, be regarded as decisive. According to the French Government, the term in question must fall within the general category referred to in subparagraph (q) of the above-mentioned Annex inasmuch as it has the effect of 'hindering the consumer's right to take legal action or exercise any other legal remedy'. For our purposes, however, of greater significance is the fact that, as stated in Article 3(3), the Annex contains 'an indicative and non-exhaustive list of the terms which may be regarded as unfair',[6] and Member States may add further terms to it which will obviously be subject to the same regime as that which the Directive as a general rule provides in respect of the other terms. In short, for a term of a contract to fall within its scope, the Directive only requires that it should not be individually negotiated between the seller or supplier and the consumer and that it should cause 'a significant imbalance in the parties' rights and obligations arising under the contract', to the detriment of the consumer (Article 3(1)). While respecting these general parameters, the Member States may indeed indicate other, more specific terms than those contained in the list: in that case the terms will be 'unfair' in the light of the Directive and will therefore be subject, as I have said, to the regime which the Directive seeks to apply to them.

18. It follows from the explanation I have just given that it is exclusively an interpretation of the text of the Directive, and in particular of Article 3(1) and (2) thereof, that is required in order to determine

6 — See also the 27th recital, which states that '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'.

whether or not a term such as that in question in the main proceedings is 'unfair'. In this context the Annex to the Directive can only have a purely indicative value. That said, I consider that a term agreed to by a consumer but not negotiated individually inasmuch as it is contained in a pre-formulated standard contract which obliges him to bring or defend proceedings before the court of the district where the company has its principal place of business in connection with any dispute arising from the contract has undeniable advantages for the company in question but may diminish, to a substantial extent, the consumer's rights of defence. As the national court stated, on the basis of practical experience in procedural matters, in the order for reference, the consumers' obligation to submit to the jurisdiction of the court specified by the company, which may be a very long way from his place of residence, entails the risk that the he may, for practical purposes, be unable to defend himself in view of the high cost associated with entering an appearance, especially if that cost is compared to the modest amount at issue in the dispute; in addition to this, there is the fact that the persons involved in these cases come for the most part from a modest social background and have fairly limited means. Conversely, the term in question confers unquestionable advantages on the seller or supplier who may in this way avoid applying to different courts of competent jurisdiction under the rules of procedure, by concentrating litigation concerning contracts with consumers in the area where he has his principal place of business, which for him is clearly more convenient and less expensive. I believe that a situation of this kind gives rise, without any doubt, to a significant imbalance in the parties' rights and obligations. It follows that the term in question may be defined as 'unfair' within the meaning of the Directive, with the result that the regime favouring the consumer laid down by the Directive — in particular the fact that, on the basis of Article 6, the jurisdiction clause is not binding — can certainly be applied in this case.

19. It is also not without importance that, when transposing the Directive, that is to say, when giving substance to the general principle referred to in Article 3(1) of the Directive, the Spanish Government, in accordance with the solutions adopted in other Member States, [7] expressly wished to include in the list of unfair terms the term which requires actions to be brought in a court other than that of the place of residence of the consumer or the place of performance of the obligation. [8] In the light of these arguments, it may justifiably be concluded that a term contained in a contract between a consumer and a seller or supplier which, for any dispute relating to the contract, stipulates that the court corresponding to the principal place of business of such seller or supplier is to have exclusive jurisdiction may be classified as an 'unfair term' within the meaning of the Directive.

7 — Article 1469a of the Italian Civil Code, as supplemented by Law No 25 of 6 February 1996, implementing the Directive, states that, unless proved otherwise, a term which has the object or effect of establishing as the venue for the court having jurisdiction a place other than that in which the consumer resides or other than that of his address for service is presumed to be unfair (see Article 19(3); in France, the 'recommandation de synthèse' (summary recommendation) No 91-02, adopted by the Commission des Clauses Abusives (Committee on Unfair Terms) set up by Article L-132.2 of the Code de la Consommation (Consumers' Code), includes among terms that are presumed to be unfair those which have the object or effect of derogating from the statutory rules governing territorial jurisdiction or conferred jurisdiction.

8 — See the first additional provision of the aforementioned Law No 7/1998, paragraph 27. The legislation previously in force contained wording of a general nature which could, in my view, be interpreted as including among the prohibited contractual terms the one that is the subject of this case [Article 10(1)(c), point 3, of the aforementioned Law No 26/1984].

20. Now that it has been established that the resolution of the disputes in the main proceedings entails an assessment of the jurisdiction of the referring court, an assessment to be undertaken in the light of the provisions of the Directive, it is now necessary to deal with the problem which logically follows and which is the subject of the question submitted for a preliminary ruling; what has to be determined is whether the national court may of its own motion decline jurisdiction when called upon to decide a dispute on the basis of a term inserted in a contract between a consumer and a seller or supplier which it considers to be unfair in so far as it grants exclusive jurisdiction to the court of the district in which principal place of business of that seller or supplier is situated.

