OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 23 January 2001 [1]

I — Introduction

1. In the present action, brought by the European Commission under Article 169 of the EC Treaty (now Article 226 EC), the Court of Justice is called upon to determine whether the obligation incumbent upon the Kingdom of the Netherlands to transpose into national law Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29; hereinafter 'the Directive') may be deemed to have been discharged by virtue of the fact that the Netherlands Civil Code already contains provisions allegedly in conformity with the Directive. In particular, the Court has been asked whether certain provisions in that Code relating to obligations and contracts in general achieve the result sought by Articles 4(2) and 5 of the Directive, specifically in the light of the relevant Netherlands case-law.

1 — Original language: Italian.

II — The legal background

A — *The Community legislation*

2. The Directive seeks to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer (Article 1(1)), its main aim being to protect the consumer in cases where terms of that nature have been inserted in contracts concluded with a 'seller or supplier', that is to say, with 'any natural or legal person who, in contracts covered by [the] Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned' (Article 2(c)). After defining the concept of 'unfair terms' (Article 3), the Directive provides that such terms are not to be binding upon consumers (Article 6).

3. For present purposes, however, Articles 4(2) and 5 of the Directive are especially relevant. Article 4 provides guidance as to how to assess whether or not a contractual term is unfair and 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 supplied in exchange, on the other, in so far as these terms are in plain intelligible language.'

4. However, 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. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7(2).'

Article 7(2) requires the Member States to introduce legislation under which persons or consumer associations may apply to the national courts or the competent administrative authorities for a ruling as to whether particular standard contractual terms are unfair, and for the application of appropriate measures to prevent the continued use of those terms.

5. Under Article 10(1) of the Directive, Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive no later than 31 December 1994. In addition, Article 10(2) provided that '[w]hen Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication'.

B — *The national legislation*

6. Book III of the Netherlands Civil Code sets out the general rules of property law; Book VI covers obligations and general contracts; and Books VII and VIII govern specific types of contract.

7. Although in the course of the proceedings, the Netherlands Government has relied on various provisions of the Civil Code, the parties subsequently focused their attention exclusively on the provisions quoted hereunder (unofficial translation):

— Article 35 of Book III

'The fact that a statement made by a person or conduct on his part does not faithfully reflect his intentions is no defence against another person who has understood that statement or conduct as addressing to him a statement to particular effect where, in the light of the circumstances, that is a reasonable inference.'

— Article 228 of Book VI

'1. A contract drawn up on the basis of a misunderstanding and which, but for that misunderstanding, would not have been concluded may be cancelled:

(a) if the misunderstanding is attributable to information provided by the other party, unless that party could reasonably have supposed that the contract would have been concluded even in the absence of that information;

(b) if, having regard to its actual or required state of knowledge regarding the misapprehension, the other party were under a duty to enlighten the party misled;

(c) if, at the time when the contract was concluded, the other party proceeded on the basis of the same misapprehension as the party in error, save where the other party, even if possessed of a correct understanding of the situation, could not have been expected to realise that, but for the misunderstanding, the party in error would not have concluded the contract.

2. A contract may not be cancelled on the ground of an error relating exclusively to a future circumstance, or of an error which falls to be regarded as attributable to the party in error, having regard to the the nature of the contract, to any views generally shared by the parties and to the other circumstances of the case.'

— Article 231 of Section III ('Standard Terms') of Book VI

'In this section:

(a) "standard terms" shall mean one or more terms, expressed in writing with a view to their inclusion in a number of contracts, other than terms which describe the material contractual obligations;

(b) "user" shall mean the person who employs standard terms in contracts;

(c) "the other party" shall mean the person who has consented, in writing or otherwise, to the use of standard terms.'

— Article 233 of Book VI

'A clause constituting one of the standard terms of a contract may be declared void:

(a) if it is abnormally onerous for the other party, having regard to the nature and content of the contract, the manner in which the terms came to be formulated and the interests of each party, as evident to the other, and the other circumstances of the case;

(b) if the other party has not been given sufficient opportunity to acquaint himself with the standard terms.'

— Article 248 of Section IV ('Effects of contracts') of Book VI

'1. A contract produces not only the legal effects agreed by the parties, but also those which, according to the nature of the

contract, are entailed by law or custom, or which are necessary in the interests of reasonableness and fairness.

