JUDGMENT OF THE COURT (Fourth Chamber)

14 June 2001 *

In Case C-207/00,

Commission of the European Communities, represented by K. Banks and L. Pignataro, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by U. Leanza, acting as Agent, and I.M. Braguglia, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council

* Language of the case: Italian.

Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1997 L 202, p. 60), specifically Article 1(1) amending Article 1(c) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23); Article 1(2) which replaces Article 2 of Directive 89/552 with the exception of Article 2(3), (4), (5) and (6); Article 1(3) which inserts Article 2a into Directive 89/552; Article 1(4) which incorporates Article 3a(3) in Directive 89/552; Article 1(12), which replaces Article 10 of Directive 89/552, with the exception of Article 10(2); Article 1(14) which amends the first sentence of Article 12 of Directive 89/552; Article 1(15) which replaces Article 13 of Directive 89/552; and lastly Article 1(18) which adds a paragraph 2 to Article 16 to Directive 89/552, the Italian Republic has failed to fulfil its obligations under that directive,

THE COURT (Fourth Chamber),

composed of: A. La Pergola, President of the Chamber, D.A.O. Edward (Rapporteur) and S. von Bahr, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 29 March 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 25 May 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1997 L 202, p. 60), specifically Article 1(1) amending Article 1(c) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23); Article 1(2) which replaces Article 2 of Directive 89/552 with the exception of Article 2(3), (4), (5) and (6); Article 1(3) which inserts Article 2a into Directive 89/552; Article 1(4) which incorporates Article 3a(3) in Directive 89/552; Article 1(12), which replaces Article 10 of Directive 89/552, with the exception of Article 10(2); Article 1(14) which amends the first sentence of Article 12 of Directive 89/552; Article 1(15) which replaces Article 13 of Directive 89/552; and lastly Article 1(18) which adds a paragraph 2 to Article 16 to Directive 89/552, the Italian Republic has failed to fulfil its obligations under that directive.

Community legislation

2 Directive 89/552 establishes the legal framework for television broadcasting activities in the internal market.

3 Article 26 of Directive 89/552 provides:

'Not later than the end of the fifth year after the date of adoption of this Directive and every two years thereafter, the Commission shall submit to the European Parliament, the Council, and the Economic and Social Committee a report on the application of this Directive and, if necessary, make further proposals to adapt it to developments in the field of television broadcasting.'

4 Pursuant to that provision, Directive 97/36, which amends Directive 89/552 by clarifying certain definitions or obligations of the Member States, was adopted on 30 June 1997.

5 The first subparagraph of Article 2(1) of Directive 97/36 provides:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 31 December 1998. They shall immediately inform the Commission thereof.'

6 More specifically, Article 1(1) to (4), (12), (14), (15) and (18) of Directive 97/36 amended Articles 1, 2, 10, 12, 13 and 16 of Directive 89/552 and inserted new Articles 2a and 3a.

7 Article 1(c) of Directive 89/552, as amended by Article 1(1) of Directive 97/36, states:

'For the purpose of this Directive:

...

(c) "television advertising" means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment.'

8 Article 2(1) and (2) of Directive 89/552, as amended by Article 1(2) of Directive 97/36, provides:

'1. Each Member State shall ensure that all television broadcasts transmitted by broadcasters under its jurisdiction comply with the rules of the system of law applicable to broadcasts intended for the public in that Member State.

2. For the purposes of this Directive the broadcasters under the jurisdiction of a Member State are:

— those established in that Member State in accordance with paragraph 3;

— those to whom paragraph 4 applies.'

9 Article 2(a) of Directive 89/552, introduced by Article 1(3) of Directive 97/36, provides:

'1. Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive.

2. Member States may, provisionally, derogate from paragraph 1 if the following conditions are fulfilled:

(a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22(1) or (2) and/or Article 22a;

(b) during the previous 12 months, the broadcaster has infringed the provision(s) referred to in (a) on at least two prior occasions;

(c) the Member State concerned has notified the broadcaster and the Commission in writing of the alleged infringements and of the measures it intends to take should any such infringement occur again;

(d) consultations with the transmitting Member State and the Commission have not produced an amicable settlement within 15 days of the notification provided for in (c), and the alleged infringement persists.

