OPINION OF ADVOCATE GENERAL ALBER

delivered on 26 November 1998 *

A — Introduction

1. In this reference for a preliminary ruling, the Juzgado de Primera Instancia No 22 de Valencia (Court of First Instance No 22, Valencia) has referred to the Court questions concerning the applicability of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1] to a time-share contract concluded in a holiday complex in Denia — located 100 km from Valencia — at the invitation of a company having its seat in Valencia.

2. According to the court referring the questions for a preliminary ruling, the contract made on 14 September 1996 between Travel Vac, S. L. (hereinafter 'Travel Vac') and a consumer, Mr Manuel José Antelm Sanchís, covered rights to use immovable property on a time-share basis as well as services and other purely contractual obligations. At the invitation of Travel Vac — a company having its place of business in Valencia — the consumer travelled to Denia to conclude the contract. The national court also states that the value of the immovable property itself amounted to ESP 285 000 whilst the total value amounts to ESP 1 090 000.

3. As is evident from the contract submitted by the national court, the property in question was a 1/51 ownership share in an apartment in a holiday complex in Denia, granting an exclusive right of enjoyment during the 19th week of each year. The ownership of the apartment was thus regarded as being divided into 51 shares, each of these shares conferring a right of use during a certain week of the year, with the rest of the year (that is to say, week 52) being set aside for maintenance. Under the terms of the contract, the balance (that is to say, the total price less the value of the immovable property) included value added tax, time-share rights to furniture and affiliation to R. C. I. (Resorts Condominium International). As a member of that organisation, a time-share owner could exchange his respective time-share and use all the shared facilities of the complex.

4. The contract further provided that, in the event of failure to pay on the due date, compensation in the amount of 25% of the total value of the transaction plus interest *inter alia* would become payable. This sum would be payable even if the consumer had, in a binding

* Original language: German.

1 — OJ 1985 L 372, p. 31.

document, exercised his right of renunciation which he had for a period of seven days.

5. According to the national court, the consumer did not appear at the agreed stipulated meeting at the bank on 17 September 1996 (three days after the contract was signed) to sign the confirmation. Instead, on that same day, he went to the vendor's office in Valencia where he declared orally that it was all off and that the documents he had signed were to be returned to him.

6. Travel Vac finally lodged an application for enforcement of the contract against the customer, resulting in the main proceedings.

7. The national court points out that Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a time-share basis [2] (hereinafter 'Directive 94/47') does not apply to the present case, as it provides for a transposition period of 30 months, so that it would only have had to be incorporated into national law by April 1997, whereas the contract at issue in the present case dates from 1996. The court nevertheless considers that another directive (Directive 85/577) might apply to the contract at issue in these proceedings as it not only relates to time-share rights to a property but also constitutes a contract negotiated away from business premises. Unlike the specific provisions of Directive 94/47, Directive 85/577 contains general provisions relating to contracts negotiated away from business premises. Directive 85/577 continues in force save in so far as it does not conflict with the specific provisions contained in Directive 94/47.

8. On those grounds, the national court has referred the following questions to the Court for a preliminary ruling:

(1) Are time-share contracts generally, and the contract at issue in the present case (page 76 in the case-file) in particular, to be regarded as falling within the scope of Article 3(2)(a) of Directive 85/577/EEC, which contains provisions excluding the application of that directive?

(2) Even if, by virtue of that article, the contract at issue in the present case, being a time-share contract, is excluded from the application of that directive, could such exclusion be precluded by the fact that the contract is not concerned solely with

2 — OJ 1994 L 280, p. 83.

immovable property but also involves the provision of services and other matters relating exclusively to the fulfilment of obligations (clause 3) which account for the greater part of the consideration payable (inasmuch as the value of the immovable property itself amounts to ESP 285 000 out of the total contract value of ESP 1 090 000)?

(3) Is the complex of holiday time-share flats offered to consumers in the town of Denia covered by the first indent of Article 1(1) of Directive 85/577, having regard to the fact that the premises of Travel Vac, S. L. are located at 5-6° Calle Profesor Beltrán Báguena, Valencia?