2. Any rule to which the relationship between the parties is subject by virtue of the contract shall be inapplicable in so far as it would be irreconcilable with the standards of reasonableness and fairness appropriate to the circumstances of the case.'

III — Arguments of the parties

8. The Commission claims that the Court should declare that the Kingdom of the Netherlands has failed to fulfil its obligations in that the tranposition of the Directive into Netherlands law was insufficient in terms of the form and method chosen, and incomplete in terms of its effects.

9. Specifically, the Commission objects that only in very closely defined circumstances may a directive be deemed to have been 'implicitly' transposed into national law simply because provisions in conformity with that directive already exist within the legal system of the Member State in question. This is especially important where, as in the present case, the aim of the directive is to protect consumers by conferring upon them specific rights. In such cases, the implementing measures adopted must be clear and free of all ambiguity so that consumers may be fully aware of the rights conferred upon them. Independently of those general considerations, however, the Commission disputes the assertion that the provisions of the Civil Code are sufficient to ensure that Articles 4(2) and 5 of the Directive will be given proper effect in practice.

10. The Netherlands Government takes the opposite view, contending that the Court should dismiss the action on the ground that the existing provisions of the Civil Code already make exhaustive provision for the matters covered by the Directive.

11. It points out first of all that the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC) leaves Member States free to choose the form and methods necessary to transpose a directive into national law and that the Court has consistently held that in view of that freedom, specific implementing measures are not indispensable if the national legal system already secures the aims pursued by the directive. That is the position in the present case, given both the above provisions of the Civil Code — which the Netherlands Government analyses at length — and the unwritten rules of law acknowledged within that legal system, such as the principle of *interpretatio contra proferentem*, which is in all

respects equivalent to the provision made by the second sentence of Article 5 of the Directive.

12. In the defence put forward by the Netherlands Government, particular emphasis is placed on the application by the national courts of the provisions in question. This, it is contended, provides added and final confirmation that the Netherlands legal system is fully in conformity with the Directive. The Netherlands Government refers in particular to a decision handed down on 19 September 1997 by the Hoge Raad (Supreme Court of the Netherlands) (NJ 1998, No 6), in which it is stated that the 'provisions [of the Netherlands Civil Code 1992] governing standard terms — which, in the view of the legislature, already incorporate the provisions of the Directive — must be interpreted in such a way as to confer upon consumers at least the same level of protection as the Directive'.

13. In any event, even though the Kingdom of the Netherlands maintains that position, it points out that on 28 October 1999 (that is to say, after the expiry of the deadline fixed by the Commission in the reasoned opinion) its Parliament adopted a law intended to 'clarify' the provisions of the Civil Code governing standard terms in contracts. It emphasises, however, that this law does not in any way amend the pre-existing law applicable to unfair terms in standard contracts, but merely 'expresses it more plainly', by codifying the principles of law already in force within the domestic legal system.

IV — Legal analysis

A — *General considerations*

14. Pursuant to the third paragraph of Article 189 of the EC Treaty, a directive 'shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'.

15. On numerous occasions, the Court has been called upon to define the meaning and scope of that provision. For present purposes, I shall mention merely the established position that '[a]lthough [the third paragraph of Article 189 of the EC Treaty] leaves Member States to choose the ways and means of ensuring that the directive is implemented, that freedom does not affect the obligation imposed on all the Member States to which the directive is addressed, to adopt, in their national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues'. [2] The Court has explained that, to that end, the Member States must define a specific legal framework in the sector concerned which ensures that the national legal system

2 — See Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 15.

complies with the provisions of the directive in question. [3] That framework must be designed in such a way as to remove all doubt or ambiguity, not only as regards the content of the relevant national legislation and its compliance with the directive, but also as regards the authority of that legislation and its suitability as a basis for regulation of the sector. Thus, for example, for the purposes of transposing a directive correctly into national law, mere administrative practice or ministerial circulars are not sufficient. In contrast with proper legislative measures, these offer no safeguards in terms of consistency, binding authority and publicity. [4] Consequently, given that the Member State concerned is required to 'ensure the full and exact application of the provisions of any directive', it falls short of its obligations so long as it 'has not completely complied with [the directive]', even if 'that [domestic] law has to a large extent already secured the objectives of the directive'. [5]