The Commission shall, within two months following notification of the measures taken by the Member State, take a decision on whether the measures are compatible with Community law. If it decides that they are not, the Member State will be required to put an end to the measures in question as a matter of urgency.

3. Paragraph 2 shall be without prejudice to the application of any procedure, remedy or sanction to the infringements in question in the Member State which has jurisdiction over the broadcaster concerned.'

10 Article 3a of Directive 89/552, introduced by Article 1(4) of Directive 97/36, provides in paragraph (3):

'Member States shall ensure, by appropriate means, within the framework of their legislation that broadcasters under their jurisdiction do not exercise the

exclusive rights purchased by those broadcasters following the date of publication of this Directive in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events which are designated by that other Member State in accordance with the preceding paragraphs via whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage on free television as determined by that other Member State in accordance with paragraph 1.'

11 Article 10 of Directive 89/552, as amended by Article 1(12) of Directive 97/36, states:

'1. Television advertising and teleshopping shall be readily recognizable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.

2. ...

3. Advertising and teleshopping shall not use subliminal techniques.

4. Surreptitious advertising and teleshopping shall be prohibited.'

12 Article 12 of Directive 89/552, as amended in Article 1(14) of Directive 97/36, subjects teleshopping to the same restrictions as television advertising.

13 Article 13 of Directive 89/552, as amended by Article 1(15) of Directive 97/36, provides:

'All forms of television advertising and teleshopping for cigarettes and other tobacco products shall be prohibited.'

14 Lastly, Article 16(2) of Directive 89/552, as amended by Article 1(18) of Directive 97/36, provides:

'2. Teleshopping shall comply with the requirements referred to in paragraph 1 and, in addition, shall not exhort minors to contract for the sale or rental of goods and services.'

Prelitigation procedure

15 The Commission considered that Directive 97/36 had not been implemented in Italian law within the prescribed period. It therefore initiated the infringement procedure under the first paragraph of Article 226 EC. It sent a letter of formal notice on 12 March 1999 asking the Italian Republic to submit its observations on the matter.

16 By letter of 29 March 1999 the Italian Government transmitted to the Commission the text of a Government amendment to Draft Law A.S. No 1138 then being debated in the Italian Senate ('Draft Law A.S. No 1138'). Then, by letter of 14 June 1999 it communicated a copy of the decreto (decree) of the Minister for Telecommunications of 8 March 1999 entitled 'disciplinare per il rilascio delle concessioni per la radiodiffusione privata televisiva su frequenze terrestri, in ambito nazionale' (rules on the issue of licences for private television broadcasting on terrestrial frequencies at national level) (GURI, No 59 of 12 March 1999) which, according to the Italian Government, implemented Directive 97/36 in national law.

17 The Commission took the view that that decree did not contain any provision capable of being regarded as implementation of Directive 97/36. On 4 August 1999 it sent a reasoned opinion to the Italian Republic asking it to take the measures necessary to comply with the opinion within two months of its notification.

18 The Italian Government replied to the reasoned opinion on 9 August 1999. It referred to its letter of 14 June 1999 and sent it a further copy of the Decree of 8 March 1999. On 22 November 1999 the Italian Minister for Telecommunications also sent the Commission a summary of the Italian regulatory framework concerning the implementation in national law of Directive 89/552, as amended by Directive 97/36, highlighting the implementation provisions provided for in Draft Law A.S. No 1138 which was still being examined by the Italian Parliament.

19 Since it took the view that the directive had still not been implemented, the Commission decided to bring the present action.

Arguments of the parties

20 It is not disputed that the Italian Republic was obliged, before 30 December 1998, to take the necessary measures at national level to comply with Directive 97/36 and to inform the Commission thereof forthwith.

21 The Commission maintains that the Decree of 8 March 1999 contains no provision capable of being regarded as implementation of Directive 97/36, and that its subject-matter clearly falls outside the scope of that Directive.