(4) Is the right of renunciation granted to the consumer by Article 5(1) of the directive based on a presumption that the exercise of his free will has been affected or manipulated as a result of the circumstances referred to in Article 1 of the directive; if so, to what extent does that right of renunciation, as guaranteed by the directive, arise from the deliberate deceit on the part of the vendor in using, as one of the contracting parties, 'false pretences which induce the other to enter into a contract which would not otherwise have been concluded' (Article 1269 of the Spanish Civil Code) and, generally, from the freely given consent which necessarily forms part of any contract (Articles 1254, 1258, 1261 et seq. of the Spanish Civil Code)?

(5) Must the notice provided for by Article 5(1) of the directive be given expressly, or can it, where appropriate, take the form of specific unequivocal acts such as, in the present case, the non-appearance of the consumer at the time stipulated and agreed for the signature of the confirmation on the Bank's premises, on 17 September 1996, three days after signature of the contract appearing on page 76 in the case-file, the consumer's position being evidenced and made clear by his appearance in the vendor's premises in Valencia on the same day, 17 September 1996, when he stated orally that 'it was all off and that the documents which he had signed were to be returned to him'?

(6) Are the provisions of Article 7 of the directive concerning repayments, return of goods and other effects arising in favour of the vendor upon the exercise by the consumer of his right of renunciation pursuant to Article 5 compatible with a stipulation to pay 'compensation for damage caused to the vendor' in the form of a lump sum quantified at 25% of the total price of the transaction, as laid down in clause 4 of the contract (on the reverse of page 76 in the case-file)?

The relevant European Community legislation

9. Article 1(1) of Directive 85/577 provides that the directive is to apply to 'contracts under which a trader supplies goods or services to a consumer and which are concluded:

— during an excursion organised by the trader away from his business premises, or

...'.

10. Article 3(2), however, excludes certain types of contract from the scope of the directive. Accordingly, the directive does not apply to:

'(a) contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property.

...'.

11. The consumer's right of renunciation — also mentioned in the questions referred — is governed by Article 5:

'1. The consumer shall have the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from receipt by the consumer of the notice referred to in Article 4, in accordance with the procedure laid down by national law. It shall be sufficient if the notice is dispatched before the end of such period.

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

12. Article 6 provides that the consumer may not waive the rights conferred on him by the directive. The legal effects of exercising the right of renunciation are set out in Article 7. This provides:

'If the consumer exercises his right of renunciation, the legal effects of such renunciation shall be governed by national laws, particularly regarding the reimbursement of payments for goods or services provided and the return of goods received.'

Observations of the parties

13. Travel Vac, the plaintiff in the original proceedings, considers that the contract at issue here does not fall within the scope of application of Council Directive 85/577. In support of this view, it refers to deliberations within the Commission. On the question whether or not the directive should apply to immovable property and rights in immovable property, it was clear that time-share contracts and multiple ownership did not fall within the scope of the directive. In order to introduce specific rules for time-sharing activities, Council Directive 94/47 was adopted. It is not applicable in this case, however since at the relevant time it had not been transposed into national law and did not need to be. Travel Vac thus does not comment on the remaining questions referred to the Court.

14. The consumer, the defendant in the original proceedings, on the other hand, considers that time-share contracts do not confer rights in immovable property. Such agreements merely concern services to be provided by the trader. Furthermore, it may be assumed that the contract at issue in the present case was concluded during an excursion organised by the trader since Travel Vac had fixed the date and venue unilaterally. The fact that the consumer was not taken to the place where the contract was concluded in a vehicle hired by the trader is not relevant in this context. Nor can the venue chosen for the signing be regarded as business premises, as it consisted of large function rooms in the holiday complex.

