OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 17 July 2008 [1]

1. In these proceedings under Article 226 EC, the Commission submits that Spain has failed in two respects to fulfil its obligations under Article 3(1), (2) and (4) of Directive 2000/35/EC ('the Directive'). [2] First, the Commission claims, a provision in the national law transposing the Directive allows the payment period for specific products to be extended from 60 days to up to 90 days without automatically imposing the higher rate of interest for late payment which Article 3(2) of the Directive stipulates should apply in such circumstances. Second, Spain postponed the full entry into force of the 60-day period until 1 July 2006, whereas the Directive, which requires implementation by 8 August 2002, does not provide for any partial or progressive application of its provisions.

Relevant legislation

The Directive

2. The Directive aims to combat late payments in commercial transactions, which in particular burden small and medium-sized businesses. [3]

3. According to recital 18 of the preamble, the Directive 'takes into account the issue of long contractual payment periods and, in particular, the existence of certain categories of contracts where a longer payment period in combination with a restriction of freedom of contract or a higher interest rate can be justified'.

1 — Original language: English.

2 — Directive of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (OJ 2000 L 200, p. 35).

3 — Recital 7 in the preamble.

4. Recital 19 states that the Directive should prohibit abuse of freedom of contract to the disadvantage of the creditor and lists various factors that may be considered to constitute such abuse.

5. Article 2(2) of the Directive defines 'late payment' as 'exceeding the contractual or statutory period of payment'.

6. Article 3 is entitled 'Interest in case of late payment'. It provides:

'1. Member States shall ensure that:

(a) interest in accordance with point (d) shall become payable from the day following the date or the end of the period for payment fixed in the contract;

(b) if the date or period for payment is not fixed in the contract, interest shall become payable automatically without the necessity of a reminder:

(i) 30 days following the date of receipt by the debtor of the invoice or an equivalent request for payment; or

(ii) if the date of the receipt of the invoice or the equivalent request for payment is uncertain, 30 days after the date of receipt of the goods or services; or

(iii) if the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, 30 days after the receipt of the goods or services; or

(iv) if a procedure of acceptance or verification, by which the conformity of the goods or services with the contract is to be ascertained, is provided for by statute or in the contract and if the debtor receives the invoice or the equivalent request for payment earlier or on the date on which such acceptance or verification takes place, 30 days after this latter date;

…

(d) the level of interest for late payment ("the statutory rate"), which the debtor is obliged to pay, shall be the sum of the interest rate applied by the European Central Bank to its most recent main refinancing operation [4] carried out before the first calendar day of the half-year in question ("the reference rate") plus at least seven percentage points ("the margin") unless otherwise specified in the contract. …

…

2. For certain categories of contracts to be defined by national law, Member States may fix the period after which interest becomes payable to a maximum of 60 days provided that they either restrain the parties to the contract from exceeding this period or fix a mandatory interest rate that substantially exceeds the statutory rate.

4 — As defined in Article 2(4) of the Directive.

3. Member States shall provide that an agreement on the date for payment or on the consequences of late payment which is not in line with the provisions of paragraphs 1(b) to (d) and 2 either shall not be enforceable or shall give rise to a claim for damages if … it is grossly unfair to the creditor. … If such an agreement is determined to be grossly unfair, the statutory terms will apply, unless the national courts determine different conditions which are fair.

4. Member States shall ensure that, in the interests of creditors and of competitors, adequate and effective means exist to prevent the continued use of terms which are grossly unfair within the meaning of paragraph 3.

…'

7. Article 6(1) requires Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 8 August 2002. Article 6(2) permits Member States to maintain or bring into force provisions more favourable to the creditor than those necessary to comply with the Directive.

Spanish legislation

8. The Directive was transposed in Spain by Law 3/2004 of 29 December 2004 [5] on combating late payment in commercial transactions ('Law 3/2004'). [6]

9. Article 4(1) of Law 3/2004 provides that the payment period is to be either that agreed between the parties 'within the applicable legal framework' or, in the absence of such an agreement, as stipulated in Article 4(2). That provision fixes a period of 30 days, in terms identical to subparagraphs (i) to (iv) of Article 3(1)(b) of the Directive.

10. Article 7(1) of Law 3/2004 provides that the interest rate for late payments is to be either that agreed between the parties or, in the absence of such an agreement, the statutory rate stipulated in Article 7(2), which, in turn, essentially transposes the specification for the statutory rate set out in Article 3(1)(d) of the Directive.

11. According to Article 9(1) of Law 3/2004, agreements between the parties in respect of a period of payment or the consequences of late payment which depart from the default period specified in Article 4(2) or the statutory interest rate set out in Article 7(2) respectively are void if they are grossly unfair to the creditor.

12. Law 3/2004 contains, in addition to its numbered articles, certain further provisions. The first 'additional provision' of Law 3/2004 states that payments to trade suppliers regulated by Law 7/1996 of 15 January 1996 on retail trade ('Law 7/1996') [7] are principally governed by Article 17 of the earlier law, and that the later law is supplementary in character.