22 More specifically, the Commission states that Draft Law A.S. No 1138 provides for implementation of several provisions of Directive 97/36 but that since that draft law has not been adopted the following provisions have not yet been implemented:

— Article 1(c) of Directive 89/552, as amended by Article 1(1) of Directive 97/36;

— Article 2(1) and (2) of Directive 89/552, as amended by Article 1(2) of Directive 97/36, the other paragraphs having in the Commission's view been correctly implemented;

— Article 2a of Directive 89/552, as incorporated by Article 1(3) of Directive 97/36;

— Article 3a(3) of Directive 89/552, as inserted by Article 1(4) of Directive 97/36;

— Article 10(1), (3) and (4) of Directive 89/552, as amended by Article 1(12) of Directive 97/36, Article 10(2) having in the Commission's view been correctly implemented;

— Article 12 of Directive 89/552, as amended by Article 1(14) of Directive 97/36, inasmuch as it regulates teleshopping;

— Article 13 of Directive 89/552, as amended by Article 1(15) of Directive 97/36; and

— Article 16(2) of Directive 89/552, as amended by Article 1(18) of Directive 97/36.

23 Pointing to the Member States' obligations under the third paragraph of Article 249 EC, Article 10 EC and Article 2(1) of Directive 97/36, the

Commission maintains that the Italian Republic has failed in those obligations by not adopting, within the prescribed period, the measures necessary to implement the above provisions of the said directive in its national law.

24 The Italian Government does not dispute the fact that it has not implemented Directive 97/36 within the prescribed period. In its defence, it states that the Commission's complaint concerns only the failure to implement some provisions of Directive 97/36, since the other provisions have been correctly implemented.

Assessment by the Court

25 It should be remembered that, under the first paragraph of Article 10 EC, the Member States are to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EC Treaty or resulting from action taken by the institutions of the Community. Such action includes directives which, pursuant to the third paragraph of Article 249 EC, are binding as to the result to be achieved upon each Member State to which they are addressed. That obligation involves, for each Member State to which a directive is addressed, the adoption, within the framework of its national legal system, of all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues (see Case C-97/00 *Commission* v *France* [2001] ECR I-2053, paragraph 9).

26 The Italian Government states that it has presented to the Senate the amendments necessary to bring Draft Law A.S. No 1138 into line with Directive 97/36 and that it expects that the draft will be rapidly approved.

27 According to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see Case C-147/00 *Commission* v *France* [2001] ECR I-2387, paragraph 26).

28 Even where the default has been remedied after the time-limit given in the reasoned opinion has expired, there is still an interest in pursuing the action in order to establish the basis of liability which a Member State may incur, as a result of its default towards other Member States, the Community or private parties (see, *inter alia*, Case C-29/90 *Commission* v *Greece* [1992] ECR I-1971, paragraph 12).

29 In this case the reasoned opinion allowed the Italian Republic a period of two months from notification to comply therewith. Since the reasoned opinion was notified on 4 August 1999, the prescribed period expired on 4 October 1999. That is therefore the material date for the purpose of assessing the alleged failure to fulfil obligations.

30 It is clear from the documents before the Court that Draft Law A.S. No 1138, including the Government amendments designed to introduce the provisions of Directive 97/36 that have not yet been implemented, was not adopted before expiry of the period prescribed in the reasoned opinion. As for any subsequent amendments to the Italian legislation, they are irrelevant for the purpose of giving judgment on the subject-matter of this action (see Case C-433/93 *Commission* v *Germany* [1995] ECR I-2303, paragraph 15).

31 Accordingly it must be concluded that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with Articles 1(c), 2(1) and (2), 2a, 3a(3) and 10(1)(3) and (4), Article 12, inasmuch as it regulates teleshopping, and Articles 13 and 16(2) of Directive 89/552, as amended by Directive 97/36, the Italian Republic has failed to fulfil its obligations under that directive.

Costs

32 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Italian Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fourth Chamber),

hereby:

1. Declares that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with Arti-

cles 1(c), 2(1) and (2), 2a, 3a(3) and 10(1)(3) and (4), Article 12, inasmuch as it regulates teleshopping, and Articles 13 and 16(2) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, the Italian Republic has failed to fulfil its obligations under that directive.

2. Orders the Italian Republic to pay the costs.

La Pergola Edward von Bahr

Delivered in open court in Luxembourg on 14 June 2001.

R. Grass

Registrar

A. La Pergola

President of the Fourth Chamber