15. The Spanish Government considers that it is not quite clear from the contract itself whether the vendor in the contract is Travel Vac or a company having its place of business in Denia. It is very likely, according to the Spanish Government, that the contract was concluded in a room arranged by the vendor for the purposes of marketing its product in close proximity to the holiday complex. If one takes into account this material factor, there can be no doubt that the contract was concluded on the trader's business premises. The Spanish Government nevertheless considers that Directive 85/577 is applicable, as it also aims to provide protection in cases where the consumer is induced to attend the business premises of the trader in order to conclude the contract there.

16. The Commission and the national court consider that Directive 85/577 is to be applied as a general standard to contracts negotiated away from business premises. The Commission considers that the present case is one such case, as the contract concerns not only rights in immovable property but also the provision of services. Moreover, given its protective object, Article 1(1), which defines the scope of application of the directive, should be interpreted broadly. The directive, therefore, also applies in cases where the trader invites the consumer to a specified venue where products and services will be offered and displayed in a certain way. The Commission takes the view that in the present case this venue does not constitute the trader's business premises.

B — Opinion

17. The first three questions referred by the national court concern the applicability of Directive 85/577 to the present case and in particular to the contract concluded in the present case.

Questions 1 and 2

18. These concern the question whether the contract at issue in the present case is covered by the exclusions provided for by the directive and therefore does not come within the scope of application of the directive. As mentioned above, a directive on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a time-share basis was adopted in 1994. It may thus be doubtful, given the existence of this directive, whether Directive 85/577 on doorstep sales nevertheless applies to the present contract, being a contract concerning the right to use immovable property on a time-share basis. It must be borne in mind here that at the time of conclusion of the contract Directive 94/47 had not yet been incorporated into Spanish law, nor had the deadline for its incorporation expired. It is therefore evident, and undisputed, that Directive 94/47 does not apply to the contract now in question.

19. The Commission, on the other hand, considers that if the contract at issue in the present case satisfies all the criteria required to come within the scope of application of Directive 85/577, it would certainly apply here as a general standard.

20. This argument must be accepted. Both directives are concerned primarily with the protection of consumers, as is evident from the titles of the directives themselves. Recital 8 in the preamble to Directive 94/47 provides, moreover: '... in order to give purchasers a high level of protection and in view of the specific characteristics of systems for using immovable properties on a time-share basis, contracts for the purchase of the right to use one or more immovable properties on a time-share basis must include certain minimal items'. According to Article 1, the purpose of this directive is to 'approximate the laws, regulations and administrative provisions of the Member States on the protection of purchasers in respect of certain aspects of contracts relating directly or indirectly to the purchase of the right to use one or more immovable properties on a time-share basis.'

21. Directive 94/47 is thus intended to protect a consumer who purchases rights to use immovable properties on a time-share basis. Directive 85/577, on the other hand, affords the consumer protection not primarily because he purchases certain goods but because of the way in which the goods are purchased or the contract concluded. It applies, in particular, to contracts concluded away from the

business premises of a trader. The 'special feature of [such] contracts ... is that as a rule it is the trader who initiates the contract negotiations, for which the consumer is unprepared ...; ...the consumer is often unable to compare the quality and price of the offer with other offers'. [3] The directive thus affords the consumer protection where this 'surprise element' [4] is present.

22. The present case concerns a contract relating to rights to use immovable properties on a time-share basis. The consumer should thus enjoy a certain degree of protection. Should this contract also satisfy the requirements of Directive 85/577, however (in other words, should it be a contract concluded away from business premises), this too would call for a certain level of protection for the consumer concluding the contract. Thus, in the present case, the consumer would qualify for protection on the basis of both situations — involving a time-share contract and a doorstep contract — which are here combined. The fact that the time-share contract may have been concluded away from business premises as defined in Directive 85/577 makes the consumer even more in need of protection and therefore all the more worthy of protection.

23. If one followed the reasoning of the plaintiff, who argues that the contract at issue here falls solely within Directive 94/47, it would mean that the consumer would enjoy no protection in the present case, because the transaction concluded was also concluded away from business premises. The fact that an additional factor makes him even more vulnerable and thus all the more worthy of protection would result in the required protection being denied altogether. This would, however, go against the purpose and intention of both directives.

