Etienne Rigal

The True Story of the Active Role of Courts in Consumer Litigation

La question que j'avais posée était celle de la conformité d'un délai de forclusion de deux ans avec la finalité de la directive 93/13/CE, ce délai courant du contrat écoulé interdisant au juge de faire valoir le caractère abusif d'une clause.

La Cour de cassation française interdisait le relevé d'office et imposait un bref délai de forclusion pour ce qui était du constat de violations de la loi par les organismes de crédit à la consommation. Il s'agissait d'une pratique bancaire qui laissait croire à un crédit gratuit (le contrat était présenté avec le titre «Offre gratuite de réserve d'argent») quand il était remboursable selon un intérêt annuel de 17%. Ce faisant la Cour rendait inefficiente la protection du consommateur pourtant recherchée par la loi communautaire, en cela transcrite par la loi française. Permettez-moi un hommage et des remerciements en préambule à cette intervention. Hommage à notre collègue juge à Barcelone qui a le premier pris l'initiative de saisir la CJEU d'une question préjudicielle quant à l'office du juge en matière d'éradication d'une clause abusive dans l'affaire *Océano Grupo*. Il est le pionnier, le seul père de cet élan des juges vers le droit communautaire de la consommation et la Cour. Je lui voue une estime et une reconnaissance éternelle. Je sais le risque qu'il a pris dans un domaine jusqu'alors inexploré. J'ai peut-être été le second de cordée, mais il restera le guide.

Il m'est aujourd'hui demandé de partager mon expérience et je veux tout d'abord parler de l'idée même de la question préjudicielle avec cette caractéristique que je suis un juge questionnant mais également le membre d'une institution interrogée pour avis. Juge questionnant car j'ai saisi le CJEU, mais également la Cour de cassation française en 2016 et 2017. Membre questionné car j'exerce les fonctions de vice-président de la commission des clauses abusives, saisie par des juges pour avis.

Le premier constat que je veux faire est celui que les questions préjudicielles posées d'office émanent de juges statuant seuls et non en collégialité. Il y a sans doute dans le fait d'interroger l'expression d'un engagement personnel et d'un risque qui ne peuvent relever que d'une démarche individuelle. J'ajoute que parfois et ce fût mon cas, la juridiction communautaire est

saisie dans le contexte d'une résistance à une jurisprudence nationale. Il y a dans la collégialité un apport de raison et c'est essentiel, mais poser une question ressort également et pour partie au moins d'une part de passion. Telle est du moins mon expérience. Il y a là la part du juge et cette part personnelle peut être difficilement partageable avec ceux que le seul tableau de service a désigné comme nos partenaires. La collégialité qui m'était nécessaire a été une collégialité choisie, un partage avec une universitaire et des juges d'instance ayant les mêmes aspirations.

Le second point sur lequel je veux m'arrêter est le suivant: pourquoi interroger et ce faisant déléguer la décision à autrui ? Le métier du juge est évidemment celui de juger, d'interpréter le droit et il n'y a pas lieu de se décharger de cette fonction sur autrui. L'an passé au sein de la commission des clauses abusives nous avons été interrogés par un juge qui d'évidence nous confiait son dossier qu'elle ne savait ou ne voulait pas traiter; je dois dire à quel point j'ai trouvé cela désagréable.

La démarche juste à mon sens est celle de présenter une interprétation choisie, une analyse et de la soumettre à la validation, ici pour ce qui nous réunit, de la Cour européenne.

Je reste juge et ce faisant interprète mais dans une démarche déontologique qui s'inscrit dans la hiérarchie des juridictions.

Là encore, il y a deux étapes qui renvoient, d'une part, à la part individuelle du juge et, d'autre part, au collectif des juridictions.

Comme membre de la commission des clauses abusives, j'ai ce même sentiment de partage lorsque saisis pour avis d'un juge dans sa question nous confirmons sa proposition d'interprétation. Je sais à quel point mon collègue s'est investi et je reçois la part de confiance qu'il nous a fait. Il a été plus douloureux de ne pas le suivre quand tel a été notre avis.

Je voudrais dire mon attachement au droit comme outil d'universalisme; j'aime ce mot universalisme que j'entends de moins en moins prononcé en France. J'aime penser que le droit est ce qui reste â celui qui n'a rien et je voudrais faire miens ces mots d'un juriste qui est ma référence, Paul Bouchet, qui nous appelle nous les juges à «faire du droit une matière vivante pour les vivants».

Je suis d'un pays dont la tradition est celle d'une interprétation essentiellement littérale du droit. Je continue de m'étonner que la Cour de cassation au travers de ces arrêts mais même de leurs rapports préalables, ne cite que trop rarement les travaux préparatoires des lois. La finalité ou plutôt une des finalités des directives et lois nationales en droit de la consommation est celle de la protection de la partie faible au contrat. Protéger, équilibrer, je

retrouve là une valeur universelle, je crois même le fondement primaire de l'existence du droit dans une démocratie.

L'interprétation finaliste favorable au consommateur me semblait offerte par la Cour à la lecture de l'arrêt *Océano Grupo*, sans lequel nous n'aurions pas agi. Bernadette Le Baut Ferrarese défendait l'idée que l'autonomie processuelle des Etats devait être limitée quand elle contrevenait à l'objectif protecteur des directives.

Par prudence, nous avons souhaité dans un premier temps rester dans le champ de la directive "clauses abusives" et non dans celui de celle relative au crédit à la consommation, alors même que les contrats concernés étaient des crédits revolving. D'abord parce que nous avions ce précédent *Océano Grupo*. Plus encore parce que l'article 5 de la directive "clauses abusives" instaurait une obligation de résultat qui nous semblait solidifier notre interprétation. J'en rappelle les termes: «*Les États membres prévoient que les clauses abusives figurant dans un contrat conclu avec un consommateur par un professionnel ne lient pas les consommateurs, dans les conditions fixées par leurs droits nationaux*».

Tout cela nous a guidés et face à la jurisprudence française de l'époque, il nous a semblé que seule la Cour pouvait permettre à notre droit de retrouver sa vocation et son efficience protectrice.

Je dois ici rappeler quelle était l'état de la jurisprudence française.

Il était inséré à la loi relative au crédit à la consommation une disposition interdisant l'action en justice au-delà d'un délai de forclusion de deux années courant de l'événement fondant le procès. L'intention du législateur était celle d'obliger les banques à agir sans tarder en présence d'impayés, afin de ne pas laisser le consommateur s'installer dans son défaut de paiement. Cependant, la Cour de Cassation avait étendu le champ d'application du délai de forclusion aux actions en contestation du contrat et interdisait tout contrôle de la régularité du contrat deux ans après sa formation. Par ailleurs, elle interdisait le relevé d'office par le juge des irrégularités.

Ma colère était née de cela, d'une jurisprudence de ma Cour de cassation nationale qui de fait rendait inefficiente la protection du consommateur telle que l'avait exprimée la CJEU dans l'arrêt *Océano Grupo*. Colère également d'une pratique bancaire qui laissait croire à un crédit gratuit (le contrat était présenté avec le titre en grands caractère rouges «Offre gratuite de réserve d'argent»), quand il était remboursable selon un intérêt annuel de 17%, ce taux étant mentionné au verso du contrat et en caractères si petits qu'ils étaient difficilement lisibles.

Faire vivre le droit par une autre interprétation: la colère plus forte que la

peur, une colère mêlée de respect, celui de la hiérarchie des cours. Et le juge ne devait rien dire de cet abus tel les trois singes chinois...

La colère est une émotion, là encore la part du juge et à dire vrai, une autre émotion nous habitait, la crainte, disons le même, la peur.

Peur du juge orgueilleux d'être désavoué et de passer pour un incompétent. Plus encore, peur de figer le droit dans le sens contraire à celui de nos interprétations et de ruiner les efforts de tous ceux qui se retrouvaient avec nous dans cette résistance, avec ses enjeux. C'est là que nos propres réticences, nos hésitations et freins personnels ont été les plus présents.

Outre la conviction juridique forte et orgueilleuse que notre raisonnement était rigoureux, ce qui a emporté notre décision, la mienne, c'est l'affirmation que l'éthique qui s'imposait au juge devait me conduire à me soumettre à l'avis de la Cour européenne. Le juge ne tire sa légitimité que de son respect des normes et des autorités normatives. Je me devais à ce respect.

Cela ne devrait pas être dit mais ce sentiment, cette peur était bien présente et m'est resté 'pendant les deux années d'attente de l'arrêt, fluctuant au gré de l'avis nous confortant de la commission, mais également de l'avis défavorable de l'avocat général, lequel contestait le caractère abusif des clauses.