21. With regard to the substance, I feel that it is necessary to point out, in the first place, that the defendant in the dispute pending before the national court (the consumer) did not appear as party to the proceedings, thus forgoing the right to invoke the lack of jurisdiction of the court before which the case was brought on the ground that that jurisdiction was based on an unfair term. According to the Spanish Government, decisive significance must be attached to the party's behaviour. Given that the powers conferred upon the national court must be assessed exclusively in the light of national law, which, as noted earlier, does not give the court a power of that kind in proceedings such as the main proceedings in this case, it follows that it is impossible for that court to raise the ineffectiveness of the contractual term of its own motion.

22. May I say at once that I do not find this interpretation to be convincing. In agreement with the Commission and the French Government, I deem it more appropriate to have recourse to a general analysis, which leads to the conclusion that it is from the actual system for protecting the consumer, the weak party to the contract, that the need arises to confer upon the national court the power to raise of its own motion the ineffectiveness of an unfair term within the meaning of the Directive. In other words the requirement that the provision in question be endowed with 'effectiveness' argues in favour of an interpretation which does not impose on the weak party to the contract the burden of defending himself in legal proceedings in order to plead that contractual terms that are harmful to him are not applicable; and this is so, I would add at once, especially if the term in question obliges the consumer to defend himself in a place other than that where he resides.

23. It should be noted that the system of protection guaranteed by the provisions of the Directive proceeds from the general principle that, in contracts entered into by a seller or supplier, the consumer must be regarded as the 'weak party', who needs special protection: the aim of the Directive is therefore to restore, in these relations, a contractual balance, while at the same time safeguarding the general interest in the observance of proper commercial practices. In this context, the Directive imposes upon Member States an obligation of result, in this instance to make sure that terms judged to be unfair cannot be binding on the consumer, as provided for under national law (Article 6). Consequently, while it is for the Member States to choose the specific civil-law penalty to be applied to such terms — ineffectiveness, nullity, voidability — they are in any event asked to introduce a system whose objective is to

provide effective protection for consumer rights.

That objective, as the Commission most appropriately points out, may be difficult to attain if the court is not given the opportunity to determine of its own motion whether a contractual term is unfair. In reality, the system for protecting the weak contracting party, as defined in the Directive, seems to disregard the consumer's behaviour. No importance is attached, for instance, to the fact that the consumer, in signing a pre-formulated standard contract, has accepted the term because, notwithstanding the signature, the term *cannot* be binding upon the consumer. In my view, it would be in conformity with that approach to preclude the attachment of decisive significance to the consumer's behaviour *in court proceedings*: the consumer might fail to invoke the unfairness of the term out of ignorance, or because he regards it as too expensive to defend himself in a court some distance from where he lives, as is the case with the term that is the subject of the dispute in the present case. In all these cases the objective which the Directive is seeking to pursue would not be attained if the term, although clearly harmful to the party to the contract who is in a weak situation, were to achieve its goal; the effectiveness of the Directive would be irreparably endangered.

24. Furthermore, it is of undoubted importance that, in order to remedy a situation of significant imbalance between the two parties to the contract, the Directive requires Member States to introduce a system of protection which involves — and actively so — persons unconnected with the individual contractual relationship. On the basis of the obvious premiss that the reaction of consumers to terms that are harmful to their interests is not an effective remedy because of the cost of bringing an individual action and the disinclination of consumers to venture into complex proceedings against sellers or suppliers who are more powerful and better organised, the Directive requires that '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' (Article 7). Assessment of whether the means of protection which the Directive requires Member States [9] to provide are 'adequate' and 'effective' is linked to a specific assessment of the question whether the means are appropriate to the objective pursued, which, I repeat, is to ensure that unfair terms are not binding upon the consumer. On the basis of the considerations I have just set out, it is reasonable to consider that action by the

9 — It should be noted that this assessment is directly provided for in Article 7(2) of the Directive, which states that '[t]he 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'. This is obviously illustrative and for guidance and does not preclude other forms of action such as action by the court of its own motion but is particularly important in the system of protection guaranteed by the Directive in so far as it offers consumer bodies or associations access to dissuasive action that is of a preventive nature and thus not related to a specific dispute. This form of protection — which is particularly effective because of its general nature — is a totally novel feature for the legal systems of certain Member States, particularly those which follow the Roman law tradition, and that is why Member States were quite understandably expressly asked to make provision for this in their domestic law. As the French Government observed, it would be difficult to justify an interpretation of the Directive which, on the one hand, permitted 'preventive' collective actions that have beneficial effects for all consumers and, on the other, precluded action of its own motion by a court that finds itself having to apply a manifestly unfair term in a specific dispute in which the consumer directly suffers harm.

court of its own motion constitutes not only a means that is extremely effective for the purposes of sanctions but also seems be an effective instrument for dissuading sellers or suppliers from inserting the terms in contracts entered into with consumers.