24. The plaintiff further cites the different time periods which the directives allow the consumer to consider whether to renounce the contract. The plaintiff considers that this is to the consumer's disadvantage. The logic of this argument is not quite evident. The fact that the basic principles of two directives which confer a certain degree of protection on the consumer might both be applicable to a particular contract cannot result in the consumer being denied all protection. Should both directives apply, at most a decision would need to be made as to which of the two applies to the given facts. Since, however, it is common ground that Directive 94/47 does not apply, the latter question does not fall to be decided in the present case.

25. It should be pointed out moreover that the directive on doorstep sales does not grant the consumer a longer period of reflection than Directive 94/47. On the contrary, Article 5(1) of Directive 85/577 provides for a period

3 — Fourth recital in the preamble to Directive 85/577.

4 — Fourth recital in the preamble to Directive 85/577.

of at least seven days, while Directive 94/47 allows ten days. [5] In this context, it must also be pointed out that both directives only provide for a minimum level of protection for consumers, so that the Member States could very well provide for longer periods. [6] Directive 85/577 thus provides that consumers must enjoy at least a minimum level of protection in the case of doorstep sales. This cannot be denied the consumer on the ground that he cannot yet enforce a right to protection provided for by another directive.

26. Moreover, neither of the directives contains any provision expressly excluding the applicability of the other directive. Furthermore, Directive 94/47 contains no provisions covering time-share contracts concluded away from business premises. Nor does the directive on doorstep sales expressly provide that it does not apply to time-share contracts.

27. It is conceivable, however, that Article 3(2)(a) of Directive 85/577 might result in such a delimitation or exclusion. The plaintiff considers this to be the case, citing deliberations within the Commission. There is no evidence, however, of this being the content of deliberations within the Commission. The wording of Article 3(2)(a) is quite general. Whether it is supposed to include time-share contracts, in particular, is not evident from the directive itself. Rather, one needs to examine the features of the time-share contract in order to determine whether that form of contract falls within the provisions of Article 3(2)(a). This is all the more true as so-called 'time-share contracts' are not contracts whose features can be clearly defined. Directive 94/47 itself draws attention to the fact that the directive is designed to regulate neither 'the extent to which contracts for the use of one or more immovable properties on a timeshare basis may be concluded in Member States [nor] the legal basis for such contracts'. [7] Thus, the question of whether or not Directive 85/577 applies to time-share contracts will depend, according to the provisions of Article 3(2)(a) of the directive, on the features of the relevant contract.

28. At this point it is appropriate to point out that in the context of a referral for a preliminary ruling, answers cannot be given to hypothetical questions but only in relation to the circumstances of the concrete case, [8] that is to say, in the present case, not in relation to time-share contracts in any form at all, but in relation to the specific contract concluded between the parties to the main proceedings. If that contract fulfils the conditions of Article 3(2)(a), Directive 85/577 will not apply to it, regardless of whether or not it is described as a time-share contract. From that point of

5 — Article 5(1).

6 — Article 11 of Directive 94/47; Article 8 of Directive 85/577; this is also evident in the wording of Article 5(1), which provides for a period of 'not less than 7 days'.

7 — Fourth recital in the preamble to Directive 94/47.

8 — Judgment in Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, at paragraph 18.

view, Questions 1 and 2 are to be dealt with together.

29. According to the court referring the questions, the contract at issue in the present proceedings concerns not only rights to use immovable properties on a time-share basis, but also services and other purely contractual obligations, whose value is higher than that of the immovable property rights. The contract is to be considered and characterised as a whole, although attention should be paid to the effect of the different elements. One could thus exclude the contract altogether from the scope of Directive 85/577 on the grounds that it confers rights to use immovable property on a time-share basis. The legal nature of such time-share rights is determined by the Member States and can differ very widely from one Member State to another. [9] It is fair to assume, however, that they are at least 'other rights to immovable property' within the meaning of Article 3(2)(a) of Directive 85/577. The Spanish Government, incidentally, has also adopted this classification.