Une petite anecdote. Le gouvernement français en des termes très forts et résolus avait pris parti pour le relevé d'office dans le cadre des échanges préalables à l'arrêt *Océano Grupo* et je m'attendais à son soutien dans l'affaire *Cofidis/Fredout*, après tout notre point de vue ne critiquait pas la loi mais son interprétation de celle-ci par les juges. Mais l'orgueil n'affecte pas que le juge et la France a défendu son droit, développant des arguments qu'elle avait précédemment rejetés. Plus tard, j'ai rencontré un des rédacteurs de cet avis, il m'a dit sa gène car, à titre personnel et comme ses collègues, il soutenait notre point de vue.

Je veux insister sur le lien entre juges et chercheurs en droit et, ici à l'instant d'un colloque nous réunissant, témoigner de la disponibilité des universitaires lorsque nous, juges, les invitons à nous rejoindre dans la mise en œuvre du droit réel. En France, il est rare que le magistrat requière l'aide du professeur, chacun sa chapelle; c'est une erreur tant nous nous complétons. Mon universitaire aidante se nomme Bernadette Le Baut Ferrarese et je n'ai aucune difficulté à dire qu'elle a été la rédactrice de la part communautaire de mes jugements interrogeant la Cour, elle a été la spécialiste sans laquelle je n'aurais pu agir. Elle fût la stratège, j'ai été le tacticien et celui qui a mené la charge.

J'ajoute que ces jugements ont préalablement été lus, corrigés et au final co-écrits par deux autres juges d'instances Juliette Devynck et Philippe Flores.

Je crois en cette nécessité d'un travail partagé, collégial et dans le même temps, je vois que l'initiative doit parfois passer par une décision solitaire. Alors va pour la collégiale choisie, d'appartenance.

Quelques mots sur la procédure française s'agissant des questions préjudicielles.

Je dois d'abord dire que le juge français a cette chance d'être libre dans ses jugements et notre hiérarchie n'a pas à être informé de notre volonté préjudicielle, le serait-elle qu'elle s'interdirait de réagir.

Le jugement rendu, je l'ai simplement communiqué pour information au président de mon tribunal, qui ne m'en a d'ailleurs rien dit.

Nous rendons des jugements ouvrant droit à appel, si l'affaire concerne une créance de 4000 euros ou plus, mais si la somme demandée est moindre, seul un pourvoi en cassation est ouvert aux parties.

Au surplus, ce pourvoi n'est pas recevable contre un jugement avant dire droit, tel celui posant une question préjudicielle.

J'ai donc choisi un dossier de moins de 4 000 euros, sachant qu'aucun recours n'était possible contre mon jugement interrogeant la Cour européenne.

L'étape essentielle a été celle du choix de l'affaire.

Souhaitant me fonder sur la directive "clauses abusives", il a fallu trouver un crédit dont la clause financière était de mon point de vue trompeuse et la contrat LIBRAVOU répondait à mon sens à cette exigence, tant dans sa présentation et son intitulé, il pouvait laissait croire à une "réserve d'argent" gratuite.

Enfin, j'ai choisi une instance au cours de laquelle le débiteur n'avait pas comparu, par souci de ne pas perturber un plaideur m'ayant par exemple demander des délais de paiement et qui se serait vu sans réponse durant deux années et n'y aurait sans doute rien compris.

Mon choix s'est dons arrêté sur ce contrat LIBRAVOU proposé par COFIDIS et qui me semblait scandaleux en sa présentation. Parmi mes dossiers de ce prêteur, celui octroyé à Monsieur Jean Louis Fredout remplissait toutes mes conditions et c'est avec un frémissement d'excitation que je l'ai reçu.

Ce choix fait, il a fallu être patient, informer les parties de la possibilité d'une question préjudicielle et recueillir leurs observations. L'avocat de COFIDIS ignorait l'existence de telles questions et m'a dit ne rien avoir à en dire, le temps de la rédaction du jugement est venu et je l'ai vécu avec un grand enthousiasme.

La question que j'avais posée était celle de la conformité d'un délai de forclusion de deux ans avec la finalité de la directive, ce délai courant du

contrat, écoulé interdisant au juge de faire valoir le caractère abusif d'une clause. La réponse de la Cour a été au-delà de la question posée. Dès lors que le relevé d'office a été reconnu comme pouvant s'exercer sans délai. Il me semble que cette affirmation limpide, très forte et de portée générale était peut-être la part du juge de la Cour, comme une invitation à poursuivre. Je n'ai pas été le seul à l'entendre ainsi. Conforté par l'avis favorable apportée par la Commission dans l'affaire *Cofidis*, j'avais saisi la Cour, d'une seconde question ayant trait au pouvoir du juge de relever d'office des violations non plus à la directive clauses abusives, mais â celle ayant trait au crédit à la consommation et l'affaire devait être plaidée en décembre 2002. C'était le second étage de notre démarche déterminée mais prudente, un pas après l'autre. L'affaire devait être plaidée en décembre 2002 et le juge rapporteur a invité les parties à se référer à l'arrêt *Cofidis/Fredout* rendu quelques jours plus tôt. Une semaine avant cette audience à Luxembourg la banque s'est désistée de son procès devant ma juridiction, mettant fin au litige et dessaisissant ainsi la Cour communautaire.

Il a fallu réinterroger la Cour et Philippe Flores l'a fait, conduisant la Cour à l'arrêt *Rampion* du 4 octobre 2007. J'en rappelle le dispositif : «La directive 87/102, telle que modifiée par la directive 98/7, doit être interprétée en ce sens qu'elle permet au juge national d'appliquer d'office les dispositions transposant en droit interne son article 11, paragraphe 2». Là encore, Philippe s'est interrogé, devait-il poser la question en terme de devoir du juge de relever d'office, qui était notre point de vue ou de simple pouvoir; la prudence est restée de mise et il n'a franchi que la première marche, celle du pouvoir. La Cour a répondu à cette seule question, laissant un débat entre juges français, les tenants du devoir et ceux du pouvoir. La cordée doit se continuer sur ce point.

J'ai parlé de moi au moment de questionner et de ma part personnelle, je vais continuer et dire que j'ai reçu ma part en retour, au travers du sentiment d'avoir été un bon juriste, d'avoir été utile. Philippe Flores, mon ami, a plus tard lui-même interrogé la Cour sur la question du relevé d'office, là aussi dans un jugement nous réunissant. Quand la réponse également positive lui est parvenue, il m'a écrit ce message: «La Cour a statué, tu sais, maintenant, je peux prendre ma retraite». Son devoir était accompli et lui comme moi vivons avec cette satisfaction.

Quelques mots pour finir des suites de ces cet arrêt *Cofidis/Fredout* et *Rampion.*

Dès avant l'arrêt *Cofidis* et au vu des débats devant la Cour, le législateur français par la loi du 11 décembre 2001 a limité l'application du délai

de forclusion aux actions en paiement consécutives à une défaillance de l'emprunteur. Dès lors, les actions intentées par le consommateur-emprunteur ou les exceptions relevées par le juge ne relevaient plus de ce délai. La loi du 3 janvier 2008 a fait suite à l'arrêt *Rampion* créant un article l'article L. 141-4 du code de la consommation, qui énonçait que «le juge peut soulever d'office toutes les dispositions du présent code dans les litiges nés de son application».

Appendix to
«The true story of the active role of courts in consumer litigation»:
case C-473/00, Cofidis SA v Jean-Louis Fredout,
Opinion of Advocate general Tizzano 18 April 2002 and
Judgement of the CJEU 21 November 2002

OPINION OF ADVOCATE GENERAL TIZZANO
delivered on 18 April 2002 (1)

Case C-473/00
Cofidis SA
v
Jean-Louis Fredout

(Reference for a preliminary ruling from the Tribunal d'instance de Vienne (France))

(Directive 93/13/EEC - Unfair terms - Judicial review - Limitation period - Compatibility with the Directive)

1. In accordance with Article 234 EC, the Tribunal d'instance de Vienne (District Court, Vienne), France, asked the Court, by judgment of 15 December 2000, whether Directive 93/13/EEC (2) precludes a national provision which prescribes a limitation period of two years for a national court, either of its own motion or on application by the consumer when defending an action, to determine whether any term included within a standard contract made between a seller or supplier and a consumer is an unfair term. (3)

I - Legal framework

A - *The relevant Community provisions*

2. Article 1 of the Directive provides:

'1. The purpose of this Directive is to approximate the laws, regula-

tions and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.

2. The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive'.

3. Article 2 of the Directive provides:

'For the purposes of this Directive:

(a) "unfair terms" means the contractual terms defined in Article 3;

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

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

4. Article 3 of the Directive provides:

'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. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. ...

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

5. Article 4 of the Directive provides:

'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. Assessment of the unfair nature of the terms 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'.