It should be added that to preclude action by the court of its own motion where the consumer fails to invoke the unfairness of the term would have paradoxical effects in a situation such as that in point in the present case, where the granting to the court of the district where the seller or supplier has his principal place of business of exclusive jurisdiction to rules on disputes relating to the contract is the subject of dispute. It will be recalled that in the main proceedings a dispute had been brought before the referring court, the Juzgado de Primera Instancia de Barcelona, involving sellers or suppliers (Océano Grupo Editorial SA and Salvat Editores SA, whose business consists of selling encyclopedias on instalment terms) and various consumers living in different towns in Spain, some a hundred kilometres or so from the court dealing with the case. In these circumstances, should it be precluded that, if the defendant fails to appear, the court may on its own initiative determine whether a contractual term that is manifestly 'unfair' is effective, the paradoxical situation would arise in which the consumer would be obliged to appear before a court in a place other than that where he resides precisely in order to argue that the contractual term obliging him to do so is an unfair term! Such a system would obviously be totally ineffective as a means of protecting the consumer who, to avail himself of the protection afforded by the Directive, would in any event be required to put up with all the disadvantages (court fees in a place other than that where he resides, the obligation to be aware of the unfairness of the term, having to retain a lawyer for a dispute involving a small amount, etc.) which prompted the Member States to include the binding choice of the forum of the seller or supplier as one of the contractual terms that are detrimental to the consumer.

25. It should be added, finally, that giving the court the power to act of its own motion appears perfectly consistent with the civil-law regime referred to by the Directive as a penalty for the terms inserted in the contracts with consumers which fall within its scope. As will be recalled, the Directive requires Member States to prescribe that such terms are not, as provided for under their national law, to be binding on the consumer (Article 6(1)). While the Directive confines itself, in accordance with the limits of the action to achieve a 'minimum' level of harmonisation of national laws, to indicating in a general manner a result to be achieved (the fact that unfair terms are 'not [to] be binding'), leaving it to the national legal systems to choose the specific civil-law penalty to be applied to these terms, [10] it is clear that the choice effected by that wording entails conferring upon the provisions of the Directive the character of 'mandatory' rules of 'economic public policy' which cannot

10 — See, in this connection, the comparative evaluation undertaken by Paisant, G., 'La lutte contre les clauses abusives des contrats dans l'Union européenne', in *Vers un code européen de la consommation, sous la direction de F. Osman*, Brussels, 1998, p. 165 et seq., particularly p. 174, which shows that the majority of Member States have provided for an express sanction of nullity of unfair terms.

fail to be reflected in the powers conferred upon the national court. [11]

26. In short, I believe that to confer on the court the power to declare of its own motion an unfair contractual term to be void falls squarely within the general context of the special protection that the Directive is intended to provide for the interests of the community which, because they are part of economic public policy, extend beyond the specific interests of the parties concerned. In other words, there is a public interest in terms harmful to consumers not producing effects. That interest constitutes the ground, from the substantive point of view, for the sanction of the 'non-binding nature' of the term — despite the fact that the consumer may have signed the contract even though it has not been negotiated individually — and, from the procedural point of view, for action by the court which, having assessed the harm done to the consumer, may decide to disapply the term irrespective of the consumer's procedural conduct.

27. Given that the system for protecting the rights conferred by the Directive would not be 'effective' if the national court were not permitted to assess the contractual term of its own motion in the light of the provisions of the Directive, it necessarily follows that national procedural provisions which preclude such an assessment should therefore be disapplied by the court, in conformity with the duties of cooperation incumbent upon all national bodies — including, within the framework of their responsibilities, the courts — pursuant to Article 5 of the EC Treaty (now Article 10 EC). This, moreover, is a principle that has been applied a number of times in the Court's decisions, on the basis of which, in accordance with the general principle of the primacy of Community law, [12] national procedural provisions cannot be applied by a court unless they afford effective

11 — In this connection I would observe that, in the context of transposition of the Directive, French legislation has expressly defined as being a matter of 'public policy' consumer protection provisions in relation to unfair terms (see *Code de la consommation*, Article L-132.1); academic legal writers consider that, because of this classification, 'courts must henceforth raise of their own motion the nullity of the unfair term' (Karimi, A., 'Les modifications des dispositions du code de la consommation conernant les clauses abusives par la loi no 95-96 du 1er février 1995', in *Les petites affiches* no 54, 1995, p. 4 et seq.). In Italy the new Article 1469d of the Italian Civil Code states that terms regarded as unfair 'are ineffective, while the remainder of the contract continues to be effective' and then adds that 'they are ineffective only in respect of the consumer and that ineffectiveness may be raised of its own motion by the court.' With regard to the Belgian system, see Balate, E., 'Le contrôle des clauses abusives: premier bilan', in *Droit de la consommation*, 1997, p. 321 et seq., in particular pp. 131 and 140, where it is stated that, as a result of the public policy nature of the provisions referred to, the court is required to apply them of its own motion, even if the consumer fails to appear. For a general discussion of these matters, see M. Tenreiro, 'The Community Directive on Unfair Terms and National Legal Systems', in *European Review of Private Law*, 1995, p. 273 et seq., in particular p. 282, where it is pointed out that the non-technical expression, namely that unfair terms 'are not binding' on the consumer, enables practical conclusions to be drawn, in particular that 'the judge shall declare a term as unfair and refuse to enforce it ex officio, without any need for special demand from the consumer'.