30. On the other hand, one must bear in mind that, economically, the major part of the contract comprises services and other contractual obligations. Spain and the Commission therefore rightly conclude that the contract at issue here is not excluded from the scope of the directive by the provisions of Article 3(2)(a).

9 — Third recital in the preamble to, and Article 1(3) of, Directive 94/47.

31. This would also appear to come closest to achieving the protective object of the directive. Consumers who conclude, away from business premises, contracts concerning mainly rights other than rights to immovable property should be able to claim the protection conferred by the directive.

32. The defendant goes one step further and submits that time-share contracts generally relate only to services. Their object is to enable immovable property to be enjoyed through services rendered by its owner or by the trader. The latter draws up appropriate schedules, permits the use of the apartment, and maintains and furnishes it. Furthermore, continues the defendant, time-share contracts do not relate to the use of a single property but to the use of several properties. The conclusion of such a contract is more like joining a club by acquiring a share. Again, it has to be remembered that it is not time-share contracts in general which are at issue here, but the contract in point in the present case.

33. The defendant looks at the contract as a whole, that is to say he does not consider the individual components but the whole contract including the services. He regards these as being of overriding and decisive importance. However, it does not follow that no form of immovable property right is acquired at all. Even if the defendant relies on the case-law of the Spanish courts which, in the absence of a statute, governs time-share contracts, the interpretation given by national courts cannot be conclusive for the

application of a Community directive. As previously stated, the interpretation and form of time-share contracts under national law may vary from one Member State to another and differences in application of Directive 85/577 would thus result. This would conflict with the aim of the directive, which is precisely to approximate the different rules of the Member States. [10] Moreover, it should also be noted that the terms of the contract underlying the judgment cited by the defendant are not known. Furthermore, even the definition of contracts relating to the acquisition of time-share rights which is given in Directive 94/47 assumes that 'a real property right or any other right relating to the use' of one or more immovable properties is established or is the subject of a transfer or an undertaking to transfer. [11]

34. That means that there is a transfer of a right to use immovable property and, consequently, of an 'other right' relating to immovable property. Accordingly, one could, as the defendant suggests, consider whether such real property rights can be neglected in the context of the overall structure of the contract.

35. The result is, therefore, in relation to Article 3(2)(a), that as far as the contract at issue in the present case is concerned, it must be determined whether the real property rights are of limited significance, both in terms of their content and having regard to the whole contract. In economic terms, this question can be answered in the affirmative in the present case. Whether this can also be said for the other aspects must be determined by the national court in the light of the circumstances of the case.

36. Given that, in financial terms at least, the services and other contractual obligations under the contract at issue in the present case predominate, it can be assumed that the contract is not excluded from the scope of Directive 85/577 by Article 3(2)(a).

37. In answering the second question, the defendant raises a further consideration, namely whether the contract at issue in the present proceedings, being a contract concerning services, is excluded from the scope of application of Directive 85/577 by Article 3(2)(c). It would be outside its scope of application if three conditions are satisfied, of which the first is most relevant in the present case. This provides: 'the contract is concluded on the basis of a trader's catalogue which the consumer has a proper opportunity of reading in the absence of the trader's representative.' If the consumer was given such a catalogue at all, he certainly was not given a proper opportunity of reading it. The other two conditions relate to maintaining continuity of contact between the trader's representative and the consumer, and the need to inform the consumer both *in the catalogue* and in the contract of his right to return the goods to the supplier during the prescribed period or otherwise to cancel the contract. In the present

10 — Second recital in the preamble to Directive 85/577.

11 — Article 2, first indent.

case, these requirements are probably not satisfied either.

38. It must therefore be concluded that the contract at issue in the present case is not excluded from the scope of application of Directive 85/577 by virtue of Article 3(2).