16. Admittedly, as the Netherlands Government points out, the Court has also acknowledged that for these purposes specific implementing measures are not indispensable, still less legislative action. That is so particularly when the relevant legislation already in force in the State concerned is 'sufficiently precise and clear', that is to say, when it is such that 'the persons concerned are made fully aware of their rights, and, where appropriate, afforded the possibility of relying on them before the national courts'. [6] However, it should be noted that such cases constitute an exception, in derogation from the above principles, which is justified by considerations of legislative economy. Accordingly, in common with all such derogations, they are subject to very stringent rules of interpretation. In the present case, this means that, if the Member State in question is not to be found in breach of its obligations, it is not enough that the national legislation should, generally speaking, be compatible with the directive: the relationship between the two must be one of clear and precise conformity.

17. As is apparent from the cases referred to above, there are two paramount requirements in such a situation: the directive must be fully and correctly applied within the Member States and, in consequence, any rights conferred by that directive must be guaranteed full protection. On the latter point, in particular, regard must be had to the Court's consistent concern to ensure

3 — See, for example, Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851, paragraph 25; Case C-59/89 *Commission* v *Germany* [1991] ECR I-2607, paragraph 28; Case C-340/96 *Commission* v *United Kingdom* [1999] ECR I-2023, paragraph 27.

4 — See, *ex multis*, Case 239/85 *Commission* v *Belgium* [1986] ECR 3645, paragraph 7; Case C-58/89 *Commission* v *Germany* [1991] ECR I-4983, paragraph 13; Case C-306/89 *Commission* v *Greece* [1991] ECR I-5863, paragraph 19; and Case C-96/95 *Commission* v *Germany* [1997] ECR I-1653, paragraph 38.

5 — Case C-91/79 *Commission* v *Italy* [1980] ECR 1099, paragraph 6, and Case 92/79 *Commission* v *Italy* [1980] ECR 1115, paragraph 6.

6 — See, *ex multis*, Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23; Case C-59/89 *Commission* v *Germany* [1991] ECR I-2607, paragraph 18; and Case C-365/93 *Commission* v *Greece* [1995] ECR I-499, paragraph 9.

that the existing national legislation leaves no doubt as to the effects of the directive upon the legal position of individuals. In the words of the Court, 'it is particularly important, in order to satisfy the requirement for legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts'. [7]

18. The possibility of dispensing with a specific implementing measure should therefore be appraised even more rigorously in the case of directives intended to confer rights on individuals, and particularly where, as in the present case, the directive sets out a body of rules to secure greater protection for consumers — a broad but indeterminate category — against 'stronger' contracting parties. As the Court observes, this 'is of particular importance where the directive in question is intended to accord rights to nationals of other Member States because those nationals are not normally aware of such principles [of what is laid down by law in Member States other than their own]'. [8] That is the position in the present case, given that one of the aims of the Directive is to 'safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own' (sixth recital in the preamble).

19. Now that the general position has been made clear, I should point out that I am not entirely certain that in this case Netherlands law fully complies with the requirements described above. That is to say, I am not convinced that the Netherlands law governing the matters covered by the Directive complies fully with the Directive, or, in any event, that it does so with 'sufficient' clarity and lack of ambiguity — as enjoined by the Court — to ensure that the persons concerned 'are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before the national court'.

20. On the contrary — leaving aside for the moment the merits of this issue, which will be examined hereunder — I would say that the parties' exchange of views on this point demonstrates, albeit indirectly, the extent to which interpretation of those rules is anything but free of uncertainty and ambiguity. The very fact that the debate has in large measure centred on the implications and importance to be

7 — See, for example, Case C-236/95 *Commission* v *Greece* [1996] ECR I-4459, paragraph 13, which gives further references.

8 — See Case 29/84, cited above, paragraph 23, and Case C-365/93, cited above, paragraph 9.

accorded to decisions handed down by senior judicial bodies in the Netherlands lends weight to the doubts described above. It is unacceptable that such difficulties of interpretation should affect the application in a Member State of a directive of the significance and scope of the directive at issue, still less, the right of individuals (whether or not Netherlands nationals) to rely on the legal situations provided for therein.