12 — Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 17 to 24.

protection of the rights conferred by Community law. [13]

It should, however, be pointed out that in the present case the Community rule that would have such an effect would be contained in a directive that was not transposed into national law within the prescribed period. Since the case in the main proceedings involves a dispute between private persons, the problem therefore arises of determining whether this factor may adversely affect the determination of the powers of the national court.

28. In this connection it should be noted above all that in the present case it is not easy to have recourse to the remedy of the 'conforming interpretation' of the provisions of national law vis-à-vis the purpose and wording of the Directive, as the national court is required to do in accordance with the settled case-law of the Court if a directive has not been correctly transposed into national law. Although, admittedly, it is for the national court to make a more precise and informed assessment, it seems, however, to be evident that — while the Spanish legislation prior to the transposition could easily be construed as including the defect in question among those which entail 'automatic nullity' of the contractual term [14] — there is a clear and manifest contradiction between the domestic procedural provisions and the Directive, since the effects of applying them are completely different: on the one hand, according to the domestic procedural rules it is possible — even for contracts entered into between a seller or supplier and a consumer which fall within the scope of the Directive — to choose as the court having exclusive jurisdiction in respect of disputes arising from the contract the court of the district where the seller or supplier has his principal place of business, thereby derogating from the general criteria of jurisdiction; on the other hand, according to the general principles on which the consumer-protection arrangements contained in the Directive are based, as set out above, the term imposing such jurisdiction, in so far as it is 'unfair' within the meaning of the Directive, cannot be binding on the consumer. There is clearly no domestic legal provision that can be 'interpreted' in such a

13 — I would point out that, with regard to the question of the relationship between the duties of the national court and the principles of domestic procedural law, the Court has stated on a number of occasions that, in the absence of Community rules on the matter, it is for the domestic legal system of each Member State to lay down the procedural regime for court actions intended to ensure that the rights derived by individuals as a consequence of Community law are protected. However, such a regime may not be less favourable than those concerning similar actions of a domestic nature nor may it make it virtually impossible or excessively difficult to exercise the rights conferred by the Community law. On this point, see Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5, and Case 45/76 *Comet* [1976] ECR 2043, paragraphs 12 to 16; Case 68/79 *Just* [1980] ECR 501, paragraph 25; Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 14; Cases 331/85, 376/85 and 378/85 *Bianco and Girard* [1988] ECR 1099, paragraph 12; Case 104/86 *Commission* v *Italy* [1988] ECR 1799, paragraph 7; Cases 123/87 and 330/87 *Jeunehomme and EGI* [1988] ECR 4517, paragraph 17; Cases C-6/90 and C-9/90 *Francovitch and Others* [1991] ECR I-5357, paragraph 43; Case C-96/91 *Commission* v *Spain* [1992] ECR I-3789, paragraph 12; Cases C-31/91 to C-44/91 *Lageder and Others* [1993] ECR I-1761, paragraphs 27 to 29; Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705, paragraphs 16 and 17, and Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraphs 24 and 27; and Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraphs 31 to 41.

14 — See Article 10(1) and (4) of Law No 26/1984.

way as to attain the objective required by the Directive. [15] However, it is, I repeat, for the national court to make a more precise determination in that respect.

29. Consequently, given that the two rules cannot be reconciled, all that would remain for the court called upon to resolve the dispute would be to make a choice between two 'competing' legal principles: the rule. of domestic origin, which allows choice of forum; and the rule, of Community origin, which requires the court to declare of its own motion that it does not have jurisdiction. The problem then arises of determining whether a directive which has not been transposed within the prescribed period may serve as a parameter of the legality of the domestic procedural provisions, with the result that the national court would be required to disapply those provisions in order to guarantee the primacy of the Community provisions and hence afford effective protection of the rights conferred by them, even though the dispute in the main proceedings is in reality between two private persons, the fact that one of the parties failed to appear being clearly of no importance in the context in question. On the other hand, if it is considered that a directive that has not been transposed cannot have such an effect, all that would remain for the national court would be to accept the validity of the choice of forum made by the term it considers to be unfair.