6. Article 5 of the Directive provides:

'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. ...'.

7. Under Article 6(1) of the Directive:

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

8. Article 7(1) of the Directive provides:

'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'.

9. Article 8 of the Directive provides:

'Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer'.

10. In accordance with Article 3(3), the annex to the Directive contains an indicative list of terms which may be regarded as unfair. These include those having the object or effect of 'irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract' [point 'i'].

B - *The relevant national provisions*

11. In French law, the provisions on unfair terms are the subject-matter of Chapter II ('Unfair terms') of Title III ('General conditions of contract') of Book I ('Information for consumers and formation of contracts') of the

Consumer Code (hereinafter 'the Code'). Those provisions include Article L. 132-1, as amended by Law No 95-96 of 1 February 1995 implementing the Directive, which is found in Section I ('Protection for consumers against unfair terms') of Chapter II. This provision defines the concept of unfair terms in accordance with the Directive and its annex contains an illustrative list of terms which is the same as that appearing in the annex to the Directive. It also states that such terms are to be deemed not written, meaning - as the court making the reference explains - that they are null and void. Like the Directive, Article L. 132-1 does not prescribe time-limits for any action for nullity; however, under the general rules of contract law, such actions may be brought for up to five years. (4) On the other hand, there is no time-bar on a defence of nullity: (5) in other words, a consumer may at any time plead that a term relied upon in an action brought against him by a seller or supplier is unfair.

12. The Civil Code also makes separate and specific provision for consumer-credit contracts. This is the subject-matter of Chapter I ('Consumer credit') in Title I ('Credit') of Book III ('Debt'), and it largely repeats the provisions of Law No 78-22 of 10 January 1978 on consumer information and protection relating to certain credit transactions, also known as the '*Scrivener* Law', which is intended to limit the great number of cases relating to the countless consumer-credit contracts made each year. To that end, the *Scrivener* Law seeks to avoid case-by-case consideration of whether the parties to such contracts had actually given genuine consent and requires the use of wording that will ensure better consumer information and simplify the courts' task of verifying the lawfulness of contracts. In particular, Article L. 311-13 of the Code provides that the document whereby the consumer is offered a consumer-credit contract must be written in accordance with standard model contracts prescribed by the Banking Regulation Committee, following consultation with the National Consumer Council. These model contracts were then prescribed by decree (6) and are now contained in an annex to the first paragraph of Article R. 311-6 of the Code; the latter provision reads:

'The initial offer of a loan as specified in Article L. 311-8 [now Article L. 311-13] shall include the particulars given in that standard model which, of those annexed to this Code, corresponds to the credit transaction offered'. (7)

13. Of the model contracts shown in the annex to Article R. 311-6 of the Code, No 5 is for an 'initial offer of new credit, to be used in instalments and accompanied by a credit card', that is to say, precisely the type of

contract under discussion in this action and referring to a credit transaction known in France as 'crédit permanent' (renewable credit).

14. The second paragraph of Article R. 311-6 of the Code provides:

'This document [that is to say, the initial offer of a loan] shall be set out clearly and legibly. It shall be in characters the height of which may not be less than eight-point'.

15. The national court does not refer to the above consumer-credit requirements but does note that, in a recommendation of 17 December 1991 (hereinafter the 'Recommendation'), (8) which was adopted to make consumer-credit contracts clearer and more comprehensible, the Commission on Unfair Terms - a body within the ministry with responsibility for consumer protection, responsible for proposing the removal or amendment of unfair terms in standard contracts (9) - suggested, firstly, that 'all contractual terms should be above the signatures of the parties' (point I-1) and, secondly, that 'contractual documents should be printed in characters the height of which is not less than eight-point' (point I-3) meaning, according to the national court, in a print size of not less than 3 mm in height. (10)

16. The rules on consumer-credit contracts also prescribe the specific consequences of a failure by a lender to comply with the formalities which, as I have just noted, are laid down for this purpose. In particular, Article L. 311-33 of the Code provides:

'A lender who grants credit without making the borrower an initial offer which meets the conditions specified in Articles L. 311-8 to L. 311-13 shall forfeit entitlement to interest and the borrower shall be required to repay only the capital, in accordance with the time schedule provided ...'.

17. Article L. 311-34 of the Code further provides that a lender failing to comply with the formalities set out in Articles L. 311-8 to L. 311-13 is to incur a fine of FRF 12 000.

18. I should also point out that Article L. 311-37 of the Code - which is the article specified in the question referred for preliminary ruling: it is in Section VIII ('Procedure') of Chapter I, on consumer credit, which includes those articles of the Code to which I have referred above - in the version in force at the time of the facts material to the main proceedings, provided:

'The Tribunal d'instance shall have jurisdiction in disputes which arise from application of the present chapter. Actions brought before the Tribunal d'instance shall be time-barred two years after the event giving rise to them ...'.

19. According to the French case-law cited by the national court, the two-year period for challenging formal irregularities in a consumer-credit contract runs from the date on which the contract is made; furthermore, that period applies both to the bringing of the action and to any pleas in defence, and it is binding on a court which establishes such irregularities of its own motion. It has also been shown that this period cannot be either suspended or interrupted (it is a 'délai préfix' or strict time-limit).

20. Lastly, it should be noted that Article 16(II-1) of Law No 2001-1168 of 11 December 2001 making urgent provisions for financial and economic reform (hereinafter 'Law No 2001-1168') (11) makes the following addition to the second sentence of Article L. 311-37, effective for contracts made after promulgation of that law (see Article 16(II-3):

'Actions *for payment that are brought* before that court *following non-performance by the borrower* shall be time-barred two years after the event giving rise to them.' (12)

21. During the hearing before this Court, the French Government stated that Article 16(II-1) of Law No 2001-1168 is simply a provision to 'interpret' (13) Article L. 311-37, intended to make it clear that the period prescribed by the latter does not apply to any action other than one brought by the lender where the borrower fails to perform, and in particular does not apply to actions seeking to establish that certain terms are unfair.

22. During the hearing, it also became evident that, since most actions concerning consumer-credit contracts do in fact relate to the borrower's failure to pay, the legislature has sought by means of these amendments to restrict the risk of excessive indebtedness for the borrower by prescribing a period which, it seems to me, essentially begins to run as soon as any repayment instalment is not paid and within which the lender must bring judicial proceedings to secure compliance with the contract.

II - The facts and the question referred

23. By a contract of 26 January 1998, Cofidis SA, a credit institution

(hereinafter 'Cofidis'), granted to Mr Jean-Louis Fredout the opening of a credit usable in instalments and accompanied by a credit card, repayable by monthly instalments and subject to a contractual rate of interest of 15.48% on a debit balance of less than FRF 30 000 and of 14.40% on the remainder. As the borrower failed to pay some of the monthly instalments by the due dates provided, on 24 August 2000 the credit company brought an action before the Tribunal d'instance de Vienne for payment of the total amount owed. The defendant did not make an appearance.

24. In examining the text of the contract, the national court observed of its own motion that the terms relating to contractual interest and to the late-payment penalties (hereinafter the 'financial clauses') had to be regarded as unfair, and thus null and void, since they 'lack legibility' and were so placed within the contract document (a single sheet printed on both sides) that it could not be guaranteed that Mr Fredout had been able to take cognisance of them. The Tribunal d'instance pointed out that, for the contract in question, Cofidis used a sheet printed on both sides on which the borrower's signature was on the front of the contract and, therefore, in breach of the provisions of the Recommendation of 17 December 1991, (14) came before the financial clauses featured on the back. Furthermore, those terms were printed in a type-size smaller than the minimum size required to ensure legibility; again on the front of the contract, there was a heading in large letters 'free application for money reserve', which the Tribunal d'instance considered might mislead the consumer but, in addition, the amount of the 'money reserve' and the amount of the monthly repayment instalments were stated but with no indication of the number of those instalments or, hence, of the total cost of the sum placed at the consumer's disposal.

25. The Tribunal d'instance therefore invited the applicant to provide clarification concerning the irregularities which, in its opinion, vitiated the contract. According to the order for reference, Cofidis observed that, under Article L. 311-37, which applies to all disputes regarding consumer-credit contracts, the court could no longer of its own motion raise any irregularities since those related to a consumer-credit contract that had been entered into more than two years before the action was brought.