Question 3

39. The national court has narrowed the question down to asking whether the holiday complex comes within Article 1(1), first indent, of Directive 85/577. It is appropriate at this point, however, to examine the whole of Article 1(1), first indent, in order to determine whether the contract at issue in the present case meets all the requirements for coming within the scope of this directive.

40. To do so, it must be a contract concluded away from business premises between a trader who supplies goods or provides services and a consumer. In this context, the Spanish Government raises the question who actually concluded the contract as vendor. It is true that, in addition to the defendant in the main proceedings, the other party named in the contract is José Francisco Laparra Estellés, acting on behalf of a Swiss company having a branch in Denia, Spain. On the other hand, the contract was concluded using one of Travel Vac's standard forms and was also signed for and on behalf of Travel Vac.

41. The national court, which ultimately must examine this question, refers in its order requesting a preliminary ruling to a contract concluded between the parties. The parties in the main proceedings are named as Travel Vac and the consumer. Moreover, given that in Question 3 relating to Article 1(1), Travel Vac's place of business is mentioned, it can probably be assumed that the contract was concluded between the defendant in the main proceedings and Travel Vac.

42. The latter is incontestably a trader for the purposes of the directive. As mentioned above, the contract concluded by Travel Vac relates, *inter alia*, to the provision of services.

43. As regards the other contracting party, namely the defendant in the main proceedings, the national court provides no further details. One can assume, however, that he is incontestably considered to be a consumer within the meaning of the directive. However, this point must ultimately be determined by the national court.

44. Pursuant to Article 1(1), first indent, a contract within the meaning of Directive 85/577 must be concluded during an excursion organised by the trader away from his business premises. The first point to note is that the consumer travelled from Valencia to Denia, covering a distance of 100 km. It can therefore probably be assumed that the contract was concluded during an excursion.

45. It is not clear, however, whether this excursion was organised by the trader. According to the national court, the consumer was invited to Denia by the trader. As is evident from the pleadings, the journey itself was not made in a vehicle hired by Travel Vac.

46. The defendant rightly points out in this context that the date, time and venue, or rather the intended destination of the excursion, were fixed by the trader. The consumer had to comply with these instructions; the time of the meeting was not agreed or discussed between the parties. The event which took place in Denia was also organised by the trader. Thus, the only thing which Travel Vac did not organise was the drive to Denia.

47. The Commission further points out that the pleadings of the consumer show (and apparently this is not disputed) that the consumer repeatedly received letters urging him to travel to Denia as a matter of urgency to receive a luxurious gift which would be presented to him solely on the basis of his attendance and without any obligation. These letters were followed by numerous telephone calls urging the consumer to take part in the sales events in the holiday complex. If that is so — a point which the national court must investigate — it can be assumed that the consumer was pressed into going to Denia.

48. If we now consider the protective aim of Directive 85/577, as described in the fourth recital in the preamble, [12] it can be concluded that it is clearly the trader who took the initiative in the contract negotiations. The fourth recital in the preamble goes on to refer to a surprise element which exists where the consumer is unprepared for the contract negotiations. It is not clear from the facts provided by the national court to what extent the consumer was aware of the programme for the planned sales event. Accordingly, it is for the national court to examine whether there was a necessary surprise element in the contractual negotiations. What one can say from the information before the Court is that this was not an ordinary appointment for a customer meeting, especially as the sales event itself was not in the forefront, given that mere attendance was to be rewarded by a gift.

12 — See point 21.

49. A further requirement pursuant to Article 1(1) is that the contract must have been concluded away from the trader's business premises. As mentioned above, the place of business of the trader, in this case Travel Vac, is in Valencia. According to the defendant, the contract was signed in large function rooms which the trader had arranged for the purposes of presenting its product to a large number of consumers. The event apparently went on for several hours. During the course of the event, gifts were distributed and alcoholic beverages offered, presumably in order to put consumers in a positive mood and encourage them to sign.

