OPINION OF ADVOCATE GENERAL MISCHO

delivered on 14 June 2001 [1]

1. In Joined Cases C-541/99 and C-542/99, the Giudice di Pace di Viadana, Italy, raises three questions concerning the meaning of the term 'consumer' in Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [2] (the 'Directive').

I — The provisions of Community law before the Court

2. The purpose of the Directive, according to Article 1(1), 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.

3. Under Article 2(b) of the Directive, 'consumer' means any natural person who, in contracts covered by the Directive, is acting for purposes which are outside his trade, business or profession.

4. 'Seller or supplier' is defined in Article 2(c) of the Directive as any natural or legal person who, in contracts covered by the same Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.

II — The main proceedings

5. The undertakings Cape Snc ('Cape') and OMAI Srl ('OMAI') both installed vending machines on their premises supplied by Idealservice Srl ('Idealservice') for the exclusive use of their employees. In proceedings brought by Idealservice, established in Viadana, before the Giudice di Pace di Viadana, Cape and OMAI rely, in the context of an application to set aside a payment order, on the nullity of the term conferring exclusive territorial jurisdiction included in Idealservice's contracts under the provisions of Italian law purporting to transpose Article 3(3) of the Directive. They claim that the term relating to choice of jurisdiction is unfair within the meaning of Article 1469*bis*(19) of the Italian Civil

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

Code and, consequently, inoperative between the parties under Article 1469 *quinquies* of the same code.

6. The order for reference emphasises that the parties pleading the unfair nature of the term concluded the contracts for supply at issue solely to make available to their employees certain products, namely drinks, which fall outside the normal business activity of the two undertakings.

7. In both cases, Idealservice challenges those objections, contending that the other parties may not be considered as consumers for the purposes of the application of the legislative rules concerning unfair terms. First, companies and not natural persons are involved and, second, they signed the contracts at issue in the course of their business activities.

8. The national court states that the provisions of the Italian Civil Code, the interpretation of which affects its jurisdiction to entertain the two actions in question, constitute transposition of the Directive. In particular, the terms 'seller or supplier' and 'consumer' referred to in Article 1469 *bis* of the Italian Civil Code literally transcribe Article 2 of the Directive.

III — The national court's questions

9. Considering that the outcome of the proceedings before it depends on the interpretation of provisions of Community law, the national court stayed proceedings and, by orders of 12 November 1999, referred the following questions to the Court of Justice:

'(1) Is it possible to regard as a consumer an undertaking which, by a contract with another undertaking using a form produced by the latter in so far as the contract falls within the scope of its normal business activity, acquires a service or merchandise for the sole benefit of its employees which is wholly unconnected with and remote from its normal trade and business; can it be said in such circumstances that that party acted for purposes which do not relate to the undertaking?

(2) If the foregoing question is answered in the affirmative, is it possible to regard any party or entity as a consumer when it is acting for purposes not relating or conducive to its normal trade or business, or does the term consumer relate only to natural persons, to the exclusion of any other?

(3) Can a company be regarded as a consumer?'

IV — Findings

10. It appears appropriate to begin by considering the second and third questions in which the national court asks, essentially, whether the term 'consumer' refers exclusively to natural persons.

11. I share the view of the French and Italian Governments and that of the Commission and Idealservice that those questions should be answered in the affirmative.

12. As the Commission explains, Article 2(b) of the Directive 'provides specifically that "any natural person" must be regarded as a consumer. By contrast, Article 2(c), defines the term seller or supplier by referring both to natural persons and legal persons. Therefore, it appears from a straightforward reading of the provision at issue that the term consumer relates exclusively to natural persons and does not include companies or more generally, legal persons.'

13. That interpretation appears to be further confirmed by the objective of the Community legislation at issue. As the Court noted in *Océano Grupo Editorial and Salvat Editores*,[3] 'the system of protection introduced by the Directive [93/13] is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.'

14. The intention to protect a category of persons in a weak position, and only that category of persons, is confirmed in the twelfth recital and Article 3 of the Directive, under which only contractual terms which have not been individually negotiated are covered by the Directive.