21. The fact that the Netherlands Government thought it necessary to adopt a law to 'clarify' and 'express more plainly' the domestic law governing unfair terms in standard contracts strongly suggests that, despite its various contentions, even that Government was aware of the need to remove the difficulties flagged up by the Commission. Whether or not that law achieves the desired result is irrelevant for present purposes, since it was adopted more than a year after the deadline fixed by the Commission in the reasoned opinion and, in consequence, would be incapable of remedying the Netherlands' alleged failure to fulfil its obligations. [9]

9 — According to established case-law, failure to fulfil obligations falls to be appraised in relation to the situation existing on expiry of the deadline fixed in the reasoned opinion: see, *ex multis*, Case C-327/98 *Commission* v *France* [2000] ECR I-1851, paragraph 28; Case C-69/99 *Commission* v *United Kingdom* [2000] ECR I-10979, paragraph 22; and Case C-374/98 *Commission* v *France* [2000] ECR I-10799, paragraph 14.

B — *Whether the principles and provisions of the Netherlands Civil Code comply with the Community Directive*

22. However, those doubts are by way of general and preliminary comment. In order to determine whether or not the action brought by the Commission is well founded, I must now examine in greater detail the submissions put forward by the Commission and the contentions of the defendant government.

23. First, I would like to consider the contention that the Netherlands legal system already embodies a general principle analogous to the principle set out in the second sentence of Article 5 of the Directive, to the effect that the interpretation which must prevail is that most favourable to the consumer. According to the Netherlands Government, that principle constitutes a canon of interpretation which is normally applied by the courts. However, this is belied by the decisions of the Hoge Raad — appositely invoked by the Commission — which on several occasions has denied that that principle constitutes a 'rule of law'. [10]

10 — As well as the judgment of 12 January 1996 (NJ 1996, No 683) cited by the Commission in its pleadings, see the references in 'CLAB Europa', *European Database on Case Law about Unfair Contractual Terms*, www.europa.eu.int/clab/ (see NL000047, NL000056 and NL000079), and in E. Hondius, *Non-implementation of the Directive on Unfair Contract Terms: the Dutch Case*, European Review of Private Law, 1997, p. 193, in particular, pp. 194 and 195, and footnote 4 with citations, which states that after the entry into force of the Directive, the position of the Netherlands Courts remained unaltered, even though, on the basis of the case-law of the Court, they were required to interpret national law in the light of the wording and purpose of the Directive.

24. Further on the subject of principles of interpretation, the Netherlands Government maintains that there are no disparities between the Directive and Netherlands law as regards the consequences should a contract contain ambiguous or incomprehensible terms.

25. To my mind, however, the Commission's position is the more valid. The Commission points out that:

(a) while Article 6:233 of the Civil Code provides for the *automatic* cancellation of a term which contravenes the principle of transparency, the application of the rule of interpretation provided for in the Directive to the effect that the interpretation most favourable to the consumer must prevail (or even of the '*interpretatio contra proferentem*') permits the term in question to be retained;

(b) the criterion of 'reasonableness' referred to by Articles 3:35 and 6:248 of the Civil Code for the purposes of interpreting obscure or incomprehensible terms does not necessarily coincide with the criterion espoused by the Directive, in accordance with which the interpretation most favourable to the consumer is to be preferred;

(c) likewise, the rule set out in Article 3:35 of the Civil Code to the effect that obscure or incomprehensible terms — or, rather, contractual terms open to an interpretation which is unreasonable or unfair — may not be invoked against the consumer is not necessarily equivalent to the rule that the interpretation most favourable to the consumer may be relied on.

26. Moving on to the question whether Netherlands law is compatible with the provisions of Article 4(2) and the third sentence of Article 5, I should point out immediately that the Kingdom of the Netherlands has failed to demonstrate the existence of domestic provisions to equivalent effect. It has merely stated, essentially, that specific implementing measures are unnecessary since the aims of the above provisions can be met by a schematic interpretation of Netherlands legislation. However, for reasons which I shall now explain, I am not persuaded that the position is exactly as they describe it or that the method suggested by the Netherlands authorities constitutes in practice a *faithful* transposition of the Directive into national law.