26. Thus, in view of the fact that the period prescribed in Article L. 311-37 relates to the bringing of proceedings and also to any pleas in defence that consumer-credit contracts are unlawful, and given that it is

binding upon a court which of its own motion raises the unlawfulness of such contracts, and in view of the fact that - according to French case-law - that would also preclude a finding of nullity under ordinary law, (15) the Tribunal d'instance ruled that it could not annul an unfair term included in a consumer-credit contract in a case in which that period of time had expired before the application was made to the court. In that connection, however, the national court entertains doubts as to whether Article L. 311-37 is in accordance with the Directive, having regard, on the one hand, to the provisions of Article 6(1) of the Directive and, on the other, to the fact that the list of unfair terms annexed to the Directive also includes terms that have the object of 'irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract' [point 'i']. The Tribunal d'instance de Vienne therefore considered it proper to refer a question to the Court of Justice for a preliminary ruling; having first stated that: 'Since the protection conferred by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts implies that a national court, applying provisions of national law previous or subsequent to that directive, is to interpret them so far as possible in the light of the wording and purpose of the latter', the Tribunal d'instance then asked:

'Does that requirement of an interpretation in conformity with the system of consumer protection under the Directive require a national court, when hearing an action for payment brought by a seller or supplier against a consumer with whom he has contracted, to set aside a procedural rule on pleas in defence, such as that in Article L. 311-37 of the Code de la consommation, in so far as it prohibits the national court, either on the application of the consumer or of its own motion, from annulling any unfair term which vitiates the contract where the latter was made more than two years before the commencement of proceedings, and in so far as it thereby permits the seller or supplier to rely on those terms before a court and base its action on them?'

III - The jurisdiction of the Court of Justice

27. Cofidis and the French Government have questioned whether the question referred is appropriate and, hence, whether the Court of Justice is competent to answer it. This matter must therefore be considered as a preliminary.

A - *Summary of the arguments of the parties*

28. The French Government, like Cofidis, maintains that the Tribunal d'instance was mistaken in holding that the period prescribed in Article L. 311-37 applies to the matter of unfair terms inasmuch as it confused the rules on consumer-credit contracts with the system for protecting consumers against unfair terms. In spite of what the Tribunal d'instance seems to suggest, Article L. 311-37 - which is part of Book III of the Code - has nothing to do with the rules on unfair terms covered in Book I of the Code and there is therefore nothing to support the argument that the legislature intended to extend the two-year limitation period to the issue of whether a term is unfair, even if it is included in a consumer-credit contract. (16) In cases such as this, however, it still holds true that an action or a defence of nullity is governed by the provisions of ordinary law in respect of time-limits. On the other hand, although the link assumed by the national court between the two sets of rules has not been confirmed by the Cour de cassation, which has not yet given a ruling in the matter, (17) this appears to be completely contradicted by the authentic interpretation of Article L. 311-37 recently given by the French legislature, (18) which - albeit with a new feature which is subsequent to the facts which are the subject of the main action - has stated that the two-year period which it prescribes applies only to actions brought by a lender following nonfeasance on the part of the borrower.

29. Cofidis argues along similar lines, noting additionally that, within the context of the rules on consumer-credit contracts, the provision of a special period of two years, instead of the usual five, relates only to objections on formal irregularities in the document as compared with the regulation model. That period of time meets obvious requirements of legal certainty and is a counterbalance to rules which are quite pervasive: by prescribing that period, the legislature intended to prevent a borrower from being able to make indefinite use of the credit granted with the intention of first making use of it and then complaining that he has been the victim of a formal irregularity committed when the offer was made. That said, where in a case such as this a contract has been made more than two years previously, in accordance with model No 5 as specified in Article R. 311-6 of the Code, (19) the Tribunal d'instance could not have examined whether the contract is lawful, as the two-year period laid down in Article L. 311-37 had expired. Instead, the Tribunal d'instance reclassified the financial clauses of the contract as 'unfair' because of the formal irregularities by which it considered the contract to be

vitiated, and was then able to justify applying the rules on unfair terms and consequently to object that the brevity of the limitation period provided for in that regard was at variance with the Directive.

30. Cofidis, however, does not exhaust its arguments with these objections regarding the general rules; it adds that the question referred is entirely irrelevant to the situation which is the subject-matter of the main action in two further respects, namely that in this case there are neither any unfair terms within the meaning of Article 3 of the Directive nor any formal irregularities infringing the French rules on consumer-credit contracts.

31. On the first point, the applicant company maintains that the terms which the Tribunal d'instance holds to be unfair - the financial clauses - do not come within the scope of the Directive. As I noted earlier, under Article 4(2) of the Directive, '[a]ssessment of the unfair nature of the terms 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'. However, according to Cofidis, in a consumer-credit contract, the terms which establish the cost of opening the credit granted to the consumer constitute precisely the 'main subject-matter' of the contract; in the present case, moreover, those terms have to be regarded as being 'in plain intelligible language'. Furthermore, Article 1(2) of the Directive provides that '[t]he contractual terms which reflect mandatory statutory or regulatory provisions ... shall not be subject to the provisions of this Directive'. Therefore, even if they were unclear, the terms in question would in any event not be subject to the Directive, since the contract signed by Mr Fredout reproduces precisely model No 5 as prescribed by the legislature. That is so even though the order for reference makes no mention of this statutory origin of the model used by the terms at issue but instead seeks to link them to the Recommendation referred to above, (20) so as to attach them not to a model contract prescribed by law but to an instrument without any regulatory force. (21)

32. Turning to the alleged formal irregularities in the terms, Cofidis maintains that, on the basis of national case-law also, (22) there are no such irregularities in the standard contract which it used for Mr Fredout and in any case points out that the Tribunal d'instance has given no indication of which specific provision of the *Scrivener* Law has been infringed. In

any event, as regards the objection that the borrower's signature comes before, rather than after, the financial clauses placed on the back of the contract, Cofidis notes that, immediately above that signature, the following declaration can be found: '[the borrower] is aware of and declares that he accepts all the conditions on the front and back' of the contract.

B – *Assessment*

33. As we have seen, Cofidis and the French Government maintain that there is no connection between the Directive and the subject-matter of the main action because, firstly, the financial clauses of the contract made with Mr Fredout are neither unfair nor unclear and, secondly, the limitation period specified in Article L. 311-37 does not apply to disputes over the terms which are the subject of the Directive. The Court, they submit, is therefore not competent to give a ruling on the question raised.

34. On this, however, I must note that - as the French Government itself and the Commission have pointed out - the Court has consistently held that, within the context of collaboration between the Court of Justice and the national courts as established in Article 234 EC, 'it is for the national courts alone, which are seised of a case and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they refer to the Court. A reference for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action'. (23)

35. However, it appears to me that this latter situation does not apply here because, I feel, in no circumstances would the Court's reply to the question be patently irrelevant for the purposes of the decision by the court making the reference. It would obviously not be so were the Court to rule that the situation which is the subject-matter of the main action does fall within the scope of the Directive, but it would also not be irrelevant if the Court were to rule otherwise because, even to come to that conclusion, the Court would perforce have appraised the scope of the Directive and therefore, for that purpose, affirmed its own competence to rule on the question referred.

36. I therefore take the view that the Court is competent to answer the question referred for a preliminary ruling in the present proceedings.

IV - The question referred

A - *Applicability of the Directive*

37. Although, as I have just said, it is not relevant whether the Directive can apply here, for the purposes of the Court's competence to give a ruling on the question referred, I believe that it is relevant as regards the response to the substance of that question, indeed that it is a preliminary to that response. If it were in fact to turn out that the Directive does not apply to the situation in the main proceedings, the very basis of the question would founder and there would thus be no reason to answer it, unless indeed we sought to give a ruling that bears no relation to the actual nature of the case or the subject-matter of the main action.

38. That said, I note that this question has been put on the assumption that the financial clauses of the credit contract made between Cofidis and Mr Fredout are 'unfair' within the meaning of the Directive. Hence the reference to the Directive, which argues that the short limitation period provided in Article L. 311-37 for consumer-credit contracts is incompatible with the Directive because, it is assumed, that period is an obstacle to effective protection against such terms.

39. We must therefore examine first of all whether the present case does involve unfair terms because, if not, the Directive would simply not apply and so could not be relied upon to challenge application of the limitation period in Article L. 311-37. That is, in fact, how the Court proceeded in the judgment in *Océano Grupo Editorial* because, before proceeding to examine the substance of a question referred for preliminary ruling and also concerned with the Directive now under discussion, the Court first examined as a preliminary point whether the contested clause in the main proceedings could in fact be described as unfair under the Directive and, hence, whether the Directive could be applied. (24)

40. It seems to me that the question raised here must be answered in the negative: the documents on the case-file do not in any way indicate that, in setting the rates of contractual interest and of interest on late payment

and in providing a penalty for failure to repay the sums due, the financial clauses concerned are such as to cause, to the detriment of the consumer and contrary to good faith, 'a significant imbalance' in the rights and obligations of the parties within the meaning of Article 3(1) of the Directive. (25) I would add that those clauses simply do not correspond to any of the examples of unfair terms in the annex to the Directive, (26) unlike in the *Océano Grupo Editorial* case. (27) Principally, however, I must point out that the financial clauses are the 'main subject-matter' of a credit contract and that in such a case, under Article 4(2) of the Directive, assessment of their unfairness is precluded if they 'are in plain intelligible language', as happens to be the position here.