15. One can reasonably maintain, as the Commission does, that it is specifically the category of persons not acting for purposes of their trade, business or profession that is in a weaker and unstable contractual position as compared with the sellars or suppliers referred to in Article 2(c) of the Directive.

3 — Joined Cases C-240/98 to C-244/98 [2000] ECR I-4941, paragraph 25.

16. By contrast, legal persons and companies [4] do not generally find themselves in that weaker position and there is therefore no reason to grant them protection which, as an exception to contractual freedom, must, moreover, be strictly interpreted.

17. It should be added that in its case-law relating to Article 13 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, the Court of Justice interpreted the term 'consumer' as meaning a '*private* final consumer' [5] or as referring to an 'individual', [6] which necessarily implies that a natural person is concerned.

18. That case-law appears relevant to the present case, the objective of Article 13 et seq. of the Convention being essentially the same as that of the Directive. In *Shearson Lehman Hutton*, the Court held that 'the special system established by Article 13 et seq. of the Convention is inspired by the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract'. [7]

19. The Spanish and French Governments also refer to their national laws which, in certain circumstances, extend the protection given by the Directive to consumers, to legal persons or to traders. Essentially, they are calling on the Court to declare that the Directive does not preclude such extensions of protection. In fact that appears to be the situation if one considers the wording of Article 8 of the Directive.

20. Clearly, those requests go beyond the scope of the present action. The question asked by the national court relates to the term 'consumer' used in Article 2(b) of the Directive. By contrast, there is no indication that, in order to be able to dispose of the main proceedings, that court should be informed of the circumstances in which Member States may, where necessary, extend the protection provided by the Directive to persons other than consumers, such as legal persons or traders.

21. I propose that the Court's answer to the national court should be that Article 2(b)

4 — It was explained at the hearing that general partnerships under Italian law do not have legal personality.

5 — Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139, paragraph 22, emphasis added.

6 — Case C-269/95 *Benincasa* [1997] ECR I-3767, paragraph 17.

7 — Paragraph 18.

of the Directive must be interpreted as meaning that the term 'consumer' refers only to natural persons.

22. That answer is sufficient to enable the national court to dispose of the main proceedings. It follows clearly from the order for reference that the two parties claiming the status of 'consumer' are companies.

23. In view of the answer to the second and third questions, it appears to me to be difficult to give a useful answer to the first question, in which the national court asks whether an undertaking that acquires a service or merchandise for the sole benefit of its employees, where that benefit is wholly unconnected with and remote from its normal trade and business, acts for purposes relating to the undertaking.

24. By that question, the national court seeks an interpretation of the term '[to act] for purposes which are outside his trade, business or profession' which is part of the definition of 'consumer' included in Article 2(b) of the Directive.

25. As the judgment in *Di Pinto* [8] shows, it would seem difficult to provide an interpretation of that concept disregarding the fact that the person who 'acts' is a natural person.

26. In *Di Pinto*, the Court interpreted the term 'consumer' in Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises. [9] In that directive, the 'consumer' is defined as being 'a natural person who, in transactions covered by this directive, is acting for purposes which can be regarded as outside his trade or profession'.

27. The Court ruled that a trader canvassed with a view to the conclusion of an advertising contract concerning the sale of his business was not to be regarded as a consumer, noting that those acts which he had referred to were 'managerial acts performed *for the purpose of satisfying requirements other than the family or personal requirements of the trader*'. [10]

8 — Case C-361/89 [1991] ECR I-1189.

9 — OJ 1985 L 372, p. 31.

10 — *Di Pinto*, paragraph 16, emphasis added.

28. The reference to 'family or personal requirements' shows that the status of the consumer as a natural person affects the meaning of terms such as '[to act] for purposes which can be regarded as outside his trade or profession', in Directive 85/577, or '[to act] for purposes which are outside his trade, business or profession', referred to in Directive 93/13.

29. I therefore propose that no answer be given to the first question.

V — Conclusion

30. I propose that the Court give the following answer to the Giudice di Pace di Viadana as follows:

Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts is to be interpreted as meaning that the term 'consumer' refers only to natural persons.