27. First, it should be recalled that Article 4(2) of the Directive expressly provides that, if terms are obscure or ambiguous, even those relating to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on

the other, may be regarded as unfair. This means, clearly and unambiguously, that the consumer may rely on such terms for the purposes of securing the protection guaranteed him under Article 6(1) of the Directive, that is to say, for a ruling that he is not bound by those terms.

28. By contrast, it does not seem to me that a comparable measure of certainty and clarity as regards the rules and their effects could be achieved through a schematic interpretation of the Civil Code by the national courts. On the contrary, as the Civil Code stands at present, it looks to me as if, pursuant to Article 6:233 of the Civil Code, it is still possible for a seller or supplier to prevent the consumer from seeking cancellation of 'terms which describe the material contractual obligations'. Moreover, the fact that Article 6:231 removes 'terms which describe the material contractual obligations' from the ambit of the expression 'standard terms' (that is to say, the only terms that can be cancelled under Article 6:233) means that the seller or supplier can always rely on that provision to prevent such terms from being classed as 'standard terms'.

29. I should make it quite clear that the exclusion of terms describing material contractual obligations from the rules governing standard terms constitutes a significant limitation of the scope of the Directive. One need only consider the implications for contracts such as insurance contracts which are especially susceptible to drafting ambiguities as regards their essential object — that is to say, in the case of insurance contracts, as regards the risk insured against.

30. A further difficulty arises in connection with the third sentence of Article 5 of the Directive. Pursuant to that provision, in proceedings where it is sought to prevent a seller or supplier from continuing to use a standard contractual term which is ambiguous, the seller or supplier may not rely on the principle that the interpretation most favourable to the consumer must prevail, if he would thereby be enabled to oppose the order sought. As the Commission points out, the purpose of that provision is to prevent a principle intended to protect the consumer from being used against him. That aim would be frustrated if, as the Netherlands Government proposes, a schematic interpretation of domestic law were adopted, because the Civil Code *would in all cases allow* the defendant seller or supplier to rely on that principle.

31. Lastly, I have misgivings as to whether Netherlands law ensures full compliance

with the obligation of transparency incumbent upon the seller or supplier when drawing up the terms of standard contracts for the purposes of the first sentence of Article 5 of the Directive. The bundle of provisions relied upon by the Kingdom of the Netherlands as being prima facie comparable in effect depends rather on criteria of reasonableness and fairness. However, as the Commission points out, that is only an indirect means to the end sought. By contrast, a provision which expressly reflects the principle laid down in the Directive is efficient and immediate in its effect, especially — as again the Commission observes — if it is borne in mind that the approach chosen by the Community legislature is specifically intended to require the seller or supplier to make sure at the outset that the contractual terms are plain and intelligible, thus ensuring that, before entering into the contract, the consumer has access to all the information needed to arrive at his decision in full knowledge of the facts. [11]

C — *Interpretation of Netherlands law in such a way as to comply with the Directive*

32. Now that it has been seen that the relevant provisions of the Netherlands Civil Code are not in conformity with the Directive, it remains to be determined whether matters may be remedied by the decision handed down by the Hoge Raad on 19 September 1997 (see point 12 above), and in particular by application of the principle expressly laid down in that judgment, to the effect that Netherlands law should be so construed as to comply with the Directive. As I have already mentioned, the Netherlands Government contends that the aim sought by the Directive is fully secured, thanks to the interpretative role played by the national courts and, in particular, to the above judgment of the Hoge Raad.

33. However, I must first point out that the above approach, albeit espoused by the Netherlands courts, does not constitute an established feature of Netherlands law; nor is it of particular significance for present purposes. Indicative of support for a general policy, it does not concern — and cannot therefore resolve — the issue before the Court, that is to say, the question whether existing national law is sufficient to ensure the full and correct implementation of a directive.