41. It is indeed true that, as I have noted above, the Tribunal d'instance held that the manner in which this contract was printed and the fact that the consumer's signature preceded the financial clauses made the contract and those clauses unclear or, at any rate, did not guarantee that the consumer was able to take full cognisance of them. I would, however, observe that in this case, as we see from the order for reference, there is no doubt as to the meaning to be attached to the financial clauses because, as I have said, they only set rates of interest and a penalty and there is not (nor have the parties or the Tribunal d'instance suggested) any uncertainty as to how much these are. (28) I would also point out that, from the copy of the contract attached to the statement from Cofidis, it is clear that the borrower's attention is drawn when signing to all the conditions on the front and the back of that contract and that the clauses relating to the total cost of the credit, shown on the back of the contract, are printed in bold type. In those circumstances, I do not think it is enough, in order to establish that the consumer could not have had effective knowledge of those clauses, to complain that they were unreadable because they were not printed in 'eight-point'; the reasons for this - as the documents in the case show - include the lack of unanimity even in French case-law on the size required for the relevant typeface. (29)

42. I must also note that, as Cofidis has contended, without contradiction, if this contract and, more particularly, its financial clauses do correspond to one of the model contracts prescribed by French law, there is further reason for the Directive not to apply, because Article 1(2) provides that '[t]he contractual terms which reflect mandatory statutory or regulatory provisions ... shall not be subject to the provisions of this Directive'

43. That having been made clear, although I agree that it is not for the Court to rule whether the two-year limitation period laid down in Article L. 311-37 also relates to a finding that clauses in standard contracts are unfair, I consider that the absence of unfair terms in this instance must lead to the conclusion that the situation which is the subject-matter of the main proceedings in this case falls outside the scope of the Directive.

44. From this it follows, in my view, that the Court should confine itself to answering along those lines and should not examine the substance of the question referred. However, I shall also consider it myself, in case the Court reaches different conclusions regarding the preliminary issue that I have just dealt with.

B - *On the substance of the question referred*

45. Assuming therefore that the Directive does also apply to the terms at issue in the main proceedings, the Tribunal d'instance asks essentially whether it must be construed as precluding a national provision which bars a national court, either of its own motion or upon a plea in defence by the consumer, from considering the unfairness of any term included within a standard contract once two years have elapsed since the time at which that contract was entered into.

1. Summary of the arguments of the parties

46. Whilst Cofidis and, to a certain extent, the French Government propose that the answer to the question should be in the negative, Mr Fredout, the Austrian Government and the Commission take the opposite view.

47. The former are primarily concerned to distinguish between the situation which is the subject-matter of the present proceedings and that giving rise to the judgment in *Océano Grupo Editorial* (30) since, in the latter, the Court ruled that '[t]he protection provided for consumers by [the] Directive ... entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts'. (31)

48. They point out that this ruling was made in respect of the very clear

instance of a term conferring jurisdiction which, by obliging the consumer to submit to the exclusive jurisdiction of the court for the place at which the seller or supplier had his principal place of business, had the effect of creating difficulties for the consumer to appear, and so to defend himself, in court. In permitting the national court to determine of its own motion whether such a term was unfair, the Court therefore simply acknowledged the national court's power itself to decline jurisdiction, which was already provided in French law in similar circumstances. In the present case, by contrast, it is necessary to assess whether or not to apply a particular limitation period imposed by the national legislature.

49. Cofidis and the French Government also maintain that, since neither the directive in question nor Directive 87/102 (which specifically relates to consumer credit), (32) includes provisions regarding limitation periods and that these are issues of procedure, the matter falls within the procedural independence of the Member States in this respect.

50. In this connection, Cofidis and the French Government refer to the case-law of this Court under which, where there are no specific Community rules, 'it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)'. (33)

51. In this connection, while Cofidis and the French Government have no doubt that Article L. 311-37 complies with the principle of equivalence, both dwell at greater length on the principle of effective protection, noting that the Court has accepted limitation periods of a year (34) or even of just 30 days (35) as being compatible with that criterion, so that the time-limit under Article L. 311-37 should certainly be regarded as reasonable, particularly since, firstly, the purpose of setting such time-limits is to safeguard the fundamental principle of legal certainty, which in this instance protects both the consumer and those operating as suppliers in the consumer-credit sector and, secondly, the time-limit prescribed under that provision applies simply to the possibility of alleging the formal irregularity

of a contract for which there is a statutory model.

52. Mr Fredout, however, argues entirely the opposite, starting from Article 6 of the Directive, which requires Member States to ensure that unfair terms shall not be binding on the consumer; he emphasises the judgment in *Océano Grupo Editorial*, pointing out that there the ability of the national court to determine of its own motion whether a term was unfair was in fact regarded as constituting a proper means by which to achieve that result. On the other hand, that result would assuredly not be achieved if a time-limit were placed on the court's ability of its own motion to determine whether a term was unfair with a view to ruling it null and void (and, hence, releasing the consumer from the obligations which it imposed). If that were in fact the case, the supplier or seller could avoid a ruling that terms were unfair simply by waiting until that limitation period expired before bringing the action for payment. Furthermore, greater importance attaches to a court's ability of its own motion to determine whether a term is unfair because, in most cases, actions relating to consumer-credit contracts are brought by the lender following failure to pay the loan, while the defendant usually does not appear or, if he does so, is often not assisted by a lawyer (36) and, therefore, does not have full knowledge of his rights under the rules on unfair terms. Nor would it be proper, in support of this limitation period, to rely on reasons of legal certainty because, among other things, the Court itself has ruled recently that such reasons 'cannot prevail since they imply a limitation of the rights expressly conferred on consumers'. (37)

53. The Austrian Government, for its part, interprets Article L. 311-37 to mean that, notwithstanding the arrangements of ordinary law, it imposes a specific limitation period for all disputes relating to consumer-credit contracts, including those on unfair terms. That said, and whilst acknowledging that the Directive leaves the Member States a considerable degree of manoeuvre as to the forms and means used to transpose Articles 6(1) and 7(1), (38) and that a limitation period enhances legal certainty, the Austrian Government none the less questions whether, given that it is an exception and that it is short, the results prescribed by those provisions can be achieved by means of that limitation period.

54. The Commission's interpretation of Article L. 311-37 is very similar to that of the Austrian Government. The Commission also refers to the judgment in *Océano Grupo Editorial*, pointing out that this interpretation

is valid generally and not - as Cofidis and the French Government have argued - limited to terms conferring jurisdiction; the national court must therefore always be able to determine of its own motion whether a contractual term is unfair. It follows, according to the Commission, that to impose a limitation period on its ability to do so conflicts with Article 6(1) of the Directive and with the objective of effective protection for consumers, and is also at variance with Article 7(1) of the Directive, which imposes on Member States a duty to provide adequate and effective means to prevent the continued inclusion of unfair terms in standard contracts. Furthermore, the Commission adds, if every Member State were allowed to impose a limitation period and, worse, a different limitation period on that ability, that would compromise the principle of uniform interpretation of directives, (39) as it would adversely affect in general the objective of harmonising national provisions and, more particularly, the objective, set out in Article 7 of the Directive, of providing adequate and effective means to prevent the continued inclusion of unfair terms.

2. Assessment

55. I would note that the national court's question to the Court is based on the assumption that the limitation period prescribed in Article L. 311-37 applies also when determining whether a term included in a consumer-credit contract is unfair and that expiry of that period precludes the consumer from pleading the unlawfulness of the term, and also prevents the courts from determining that of their own motion. However, as I have stated earlier, I shall not dwell on the soundness of that assumption because it involves questions of interpretation of national law which I do not believe are for this Court to consider; I shall only point out that, as is clear from the documents in the case, the solutions given in the question are anything but certain in French law. (40)

56. That said, I must note first of all that, in resolving the question, we find little help in the wording of the Directive, which is silent on the matter. It is true that this silence has itself been read as leaving the Member States free to set limitation periods; however, it is also true that the essential purpose of the Directive - which is stated in Article 6 - is that unfair terms should not be binding on consumers and that the task here is precisely to establish in this instance whether the application of a specific provision of French law prevents the Directive from pursuing the purpose stated.