30. On this point, I believe that a correct application of the principle of the primacy of Community law over national law and the need to guarantee uniform application of the Community provisions imply that non-transposed directives may, once the period prescribed for their transposition into national law has expired, have the effect of *precluding application of the conflicting national rule*, even if, for want of precision or because they have no direct effect in 'horizontal' relations, they do not confer upon individuals rights that can be relied on before the courts. The duty to cooperate, referred to above, which is incumbent on every national body within the framework of its own powers, requires courts and administrative authorities to 'set aside', as it were, the incompatible national law. This conclusion is, as we shall see, already implicit in the case-law of the Court, not to mention the fact that it has

15 — In Case C-168/95 *Arcaro* [1996] ECR I-4705, I-4719, after rightly stating that Community law does not authorise national courts to *eliminate* national provisions that are contrary to a provision of a directive which has not been transposed, the Court added that reliance on a 'conforming interpretation' reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions (paragraph 42). The Court therefore correctly rejected the idea that 'interpreting a national law in conformity with a Community directive' which has not been transposed should lead to the imposition of a penalty upon an individual, particularly a penalty under criminal law, for contravening the non-transposed directive.

long been the subject of attention in academic legal writing. [16]

31. In support of this conclusion, I would point out that, after first of all stressing, on the one hand, the binding nature of the directive, as laid down in Article 189 of the EC Treaty (now Article 249 EC), which entails the obligation for Member States to work to achieve the result sought by that instrument and, on the other, the obligation, under Article 5 of the Treaty, to take all appropriate measures, whether general or particular, to ensure that the result in question is achieved, the Court has made it clear that those obligations apply to all bodies of the Member States, including, within the limits of their jurisdiction, judicial bodies. In this context, the Court has above all recognised that, in the application of national law, irrespective of whether the provisions in question were adopted before or after the directive, the national courts are required to interpret their national law in the light of the wording and purpose of the directive. Accordingly, between two possible interpretations of the national provisions the court is called upon to give preference to the one that enables the result envisaged by the directive to be achieved. [17] Apart from this principle of a 'conforming interpretation' — which, to tell the truth, is anything but revolutionary — the Court has more recently examined other consequences resulting from the fact that directives rank higher, in the hierarchy of sources, than rules of domestic law. And this — it should

16 — Without claiming to be exhaustive, I shall confine myself to referring to the following authors: Simon, D., *La directive européenne*, Paris, 1997, p. 4 et seq., in which it is argued that 'the national court has an obligation, by reason of the principle of primacy, to disapply national rules that are contrary to Community law, even if the provision in question has no direct effect. Although the national court... cannot assume the role of the transposing authority, there is nothing, on the other hand, to prevent it from disapplying a national rule that is incompatible with a provision which is hierarchically superior to it by reason of the principle of primacy. Conversely, any other solution which would have the effect of authorising the national courts to make a domestic provision that is incompatible with Community law prevail would directly call into question the primacy of Community law, in this instance, specifically, the binding effect and uniformity of application of directives. Admittedly, the proposed analysis presupposes a decoupling of direct effect and primacy, *but this severance does indeed appear to constitute one of the principal threads in the recent development of the case-law both of the Court of Justice and of the national courts*' [in French added in the Opinion] (emphasis added); Prechal, 'Directives', in *European Community Law*, Amsterdam, 1955, in particular at pp. 121 and 122: 'if the theoretical underpinning of the principle of supremacy is the conception of an autonomous Community legal order involving a transfer of powers to the Community and consequent limitations of Member States' sovereign rights..., national legal rules which are contrary to a directive cannot apply or cannot validly be adopted, as they are *ultra vires*.... in practice the construction often amounts to giving directives and Community law in general a higher ranking in the hierarchy of norms which are valid within a national legal system'; Ruggeri, A., 'Continuo e discontinuo nella giurisprudenza costituzionale, a partire dalla sent. n. 170 del 1984, in tema di rapporti tra ordinamento comunitario e ordinamento interno: dalla "teoria" della separazione alla "prassi" dell'integrazione intersistemica?', in *Giurisprudenza costituzionale*, 1991, p. 1583, 1608: 'if the period prescribed for the application of directives has expired to no avail, for a rigorous and consistent affirmation of *primauté*, conflicting laws which are not rapidly made to comply with Community obligations will have to be considered to have subsequently become unconstitutional, just as any conflicting laws that may be adopted at a later date would be unlawful'. See also Timmermans, 'Directives: their Effects within the National Legal Systems', in *Common Market Law Review*, 1979, p. 533 et seq.; Galmot and Bonichot, 'La Cour de justice européenne et la transposition des directives en droit national', in *Revue française de Droit administratif*, 1988, p. 4 et seq.; Manin, 'L'invocabilité des directives: quelques interrogations', in *Revue trimestrielle de droit européen*, 1990, pp. 669 and 690; Bach, 'Direkte Wirkung von EG-Richtlinien', in *JZ*, 1990, p. 1108 et seq.; Lenaerts, 'L'égalité de traitement en droit communautaire', in *Cahiers de droit européen*, 1991, p. 38 and note 120; Slot, 'Commento alla sentenza CIA Security International SA', in *Common Market Law Review*, 1996, pp. 1036 and 1049; Timmermans, 'Community Directives Revisited', *Yearbook of European Law*, 1998, p. 1 et seq., and Barav, *Rapport Général, XVIII Congrès FIDE*, Stockholm, 1998, vol. III ('Les directives communautaires: effets, efficacité, justiciabilité'), p. 433 et seq. On the uncertainty created by the case-law of the Court, see Holson, C. and Downes, T., 'Making Sense of Rights: Community Rights', in *EC Law, European Law Review*, 1999, p. 121 et seq.