34. The principle that national law should be so construed as to comply with Community law is a famous general principle of Community law, application of which the Court has extended to cases where a directive is not transposed into national law within the period prescribed. As the Court recently pointed out, on the subject of the Directive at issue, '[a]s regards the

11 — It is apparent from various provisions of the Directive that the clarity of terms in standard contracts must be ensured at as early a stage as possible in negotiations between the seller or supplier and the consumer. In the 20th recital in the preamble, for example, it is stated that 'the consumer should actually be given an opportunity to examine all the terms', while point (j) of the Annex to the Directive provides that a term may be declared unfair if its purpose is 'irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract'.

position where a directive has not been transposed, ... it is settled case-law ... that, when applying national law, whether adopted before or after the directive, the national court called upon to interpret that law must do so, as far as possible, in the light of the wording and purpose of the directive so as to achieve the result pursued by the directive and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC)'. [12]

35. However, I repeat, that principle of interpretation does not solve the problem at issue here. It is designed to be of use pending the transposition of a directive into national law — or even after transposition if this is incorrect or incomplete — but it certainly cannot serve as an excuse for failure to transpose or for inadequate transposition. As has been rightly observed, the mere fact that a national court purports, in accordance with the principles laid down by the Court, to interpret national law in the light of Community law 'does not affect the obligation imposed on all the other authorities of that Member State, particularly the legislature, to adopt all the measures necessary, within the scope of their competence, to ensure that the Community rule is implemented and the objectives thereof are attained'. [13]

36. As Advocate General Léger observed — and as is apparent from the case-law cited above — that 'would run counter to the fundamental requirements underlying any transposition: those of legal certainty and adequate publicity. The Court has stated on many occasions that the provisions of a directive must be implemented "with unquestionable binding force ... with the specificity, precision and clarity required ... in order to satisfy the requirement of legal *certainty*" and so that "where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts". National case-law interpreting provisions of domestic law in a manner regarded as being in conformity with the requirements of a directive is not sufficient to make those provisions into measures transposing the directive in question'. [14] Consistently with that approach, as I have already mentioned, the Court explained in the same case that 'it is particularly important, in order to satisfy the requirement for legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their

12 — Joined Cases C-240/98 and C-244/98 *Océano Grupo Editorial* [2000] ECR I-4941, paragraph 30, in which further references are given.

13 — See point 19 of the Opinion of Advocate General Da Cruz Villaça in Case 412/85 *Commission* v *Germany* [1987] ECR 3503.

14 — See points 24 and 26 of the Opinion in Case C-236/95, cited above, in which further references are given.

rights and, where appropriate, to rely on them before the national courts'. [15]

37. Moving on from those general comments, I would point out that in the present case the decisions of the Hoge Raad do not even seem appropriate to the role which the Netherlands Government would like to attribute to them. As the Commission notes, the principle set out in the Hoge Raad's judgment of 19 September 1997 is not on all fours with the principles to be inferred from other decisions handed down by that court (see footnote 9). Indeed, on other occasions the Hoge Raad has stated, with regard to certain fundamental aspects of the Directive — in particular, with regard to the important principle set out in the second sentence of Article 5, that the interpretation most favourable to the consumer must prevail — that under Netherlands law that principle does not constitute a 'rule of law', but rather a general approach which may have some influence on the interpretation of contracts by the courts.

38. Admittedly, those decisions pre-date the 1997 judgment referred to above, but the fact remains that at least one of those decisions was handed down after the Directive entered into force. To my mind, this — taken together with all the foregoing observations — is further confirmation of the inadequacy of a transposition method based on approaches which are not only lacking in clarity and transparency, but which are also uncertain and provisional because they are inevitably vulnerable to the inconsistencies which may arise in case-law.

39. In conclusion, therefore, I take the view that not even the case-law referred to by the Netherlands Government can remedy the evident inadequacy of Netherlands law for the purposes of giving clear and unambiguous effect to the Directive at issue. I therefore propose that the action brought by the Commission be upheld.

D — *Costs*

40. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if these have been applied for. Since the Commission has applied for costs and having regard to my recommendation as to how this case should be decided, I consider that the Commission should be awarded costs.

15 — Case C-236/95, cited above, paragraph 13 (where further references are mentioned).

Conclusion

In the light of the foregoing, I propose that the Court declare that:

(1) By failing to adopt the laws, regulations and administrative provisions necessary for the adequate transposition into national law of Articles 4(2) and 5 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, the Kingdom of the Netherlands has failed to fulfil its obligations under the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC) and under Directive 93/13;

(2) The Kingdom of the Netherlands is to bear the costs.