57. From this point of view, I feel that *effective* protection of consumers in terms of Article 6 can be guaranteed only if it is accepted that it is possible to plead the unfairness of the term relied upon by the supplier in the action at any time, and thus without any limitation period. As has in fact been noted, because in the case in point the initiative of bringing an action to enforce the contract is left to the discretion of the lender, who is the supplier, he may delay doing so until the limitation period in question has expired, and thus nullify the protection which the Directive affords the consumer. Indeed, that is exactly what has happened in the proceedings from which the reference stems, in which the supplier, having brought the action against the borrower for payment of the sums owed, has then pleaded that expiry of the two-year period precluded any examination of the contractual clauses entitling him to payment.

58. The approach put forward regarding the supposition that a court may, of its own motion, consider whether a term is unfair seems even more clear. Indeed, I would note that, in the judgment in *Océano Grupo Editorial*, already cited several times, the Court states clearly that, in disputes concerning limited amounts, where there is a risk that the consumer may not be able to prepare a proper legal defence, the aim laid down by Article 6 of the Directive 'would not be achieved if the consumer were himself obliged to raise the unfair nature' of the terms and, hence, 'effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate [such terms] of its own motion'. (41) That is exactly what has happened in the main proceedings here, where the defendant consumer did not appear and the unfair nature of certain terms was raised by the Tribunal d'instance of its own motion.

59. I come now to the argument which, in view of the fact that the Directive is silent in this respect, asserts the freedom of Member States to make provision for the matter, advancing the principle of their procedural autonomy. I have to observe here that it is indeed undeniable that, where there are no specific Community rules, Member States are free to establish the detailed rules under which those concerned may claim the rights which the Community rules guarantee to them. But it is also true that, according to the case-law of the Court that I have cited, this freedom may only be exercised subject to the principles of equivalence and effectiveness of protection, to be considered in the light of the circumstances of individual cases. (42) In the light of what I have said earlier, it seems to me that to

impose a limitation period for the determination that a term in a contract is unfair, whether by a court of its own motion or following a plea by the consumer when defending an action, would constitute a barrier to protection of that consumer's rights and would thus infringe the principle of effective protection. (43)

60. Clearly, that conclusion also could not be challenged in principle by the fact that, in different circumstances, the Court has recognised the lawfulness of limitation periods shorter than the two years we are concerned with here. The Court actually reached that finding on the basis of an assessment of the effect which - in the particular circumstances that it took into account - the setting of such periods had on protection of the rights afforded to individuals by Community law and, more generally, on the effective application of Community law. Restricting myself to the same examples which Cofidis and the French Government have cited, (44) I note first of all that, in *Rewe* and *Comet* and also in *Palmisani*, this referred to periods for *bringing* an action based on Community law. However, it is clear that those periods were laid down for a different purpose, and therefore clearly justified by the requirements of legal certainty which generally apply in respect of such limitation periods. (45) In any case, we see from these rulings also that the limitation periods in question must be 'reasonable', that is to say, capable of serving the function for which they are intended and in accordance with the principle of effective protection. In the judgment in *Palmisani*, the Court has indeed made that requirement even more explicit, observing that the 'time-limit of one year commencing from the date of the entry into force of the measure transposing the Directive [80/987/EEC] into national law, which not only enables the beneficiaries to ascertain the full extent of their rights but also specifies the conditions under which loss or damage sustained as a result of the belated transposition [of that directive] will be made good, cannot be regarded as making it excessively difficult or, *a fortiori*, virtually impossible to lodge a claim for reparation'. (46)

61. I cannot see, therefore, how any argument can be derived from such rulings, which relate to circumstances differing from those obtaining in the present proceedings, and which in any case result from the individual assessment by the Court in each instance, to support the contention that the two-year limitation period laid down in Article L. 311-37 of the Code is compatible with the principle of effective protection, particularly since, as regards - *inter alia* - the limitation periods for bringing actions based on

Community law, the Court has not hesitated, as in the well-known *Barra* and *Deville* cases, to rule that they are incompatible once it has established that the national legislature laid them down in such a way as to prevent or specifically reduce the protection of rights afforded by Community law. (47) Similarly and more generally, in the *Peterbroeck* judgment, the Court declared unlawful a national procedural rule which prevented the court to which application was made from considering of its own motion claims based on Community law where those claims had not been raised by the party within a certain period, thereby making it impossible in practice to apply Community law. (48)

62. Nor do I consider it to be justified in the present case to invoke the principle of legal certainty in support of imposition of the limitation period, for that principle is also claimed to be imposed in the interests of the consumer. As we have seen, the expiry of this limitation period makes it possible validly to rely on an unfair term against the consumer; thus, if there are requirements of legal certainty, these in fact protect the seller or supplier relying on the term, and not the consumer, although he is - or should be - the person protected by the Directive. I would also point out that, in the *Heininger* judgment, the Court ruled that even reasons of legal certainty 'cannot prevail since they imply a limitation of the rights expressly conferred on consumers'. (49) Although that judgment did not in fact relate to a procedural time-limit, I feel that the reference is appropriate because, in that case also, the issue was to establish, in respect of the directive on contracts negotiated away from business premises, (50) whether a limitation period which, in that instance, prevented exercise of the right to cancel such a contract by a consumer not duly informed of that right made it possible to attain the result sought by the Directive. (51)

63. Finally, I do not believe that it is possible to underestimate the force of the argument used in particular by the Austrian Government and the Commission in pointing out that the fact that, in these circumstances, a consumer defending an action brought by the seller or supplier and the court to which the dispute is referred are recognised as having a right to challenge unfair terms that is unlimited in time may contribute to the gradual disappearance of such terms, because sellers and suppliers will increasingly be dissuaded from including them. Furthermore, the Court itself has had occasion to state, in the judgment in *Océano Grupo Editorial*, that the national court must have the power to determine of its own motion

whether a term is unfair because, among other things, 'such an examination ... may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers'. (52)

64. I therefore take the view that the answer to the question raised by the Tribunal d'instance must be in the affirmative.

V – Conclusion

65. In view of the foregoing, I propose that the Court should rule as follows:

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts does not apply to terms in a standard contract which reproduce mandatory or regulatory provisions.

66. In the alternative, that is to say, if the Court should hold that the Directive does apply to the financial clauses of the contract in question, I propose that it should rule as follows:

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts precludes a national provision which does not allow a national court, either of its own motion or following a plea raised by a consumer when defending an action, to determine whether any term included within a standard contract is an unfair term in the case where two years have elapsed since that contract was entered into.

1: - Original language: Italian.

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

3: - By a judgment of 26 January 2001, the national court rectified the wording of the question referred for a preliminary ruling as given in the judgment of 15 December 2000. For the purpose of clarity, I refer here only to the rectified text of the question.

4: -The national court is referring to Article 1304 of the Code civil (the Civil Code).

5: - Regarding this, the national court cites the judgment of 19 December 1995 of the First Civil Chamber of the Cour de cassation (Bull. Civ. 1, No 477).

6: - Decree No 78-509 of 24 March 1978.

7: - Like all the national legislation referred to in the text, this is not an official translation.

8: -Recommendation No 94-02 concerning contracts involving credit cards whether or not accompanied by credit, BOCC of 27 September 1994.

9: - See Articles L. 132-2 to L. 132-5 of the Code.

10: - However, it must be noted that the company bringing the action in the main proceedings disputes the application of this criterion, claiming that French case-law is

not unanimous on this point and indicates rather that the height of an 'eight-point' print character must be between 2 and 3 mm.

11: - In JORF (Official Journal of the French Republic) No 288 of 12 December 2001, p. 19703.

12: -Italics added to show the amendment.

13: - But see immediately above regarding the temporal scope of the amendment.

14: -See point 15, and footnote 8, above.

15: - In this connection, the national court cites the judgment of 15 December 1998 of the First Civil Chamber of the Cour de cassation (JCP 1999 II, No 10098), on a defence alleging fraud on the part of the plaintiff.

16: - Such a conclusion is contrary both to the wording of Article L. 311-37 and to the fact that the provisions relating to unfair terms and those relating to consumer-credit contracts constitute two separate categories of rules, with different scope and purpose.

17: - However, we have seen that the court making the reference considers the interpretation of Article L. 311-37 that the Cour de cassation gave in the judgment of 15 December 1998 to be relevant for its reconstruction (see above, point 26 and footnote 15).

18: - See above, points 20 and 21.

19: - See above, point 13.

20: - See above, point 15.

21: - On this, Cofidis cites the judgment of 13 November 1996 of the First Civil Chamber of the Cour de cassation (Bull. Civ. I, No 399).

22: - Cofidis cites, in particular, the ruling by the Cour de cassation of 25 April 1989 (in appeal No 87-15 791) that the *Scrivener* Law does not require the offer made to the consumer to be a 'slavish' copy of the models prescribed by the legislature but that it suffices if it contains all the particulars required by that law.