17 — Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26; Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20; and Case C-131/97 *Carbonari and Others* [1999] ECR I-1103, paragraph 48. It will be noted that in the *Marleasing* case the Court of Justice asked the national court to interpret the Civil Code in such a way as to preclude application of the domestic provisions which provide for a declaration of nullity of the instrument of incorporation of a company with share capital on a ground other than those listed in a directive that has not been transposed. I therefore consider that this judgment can be cited as one of those where the Court has acknowledged that the non-transposed directive, irrespective of the 'vertical' or 'horizontal' nature of the relationship, has the effect of 'precluding' incompatible domestic provisions. See Louis, *L'ordre juridique communautaire*, Brussels, 1993, pp. 147 to 149.

be emphasised — has also been the case with disputes involving private persons only, a correct distinction being made here, albeit implicitly, between the direct effect of a provision of Community law, understood in the strict sense as the right to rely upon that provision as against another person in judicial proceedings, and its capacity to serve as parameter of legality for a provision which ranks lower in the hierarchy of sources. [18]

32. In this connection, reference may usefully be made to the judgment in *CIA Security International* case. [19] In that case the Court was called upon by the Tribunal de Commerce de Liège to interpret Articles 8 and 9 of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, [20] in relation to national provisions requiring the approval of alarm systems and networks. The subject of the proceedings before the national court was an action brought by a company engaged in the marketing of alarm systems (CIA Security International SA, hereinafter 'CIA') seeking relief against unfair competitive practices allegedly engaged in by two companies which, it claimed, were guilty of having circulated libellous information regarding the quality of the alarm systems it was marketing. The two defendants maintained *inter alia* that the system in question did not comply with current Belgian legislation since it had not been approved under that legislation. CIA, for its part, maintained that the domestic legislation was not applicable because it had not been notified to the Commission pursuant to the Directive. Although the dispute involved private persons, the Court rightly referred to its settled case-law according to which 'wherever provisions of a directive appear to be, from the point of view of their content, unconditional and sufficiently precise, they may be relied on *against any national provision which is not in accordance with the directive*' (paragraph 42; emphasis added). The infringement of the directive by the State (in this instance, the failure to notify the technical rules, in breach of the obligation laid down in the directive), in the light of the objectives the directive sought to pursue, constituted 'a procedural defect in the adoption of the technical regulations concerned, render[ing] such technical regulations inapplicable so that they may not be enforced against individuals' (paragraph 45). In short, it follows from this judgment that it is not open to a private person to raise, as against another private person, a plea based

18 — It should be noted that, in a different context, this distinction is clearly apparent in the *Racke* judgment (Case C-162/96 [1998] ECR I-3655), with regard to relations between a secondary Community act and a general provision of international law. Given that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order (paragraph 46), the Court pointed out that '[i]n this case, however, the plaintiff is incidentally challenging the validity of a Community regulation under those rules in order to rely upon rights which it derives directly from an agreement of the Community with a non-member country. *This case does not therefore concern the direct effect of those rules*' (paragraph 47, emphasis added). Ultimately, as in the case with which we are dealing, the higher-ranking rule is used as a parameter of the legality of the lower-ranking rule, irrespective of the existence, in so far as the individual is concerned, of a right upon which he can rely in legal proceedings. While it is true that the present case, unlike the *Racke* case, concerns relations between the Community legal order and the national legal system, I believe that this factor should not lead to a different solution, particularly bearing in mind the typically 'monist' approach which the Court has always followed when defining relations between the two legal systems.

19 — Case C-194/94 [1996] ECR I-2201.

20 — OJ 1983 L 109, p. 8, as amended by Council Directive 88/182/EEC of 22 March 1988 (OJ 1988 L 81, p. 75).

on a failure to comply with a provision adopted in breach of a directive. A directive operates as a 'shield' against the application of a provision that is incompatible with it, it being of no importance whether application of the conflicting law is sought before the court by the State (for instance, in the person of a governmental supervisory body or the State Counsel's Office) or a private person. [21]

33. In the *Ruiz Bernáldez* case, [22] however, the Court was called upon by the Audiencia Provincial de Sevilla to interpret Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability. [23] In that case Mr Ruiz Bernáldez had been convicted in criminal proceedings of driving while intoxicated and ordered to make reparation for the damage sustained by a third party; the company with which Mr Ruiz Bernáldez had taken out an insurance policy had, however, been absolved, on the basis of the Spanish provisions concerning insurance in respect of damage connected with motor-vehicle traffic, from any liability to pay *in solidum* compensation to the injured party, as the provisions in question precluded such liability if the insured was intoxicated at the time of the accident. In replying to the question referred to it for a preliminary ruling, the Court held that those provisions were not compatible with Article 3(1) of the directive, which, it therefore concluded, 'preclude an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle' (paragraph 20). In this case too the Court requested the national court not to apply the national provisions, which were incompatible with the directive, even though the directive in question had not been correctly transposed. The private person — in this instance the insurance company — therefore had to meet a pecuniary obligation which was not incumbent upon it under national law.