50. If these facts are accurate, such an environment cannot be regarded as constituting business premises, contrary to the view taken by the Spanish Government. The consumer would not see them as such either, thus increasing the surprise element already mentioned. It would be different if the company had itself set up a branch or sales office in the tourist resort. According to the information provided, these were merely normal rooms within the holiday complex.

51. It can therefore be concluded that the contract was not signed in the context of a normal meeting with a client in an office, but, according to the information before the Court, in an atmosphere in which it was impossible to reflect calmly about concluding a contract. As the consumer was probably not informed of this in advance, it can be assumed that the contract falls within Article 1(1) of Directive 85/577, and that, due to his unpreparedness, the consumer was given no opportunity to compare the quality and price of the offer with other offers. Nor did he have the opportunity to review all the implications of his acts. The protective purpose of the directive, however, is to give him the opportunity to do precisely that. This is what was held in the judgment in the *Dietzinger* case (also cited by the Spanish Government):

'Directive 85/577 is designed to protect consumers by enabling them to withdraw from a contract concluded on the initiative of the trader rather than of the customer, where the customer may have been unable to see all the implications of his act.' [13]

Accordingly, the consumer is entitled to the protection afforded by the directive.

Question 4

52. The justification for the right of renunciation conferred by Article 5(1) of Directive 85/577 is set out in the fourth and fifth recitals

13 — Judgment in Case C-45/96 *Bayerische Hypotheken- und Wechselbank* v *Edgar Dietzinger* [1998] ECR I-1199, at paragraph 19.

in the preamble to that directive. There it is assumed that generally the initiative does not come from the consumer, that he is not prepared for the contract negotiations and that he has no opportunity to compare the offer with other offers. The right of renunciation is intended to give him the opportunity to reflect once again on his obligations under the contract. [14] If these factors are present — that is to say, if the contract comes within the scope of application of the directive — this is sufficient to afford a right of renunciation. No further proof (of manipulation of will, for instance) is required. This corresponds to the wording of Article 5(1), which gives no reason for, nor places any conditions on, the right of renunciation.

53. So the directive has regard, not to the behaviour of the trader, but to the circumstances in which the contract is concluded and to the situation of the consumer. It is conceivable that these circumstances might be such as to give the trader the opportunity to manipulate the consumer's free will or to represent the product as being better than it is. This need not be shown, however, in order for the right of renunciation to be exercised.

54. As regards the national court's reference to provisions of national law, it must be pointed out that no interpretation of national law can be made in proceedings for a preliminary ruling. It may, however, be concluded that Directive 85/577 does not establish a connection between the actions of the trader and the availability of the right of renunciation. Certainly, there may be deceptive practices on the part of the trader, intended to surprise the consumer and prevent him from fully considering the implications of concluding the contract. This need not necessarily be so, however, nor is it a requirement for the right of renunciation, for which only the objective circumstances described in Article 1(1) need be shown.

55. The same applies to contractual consent. The consumer does not need to show that his freedom of decision was impaired. It is sufficient to show circumstances which enable or enabled the consumer's freedom of decision to be restricted.

56. The Commission rightly points out in this regard that it is for the national court to determine that the requirements set out in national law are fulfilled. The sanctions attached to these criteria by national law may be applied cumulatively, in addition to the right of renunciation conferred by the directive.

14 — Fifth recital in the preamble.

Question 5

57. In this question, the national court refers to the formal requirements for giving notice of renunciation provided for by Article 5(1). As regards the giving of notice, Article 5(1) refers expressly to the procedure and conditions laid down by national law. If the notification complies with national law, it will also be acceptable under the directive. Formulating the requirements is thus a matter for the national legislature. As regards the time-limit, the last sentence of Article 5(1) does state, however, that '[i]t shall be sufficient if the notice is *dispatched* before the end of such period'. [15] This might lead one to conclude that the notification must at least be in writing. One must bear in mind, however, that in Directive 85/577, the emphasis is on protecting the consumer. If he has clearly indicated his wish to renounce the contract, the directive will certainly not deny him a right of renunciation merely because the notice was not given in writing. Given the protective aim of the directive, the consumer is certainly not meant to be aware of the contents of the directive and to know that under the directive notice must be given in writing, especially as the directive does not prevent the Member States from adopting or maintaining more favourable consumer protection provisions in the area of this directive. [16] It is quite possible, therefore, for a Member State to allow notice to be given by means of clear actions, in order to make it easier for the consumer to assert his right of renunciation. One must consider, however, whether such a provision actually makes things easier for the consumer as it would probably be more difficult to prove renunciation through clear actions. On the other hand, the formal requirements relating to the giving of notice of renunciation must not be formulated in such a way that it becomes so difficult to exercise a right of renunciation that such a right practically ceases to exist.