23: - Judgment in Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 18, where there are further citations.

24: - Judgment in Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraphs 21 to 24; I would point out that, in his Opinion, Advocate General Saggio also first of all addressed the preliminary matter of interpreting the Directive in order to clarify whether the term at issue in the main proceedings was actually unfair (see points 16 to 19).

25: - In the same sense, see *Océano Grupo Editorial* (paragraph 24 of the judgment and point 18 of Advocate General Saggio's Opinion).

26: - Even though the order for reference does mention the instance in point 'i' of the annex, that is of terms having the object or effect of 'irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract' (see above, at point 10), I find nothing whatever in the order to suggest that the contract between Cofidis and Mr Fredout included any term of the kind, particularly as regards the financial clauses.

27: - Paragraph 22 of the judgment.

28: - See above, point 26.

29: - See footnote 10.

30: - Cited in footnote 24.

31: - Operative part of the judgment.

32: - Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning

consumer credit (OJ 1987 L 42, p. 48, hereinafter 'Directive 87/102').

33: - Judgment in Case C-231/96 *Edis* [1998] ECR I-4951, paragraph 34; see also the judgments in Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5, in Case 45/76 *Comet* [1976] ECR 2043, paragraph 13, and in Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12.

34: - Judgment in Case C-261/95 *Palmisani* [1997] ECR I-4025.

35: - *Rewe* judgment, cited in footnote 33.

36: - Cases are often for such a small amount that there is no requirement of legal representation.

37: - Judgment in Case C-481/99 *Heininger* [2001] ECR I-9945, paragraph 47, with reference to Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31).

38: - Article 6(1) provides that Member States must lay down that unfair terms used in a standard contract are not binding on the consumer, while, under Article 7(1), Member States are required to provide adequate and effective means to prevent the continued inclusion of unfair terms in standard contracts.

39: - The Commission cites the judgment of the Court in Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 37.

40: - At least for consumer-credit contracts made before the entry into force of Law No 2001-1168, which amended Article L. 311-37 of the Code in this respect (see above, at point 28).

41: - Paragraph 26 of the judgment.

42: - In this sense, clearly, see the recent Opinion of Advocate General Alber in Case C-327/00 *Santex* [2003] ECR I-1877, point 88 et seq., where there are further references.

43: - With the exception of French law, in which there is the uncertainty which I discuss in this Opinion, I think it distinctly significant that in the other Member States no limitation period is imposed in regard to pleading the unfairness of terms included in standard contracts.

44: - That is to say, the periods of 30 days and one year, respectively (see point 51).

45: - See paragraph 5 of the *Rewe* judgment (subsequently cited in paragraph 28 of *Palmisani*) and paragraphs 17 and 18 of *Comet*; see also the Opinion delivered by Advocate General Warner on 30 November 1976 ([1976] ECR 2000, in particular at 2004).

46: - Paragraph 29 of the judgment (cited in footnote 34).

47: - Judgment in Case 309/85 *Barra and Others* [1988] ECR 355, paragraphs 18 and 19; judgment in Case 240/87 *Deville* [1988] ECR 3513, paragraph 18. More recently, but along the same lines, see the Opinion of Advocate General Geelhoed in Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, particularly point 62.

48: - See, in particular, paragraphs 18 to 21 of the judgment in *Peterbroeck* (cited in footnote 33).

49: - Paragraph 47 of *Heininger* (cited in footnote 37).

50: - Directive 85/577 (cited in footnote 37).

51: - I should point out in this regard that the third paragraph of Article 4 of Directive 85/577 provides that 'Member States shall ensure that their national legislation lays down appropriate consumer protection measures in cases where the information ... is not supplied' to consumers of their right to cancel the contract within the period laid down in Article 5 of that directive.

52: - Paragraph 28 of the judgment.

JUDGMENT OF THE COURT (Fifth Chamber)
21 November 2002

(Directive 93/13/EEC - Unfair terms in consumer contracts - Action brought by a seller or supplier - National provision prohibiting the national court from finding a term unfair, of its own motion or following a plea raised by the consumer, after the expiry of a limitation period)

In Case C-473/00,
REFERENCE to the Court under Article 234 EC by the Tribunal d'instance de Vienne (France) for a preliminary ruling in the proceedings pending before that court between

Cofidis SA

and

Jean-Louis Fredout,

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

THE COURT (Fifth Chamber),
composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans, D.A.O. Edward, A. La Pergola and P. Jann (Rapporteur), Judges,
Advocate General: A. Tizzano,

Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:
- Cofidis SA, by B. Célice, avocat,
- the French Government, by G. de Bergues and R. Loosli-Surrans, acting as Agents,
- the Austrian Government, by H. Dossi, acting as Agent,
- the Commission of the European Communities, by D. Martin and M. França, acting as Agents,
having regard to the Report for the Hearing,
after hearing the oral observations of Cofidis SA, represented by B. Soltner, avocat; Mr Fredout, represented by J. Franck, avocat; the French Government, represented by R. Loosli-Surrans; and the Commission, rep-

resented by M. França, at the hearing on 17 January 2002,

after hearing the Opinion of the Advocate General at the sitting on 18 April 2002,

gives the following

Judgment

1. By judgment of 15 December 2000, rectified by judgment of 26 January 2001, received at the Court on 27 December 2000 and 29 January 2001 respectively, the Tribunal d'instance de Vienne (District Court, Vienne) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29, 'the Directive').

2. That question was raised in proceedings between Cofidis SA, a company incorporated under French law, and Mr Fredout concerning the payment of sums due under a credit contract concluded between them.

Legal background

Community legislation

3. According to Article 1 of the Directive:

1. The purpose of this 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.

2. The contractual terms which reflect mandatory statutory or regulatory provisions ... shall not be subject to the provisions of this Directive.

4. Article 3(1) of the Directive provides:

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

5. Article 4 of the Directive defines how the unfair nature of a term is to be assessed. Article 4(2) provides: Assessment of the unfair nature of the terms 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 supplies in exchange, on the other, in so far as these terms are in plain intelligible language.

6. Under Article 6(1) of the Directive:

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

7. Under Article 7(1) of the Directive:

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.

National legislation

8. The provisions on unfair terms are in Book I ('Information for consumers and formation of contracts'), Title III ('General conditions of contracts'), Chapter 2 ('Unfair terms'), of the Code de la consommation (Consumer Code).

9. Article L. 132-1 of that code, in the version of Law No 95-96 of 1 February 1995 concerning unfair terms and presentation of contracts, defines what is to be understood by 'unfair terms' and states that they are to be 'deemed not written'. According to the national court's judgment, that is equivalent to nullity, which, in accordance with the general rules on contracts, may be made the subject-matter of an action within five years and pleaded as a defence without time-limit.

10. Article L. 311-37 of the Code de la consommation, to which the national court's judgment refers, is in Book III ('Debt'), Title I ('Credit'), Chapter 1 ('Consumer credit'), of the code. That chapter lays down *inter alia* precise formal rules.

11. The first paragraph of Article L. 311-37 of the Code de la consommation provides:

The Tribunal d'instance shall have jurisdiction to hear disputes arising

from the application of this chapter. Actions brought before it must be raised within two years of the event which gave rise to them and are otherwise time-barred ....

The main proceedings and the question referred for a preliminary ruling

12. By a contract of 26 January 1998, Cofidis granted Mr Fredout the opening of a credit. When instalments remained unpaid, Cofidis brought an action against him on 24 August 2000 in the Tribunal d'instance de Vienne for payment of the sums due.

13. According to the national court's judgment, the offer of credit took the form of a leaflet printed on both sides, with the words "Free application for money reserve" in large letters on the front, while the references to the contractual interest rate and a penalty clause were in small print on the reverse. The Tribunal d'instance de Vienne therefore concluded that "the financial clauses ... lack legibility" and that "that lack of legibility is to be contrasted with the word free" ... in a particularly obvious form', which was likely to mislead the consumer. Its conclusion was that 'the financial clauses may be regarded as unfair.

14. However, as the dispute was one concerning a consumer credit transaction, the Tribunal d'instance de Vienne considered that the limitation period of two years under Article L. 311-37 of the Code de la consommation applied and prevented it from annulling the terms it had found to be unfair.

15. In those circumstances, the Tribunal d'instance de Vienne decided to stay the proceedings and refer the following question to the Court for a preliminary ruling.