34. Other examples, taken from the Court's recent case-law, confirm that the Court considers the directive to be a parameter for evaluating the legality of national legislation, irrespective of its capacity to confer upon individuals 'active' subjective rights that may be relied on in legal proceedings. In *Commission* v *Germany*, [24] the Court clearly rejected the view espoused by the Member State in question that 'the case-law of the Court of Justice recognises the direct effect of the provisions of a directive only where they confer[red] specific rights on individuals' (paragraph 24). Since Articles 2, 3 and 8 of the directive on the assessment of the effects of certain public and private projects on the environment did not, [25] however, confer such rights on individuals, the Federal

21 — The circumstances of the *Unilever Italia* case (C-443/98, a case which is pending before the Court) are similar to those of the *CIA Security International* case.

22 — Case C-129/94 [1996] ECR I-1829.

23 — OJ, English Special Edition 1972 II, p. 360.

24 — C-431/92 [1995] ECR I-2189 et seq. See also Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 59 et seq.

25 — Council Directive 85/337/EEC of 27 June 1985 (OJ 1985 L 175, p. 40).

Republic of Germany considered that it was not obliged to apply them before the directive was transposed, which meant that a decision to authorise the enlargement of a thermal power station without first assessing the impact on the environment could not be the subject of infringement proceedings. The Court dismissed that objection, drawing a clear distinction between compliance with the directive and the impact of the directive on national legislation, on the one hand, and the capacity of private persons to rely directly on the directive on the other. [26] The question of the obligation, for the State, to comply with the Directive '[wa]s quite separate' from that of whether individuals may rely on provisions of a non-transposed directive (paragraph 26).

35. The solution which the Court arrived at in the *Bellone* [27] case appears to be even more significant in so far as proceedings between private persons are concerned. On that occasion the Court interpreted Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents. [28] In the national proceedings the commercial agent Mrs Bellone had applied to the Pretore (Magistrate), Bologna, for recognition of her entitlement to payment of certain sums allegedly due for acting as commercial agent on behalf of the company Yokohama; that company responded by pleading that the agency contract was void because the agent was not entered on the register prescribed by Italian legislation for that purpose. What was concerned was therefore plainly a dispute between private persons. After clearly stating that the national law made the validity of the contract conditional upon the commercial agent's being entered on that register (paragraph 12), the Court interpreted the provisions of the directive in such a way as to preclude a condition of that kind from being made a prerequisite for the enjoyment by the agent the protection provided for in the directive. The Court thus identified an incurable incompatibility between the two systems that was plainly such as to preclude any recourse to a 'conforming interpretation'. [29] Accordingly, it concluded that 'the Directive precludes a national rule which makes the validity of an agency contract conditional upon the commercial agent being entered in the appropriate register'. That statement can be construed in one sense only, given the procedural context, namely as requiring the national

26 — In support of this interpretation see D. Edward, 'Direct Effect, The Separation of Powers and the Judicial Enforcement of Obligations', in *Studi in onore di Giuseppe Frederico Mancini*, volume II, Diritto dell'Unione europea, Milan, 1998, pp. 423 and 438.

27 — Case C-215/97 [1998] ECR I-2191.

28 — OJ 1986 L 382, p. 17.

29 — In this connection, it should be noted that the Court often interprets provisions of a directive in disputes between individuals by using those provisions, irrespective of national transposition rules, as the regime applicable to the specific case in point. See, to cite just some of the more recent judgments, *Butterfly Music* (Case C-60/98 [1999] ECR I-3939) and *Allen* (Case C-234/98 [1999], ECR I-1864). While it is true, as the Court stated, that 'regardless of the effects of the directive, in cases such as the present, an interpretation of the directive may be helpful to the national court so as to ensure that the law adopted for the implementation of the directive is interpreted and applied in a manner which conforms to the requirements of Community law' (Case 111/75 *Mazzalai* [1976] ECR 657, paragraph 10), this clarification cannot be taken into account if it is established, as in the present case or in the *Bellone* case referred to above, that there is an incurable incompatibility between Community law and national law. Nor is it an answer to say that the judgment of the Court could be construed as a useful assessment for the purposes of the possible liability of the Member State for breach of the obligation to implement the directive, inasmuch as this would involve a departure from the dispute in question, which concerns two private parties and not the Member State, and conferring on the Court the task, which it has always refused, of ruling on hypothetical questions (Case C-343/90 *Lourenço Dias* [1992] ECR I-4673). It should next be noted that the facts of the case in the main proceedings here are different from those in the *Spano and Others* (C-472/93 [1995] ECR I-4321), in which the Court, in a dispute between two private persons, interpreted the content of a directive that had not been transposed because the national court sought to determine 'the extent to which national law, more particularly Article 2112 of the Civil Code, [could] be applied in conformity with the directive' (paragraph 18).