Question 6

58. This question concerns the compatibility with the directive of the clause in the contract providing for the payment of a lump sum as compensation for damage caused to the vendor quantified at 25% of the total price of the transaction, such being payable not only in the event of non-performance of the contract but also in the event of a renunciation. Such a clause is not compatible with the directive. First of all, non-performance of the contract cannot be equated with the consumer's exercise of the right of renunciation conferred on him by law.

59. Secondly, Article 5(2) of the directive provides that, in the event of renunciation, the consumer is to be released from all obligations arising under the cancelled contract. So, after renouncing the contract, the consumer no longer has any obligations in respect of which he might be liable to pay damages

15 — In the French-language version of the directive, the sentence reads: 'Il suffit que la notification soit *expédiée* avant l'expiration de celui-ci'. (My emphasis in both cases.)

16 — Article 8 of Directive 85/577.

for non-performance. Such 'damages' would be tantamount to a penalty for renunciation. This, too, would be totally contrary to the protective aim of the directive, which is to prevent the consumer from taking on financial obligations without properly considering their implications.

60. On the other hand, payments already made must be reimbursed and goods already provided must, naturally, be returned. This is provided for by Article 7 of the directive where reference is made to the laws of the Member States. In this context, there may also be provisions relating to the payment of damages in respect of loss suffered by the plaintiff. But it must be borne in mind here that the plaintiff alone initiated the contract negotiations and that the plaintiff should therefore bear the risk of non-conclusion of the contract. Under no circumstances can an agreement to pay damages in the form of a *lump sum* quantified at 25% of the original price be considered compatible with the directive where the consumer has duly renounced the contract.

C — Conclusion

61. On the basis of the preceding considerations, I propose the following answer be given to the questions submitted for a preliminary ruling:

— The contract concluded between Travel Vac and Mr M. J. Antelm Sanchís concerning rights to use immovable property on a time-share basis is not excluded from the scope of application of Directive 85/577/EEC under Article 3(2)(a) of that directive as it also covers, in addition to the time-share rights, services and other purely contractual obligations which are, at least in terms of their value, greater than the rights relating to immovable property.

— A holiday complex in which a contract is concluded and which is located 100 km away from the place of business of the contracting company is not to be regarded as business premises for the purposes of Article 1(1), first indent, of Directive 85/577 if the company has not established a permanent office there, but has only rented a large function room in order to present its product to a number of consumers as part of an organised event. Whether the facts of the present case fit those requirements is for the national court to determine.

— The basis for the right of renunciation conferred by Article 5(1) of Directive 85/577 is the fact that a contract was concluded at the trader's initiative away from his business premises. No particular behaviour or intention to manipulate is required on the part of the vendor and consequently no such behaviour or intention need be shown, nor any restriction on consent.

— The formal requirements for the giving of notice pursuant to Article 5(1) of Directive 85/577 are to be found in the general rules of the Member States. However, notice need not necessarily be given in writing. Moreover, under Article 8 of Directive 85/577 Member States may adopt or retain more favourable consumer protection provisions.

— The legal consequences of renunciation pursuant to Article 7 of Directive 85/577 and, in particular, the reimbursement of payments and the return of goods supplied concern the reversal of benefits already provided and, where appropriate, compensation for proven loss. They are not compatible with a *fixed* amount of compensation in respect of the loss suffered by the vendor.