'Since the protection conferred by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts implies that a national court, applying provisions of national law previous or subsequent to that directive, is to interpret them so far as possible in the light of the wording and purpose of the latter:

Does that requirement of an interpretation in conformity with the system of consumer protection under the directive require a national court, when hearing an action for payment brought by a seller or supplier against a consumer with whom he has contracted, to set aside a procedural rule on pleas in defence, such as that in Article L. 311-37 of the Code de la consommation, in so far as it prohibits the national court, either on the

application of the consumer or of its own motion, from annulling any unfair term which vitiates the contract where the latter was made more than two years before the commencement of proceedings, and in so far as it thereby permits the seller or supplier to rely on those terms before a court and base its action on them?'

The question referred for a preliminary ruling

16. By its question the national court essentially asks whether the protection conferred on consumers by the Directive precludes a national provision which, in proceedings brought by a seller or supplier against a consumer on the basis of a contract concluded between them, prohibits the national court, on expiry of a limitation period, from finding, of its own motion or following a plea raised by the consumer, that a term of the contract is unfair.

Admissibility

17. Cofidis and the French Government express doubts as to the relevance of the question for the outcome of the main proceedings and hence the admissibility of the reference for a preliminary ruling.

18. Cofidis submits that the terms held to be unfair by the national court are not within the scope of the Directive. As financial terms in a credit contract, they relate to the definition of its main subject-matter. They are therefore excluded from the scope of the Directive under Article 4(2). The terms in question cannot be accused of lack of clarity, since they merely reproduce a model contract drawn up by the national legislature, which under Article 1(2) of the Directive is not subject to its provisions.

19. Cofidis further submits that the national court was wrong to hold that the limitation period provided for in Article L. 311-37 of the Code de la consommation concerning consumer credit applies in the field of unfair terms. The French Government observes that that question is indeed in doubt and that the French Cour de cassation (Court of Cassation) has not yet had occasion to rule on the point.

20. In this respect, it is settled case-law that, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the

dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. A request from a national court may be dismissed only where it is obvious that the interpretation of Community law or the consideration of the validity of a Community rule requested by that court has no bearing on the real situation or on the subject-matter of the case (see, *inter alia*, Case C-318/98 *Fornasar and Others* [2000] ECR I-4785, paragraph 27, and Joined Cases C-223/99 and C-260/99 *Agorà and Excelsior* [2001] ECR I-3605, paragraphs 18 and 20).

21. In the present case, the national court considers that some of the financial terms printed in the credit contract it has to rule on are vitiated by lack of clarity and comprehensibility. That is said to be connected with the use on the printed form used by the credit establishment of wording of an advertising nature giving the impression that the transaction is free of charge, which the national court regards as having been such as to mislead the consumer.

22. It should be observed that, in that they do not merely reflect mandatory statutory or regulatory provisions and are criticised as being ambiguous, it is not obvious that the terms in question are outside the scope of the Directive, as defined by Articles 1(2) and 4(2).

23. To fall within the scope of the Directive, however, those terms must satisfy the conditions set out in Article 3(1) of the Directive, that is, they must not have been individually negotiated and must, 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. Although the national court has not provided any information on the latter point, it cannot be excluded that that condition is satisfied.

24. As to the question whether or not the limitation period under Article L. 311-37 of the Code de la consommation applies to unfair terms, that is a question of national law which as such is not within the jurisdiction of the Court.

25. In those circumstances, it is not obvious that the question referred

has no bearing on the real situation or on the subject-matter of the main proceedings.

26. It follows that the reference for a preliminary ruling is admissible. It must therefore be answered, on the basis that the terms which the national court regards as unfair satisfy the criteria defined in Articles 1(2), 3(1) and 4(2) of the Directive.

Substance

27. Cofidis and the French Government argue, first, that the present case is to be distinguished from Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941. They submit that, by allowing a national court to determine of its own motion whether a jurisdiction clause is unfair, the Court merely allowed it to decline jurisdiction. In the present case, however, the question is whether or not the court must apply a limitation period laid down by the national legislature.

28. Cofidis and the French Government submit, second, that in the absence in the Directive of any provision concerning a limitation period the question of the application of such a period is covered by the principle of procedural autonomy. It is therefore for the national legal system of each Member State to regulate the procedural rules governing the actions which are to ensure respect for the rights which individuals derive from the Directive, in compliance with the principles of equivalence and effectiveness. The Court has on several occasions ruled that limitation periods shorter than the two-year period under Article L. 311-37 of the Code de la consommation are compatible with those principles (Case 33/76 *Rewe* [1976] ECR 1989 and Case C-261/95 *Palmisani* [1997] ECR I-4025).

29. Mr Fredout submits that the judgment in *Océano Grupo Editorial and Salvat Editores* should be interpreted broadly. He argues that in that judgment the Court regarded the national court's power to determine of its own motion the illegality of an unfair term as a means of achieving the result laid down in Article 6 of the Directive of ensuring that unfair terms do not bind the consumer. That result cannot be achieved if that power is subject to a time-limit. In the case of consumer credit contracts, the majority of actions are brought by the lender, and he would merely have to wait for the expiry of that time-limit to bring an action for payment, thus

depriving the consumer of the protection conferred by the Directive.

30. The Austrian Government, while accepting that the Directive leaves the Member States a wide margin of appreciation and that a limitation period may contribute to legal certainty, submits that, having regard to the extinctive effect of the time-limit and the shortness of the period in question, it is doubtful whether it allows the result prescribed by Article 6 and 7 of the Directive to be attained.

31. The Commission, which likewise supports a broad interpretation of *Océano Grupo Editorial and Salvat Editores*, submits that fixing a time-limit for the court's power to find of its own motion that an unfair term is illegal is contrary to the objectives of the Directive. To allow the Member States to introduce such time-limits, which might differ from each other, would also be contrary to the principle of the uniform application of Community law.

32. It must be noted that the Court ruled in paragraph 28 of *Océano Grupo Editorial and Salvat Editores* that the court's power to determine of its own motion whether a term is unfair constitutes a means both of achieving the result sought by Article 6 of the Directive, namely preventing an individual consumer from being bound by an unfair term, and of contributing to achieving the aim of Article 7, since if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers.

33. That power of the court has been regarded as necessary for ensuring that the consumer enjoys effective protection, in view in particular of the real risk that he is unaware of his rights or encounters difficulties in enforcing them (*Océano Grupo Editorial and Salvat Editores*, paragraph 26).

34. The protection which the Directive confers on consumers thus extends to cases in which a consumer who has concluded with a seller or supplier a contract containing an unfair term fails to raise the unfair nature of the term, whether because he is unaware of his rights or because he is deterred from enforcing them on account of the costs which judicial proceedings would involve.

35. It is therefore apparent that, in proceedings aimed at the enforcement of unfair terms brought by sellers or suppliers against consumers, the fixing

of a time-limit on the court's power to set aside such terms, of its own motion or following a plea raised by the consumer, is liable to affect the effectiveness of the protection intended by Articles 6 and 7 of the Directive. To deprive consumers of the benefit of that protection, sellers or suppliers would merely have to wait until the expiry of the time-limit fixed by the national legislature before seeking enforcement of the unfair terms they would continue to use in contracts.

36. A procedural rule which prohibits the national court, on expiry of a limitation period, from finding of its own motion or following a plea raised by a consumer that a term sought to be enforced by a seller or supplier is unfair is therefore liable, in proceedings in which consumers are defendants, to render application of the protection intended to be conferred on them by the Directive excessively difficult.

37. That interpretation is not contradicted by the fact that, as Cofidis and the French Government submit, the Court has on several occasions ruled that limitation periods shorter than that at issue in the main proceedings are not incompatible with the protection of rights conferred on individuals by Community law (*Rewe* and *Palmisani*). It need only be pointed out that each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances (Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 14). The *Rewe* and *Palmisani* decisions cited by Cofidis and the French Government are thus merely the result of assessments on a case by case basis, taking account of each case's own factual and legal context as a whole, which cannot be applied mechanically in fields other than those in which they were made.

38. In those circumstances, the answer to the national court's question must be that the protection conferred on consumers by the Directive precludes a national provision which, in proceedings brought by a seller or supplier against a consumer on the basis of a contract concluded between them, prohibits the national court, on expiry of a limitation period, from finding, of its own motion or following a plea raised by the consumer, that a term of the contract is unfair.

Costs

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

On those grounds,
THE COURT (Fifth Chamber),
in answer to the question referred to it by the Tribunal d'instance de Vienne by judgment of 15 December 2000, rectified by judgment of 26 January 2001, hereby rules:

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts precludes a national provision which, in proceedings brought by a seller or supplier against a consumer on the basis of a contract concluded between them, prohibits the national court, on expiry of a limitation period, from finding, of its own motion or following a plea raised by the consumer, that a term of the contract is unfair.

Delivered in open court in Luxembourg on 21 November 2002.

Wathelet
Timmermans
Edward
La Pergola
Jann

R. Grass
M. Wathelet

Registrar
President of the Fifth Chamber