court not to apply the conflicting national legislation, which was incompatible with the Directive that had not been transposed within the prescribed period. [30]

36. Furthermore, it should be added that if Community directives were not accorded, on the basis of the fundamental principles of the primacy of Community law and its uniform application in the Member States, a position of superiority in the hierarchy of sources, with the ensuing obligation for judicial and administrative bodies not to apply conflicting national provisions, this would have consequences that would be difficult to accept. Let us look, for instance, at the situation where a Member State, initially 'in order' with regard to the obligations laid down in Article 189 of the Treaty (in so far as the national legislation, whether prior or subsequent to the directive, is in conformity with its contents), later adopts provisions which contain a regime that is clearly not so in conformity. In fact, this is a situation that is anything but unlikely. [31] In such cases, if directives were not recognised as having the power to affect, once the period prescribed for their transposition has expired, the valid formation of the national rules, then, in a dispute between individuals the national court would have no alternative but to apply the subsequent national provisions, even if they were adopted in contravention of the directive, and to grant the individual, if the necessary conditions were satisfied, only compensation for damage. A solution such as this is obviously far from satisfactory; when it comes to drawing the appropriate conclusions from the hierarchical relationship existing between Community law and the national law, it is evident that the fact that the conflicting law was adopted before or after expiry of the period prescribed for implementation of the directive makes no difference. [32]

37. Ultimately, the national court's function as a Community court of ordinary law entails entrusting it with the delicate task of guaranteeing the primacy of Community law over national law. The need to prevent the harmonising action of the Community directives from being compromised by Member States' unilateral behaviour, whether through omission (failure to implement a directive within the prescribed period) or action (adoption of incompatible national rules), implies that the application of incompatible legal provisions is in any event excluded. In order to be able to

30 — This was in fact how the judgment was interpreted by the Italian courts. See Judgment No 4817 of the Corte Suprema di Cassazione, sez. Lavoro (Supreme Court of Cassation, Labour Section) of 18 May 1999, which precluded application, in a dispute between private persons, of the national provision which the Court ruled was not in conformity with the directive.

31 — A question of this kind is the subject of a case pending before the Court (Case C-343/98 *Collino and Chiappero*), in which the Court is called upon to interpret, in a dispute between private persons, Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 161, p. 26).

32 — *Simmenthal* case, cited above, paragraph 17.

achieve its results, this 'exclusionary' effect must occur whenever the national rule comes into consideration for the purpose of resolving a dispute, irrespective of the public or private status of the parties concerned.

38. It should further be noted that a solution of this kind, which distinguishes between the 'substitution effect' and the 'exclusionary effect' of a directive which has not been transposed within the prescribed period, already appears in embryo in the Court's case-law concerning the consequences of a declaration of failure to fulfil an obligation under the Treaty. The Court has, as we know, stated on a number of occasions that, if it is established that an obligation laid down by Community law has been infringed, this entails for the judicial and administrative authorities of the Member State in question an obligation not to apply the incompatible national provision. Initially applied to infringements of provisions of the Treaty, [33] that obligation was subsequently extended to include infringements of the provisions of a non-transposed directive. [34] If a judgment of the Court delivered pursuant to Article 169 of the EC Treaty (now Article 226 EC) is regarded as not creating any right since it is confined to establishing a failure by the State to fulfil an obligation, it follows that no action by the Court is required for this 'exclusionary' effect, which stems directly from the duty of cooperation referred to in Article 5 of the Treaty, to apply in all cases where the provision comes into consideration, including, of course, disputes between private persons.

39. On the basis of all the foregoing observations, I consider, to come back to the case which concerns us here, that no problem will arise, and that, on the contrary, it will be perfectly consistent with the general principles governing the relations between Community law and national law, if the national court is requested to 'set aside' the domestic procedural rule in order to guarantee that Community law is fully effective, even in circumstances where that device falls to be used in order to preclude, in a dispute between private persons, the application of a provision of the code of procedure that is contrary to the provisions of a directive that has not been transposed. The exclusion of the incompatible rule would not, in this case, give rise to a 'legal void' — which could in any event be filled by application by analogy or recourse to general principles of national law if those national provisions comply with the principles on which the directive is based — since the application of the general procedural rule which requires an action to be brought in the court of the district where the debtor resides would fill any such 'void'.

33 — Case 48/71 *Commission* v *Italy* [1972] ECR 529, paragraph 7.

34 — Case C-101/91 *Commission* v *Italy* [1993] ECR I-191, paragraph 23.

Conclusion

40. In the light of the foregoing considerations, I propose that the Court should reply as follows to the question raised by the Juzgado de Primera Instancia de Barcelona:

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts permits the national court to determine of its own motion whether a term in a contract before it is unfair when making its preliminary assessment as to whether leave should be granted for a claim to proceed before the ordinary courts.