13. Part One of the second 'final provision' of Law 3/2004 then amends Article 17 of Law 7/1996. [8] So far as relevant, that article now provides:

'1. In the absence of express agreement, it shall be understood that retailers must pay the

5 — The Commission initiated an Article 226 EC action against Spain for its delay in transposing the Directive (Case C-384/03). It withdrew that action following Spain's adoption of Law 3/2004. By Order of 28 April 2005 (OJ 2005 C 182, p. 33), the Court removed Case C-384/03 from the register.

6 — BOE 314 of 30 December 2004.

7 — BOE 15 of 17 January 1996, p. 1243.

8 — According to the preamble to Law 3/2004, the provisions relating to unfair terms required Article 17(3) of Law 7/1996 to be amended in order to adapt payments to suppliers to the terms of the later law.

price of the goods they buy within 30 days from the date of delivery.

…

3. Payment for fresh food and perishables shall in no case be deferred for more than 30 days. Payment for other food and consumer products shall not be deferred for a period longer than 60 days, except by an express agreement which provides for economic compensation to the supplier equivalent to the longer period. In no case shall payment be deferred for more than 90 days.

…

5. In any case, interest for late payment shall become automatically due from the day after the date fixed for payment or, in the absence of an agreement, the date on which payment should be made in accordance with the provisions in paragraph 1. In that event, the applicable rate for determining the amount of interest shall be that provided in Article 7 of [Law 3/2004], unless the parties have contractually agreed a different rate, which may in no case be lower than statutory interest plus 50 per cent.'

14. Part Two of the second 'final provision' of Law 3/2004 contains a transitional provision, according to which the maximum limit of 60 days set out in Article 17(3) of Law 7/1996 (as amended) is to apply from 1 July 2006. Until then, 'payment for food which is not fresh or perishable and for consumer products shall not be deferred for more than 90 days from delivery of the goods'.

Procedure

15. The Commission received a complaint alleging that the Directive had been incorrectly transposed into Spanish law. On 13 July 2005 it sent Spain a letter of formal notice claiming that Law 3/2004 infringed parts of Article 3 of the Directive inter alia by allowing payment for some food and consumer products to be deferred for 90 days and by not limiting the payment period to 60 days until 1 July 2006.

16. Having received no reply to that letter, the Commission issued a reasoned opinion on 19 December 2005.

17. After considering Spain's reply of 7 February 2006 to the reasoned opinion, the Commission brought the present action on 15 September 2006.

18. It asks the Court to:

— declare that, by authorising, under Law 3/2004, a period of 90 days for the payment of foods other than fresh or perishable and consumer products and postponing the entry into force of certain provisions until 1 July 2006, the Kingdom of Spain has failed to fulfil its obligations under Article 3(1), (2) and (4) of the Directive;

— order Spain to pay the costs.

19. In the application, the payment period of 90 days is specifically alleged to infringe Article 3(1) and (2), while the postponement is alleged to infringe Article 3(1), (2) and (4).

20. The Commission requested a hearing, which was held on 13 February 2008.

Does the 90-day payment period infringe Article 3(1) and (2) of the Directive?

21. The Commission alleges an infringement of both Article 3(1) and (2). However, in my view only the infringement of the latter provision is supported by argument.

22. The Commission considers that Spain has made use of the option under Article 3(2) of the Directive and defined a particular category of contracts — those for food that is not fresh or perishable and for consumer products — that are to be governed by that provision. However, the Spanish legislation does not comply with the terms of Article 3(2).

23. It can be inferred from the Commission's argument that it takes Spain to have chosen the second option envisaged in Article 3(2) by allowing payment periods to be extended from 60 days to up to 90 days (since the first option prohibits any extension beyond 60 days). However, Article 17 of Law 7/1996 (as amended) does not 'fix a mandatory interest rate that substantially exceeds the statutory rate', as required by the second option. Instead, the debtor is required to provide 'economic compensation' to the supplier for the longer payment period. That phrase, the Commission argues, is imprecise and provides little protection for the creditor. Accordingly, Article 17(3) of Law 7/1996, as amended by Law 3/2004, infringes Article 3(2) of the Directive.

24. Spain contends that Article 17(3) of Law 7/1996 does not seek to transpose Article 3(2) of the Directive. None the less, its purpose is to help achieve the aims of the Directive. In accordance with recitals 18 and 19 to the Directive, freedom of contract is in principle respected, subject to limitations designed to prevent abuse to the detriment of the creditor. Article 17(3) limits contractual freedom by imposing maximum payment periods in order to prevent the continued use of longer, unfair payment periods prevalent in the retail sector. It thus puts an end to grossly unfair terms, in accordance with Article 3(4) of the Directive. Furthermore, Article 6(2) expressly allows Member States to bring into force provisions more favourable to creditors than those necessary to comply with the Directive.

The Directive

25. I understand the relevant provisions of the Directive in the following way.

26. Under the system as put in place by Article 3(1) and (2) of the Directive, it must be possible in all cases to ascertain a final date for payment, after which the debtor must pay interest to the creditor.

27. In principle, the parties are to be free to fix the date or period for payment in their contract (Article 3(1)(a)).

28. Member States are to provide for a statutory default period of 30 days, to apply if the parties have not exercised that freedom (Article 3(1)(b)).

29. Article 3(2) of the Directive allows the Member States optionally to extend that default period to a maximum of 60 days for

certain categories of contracts, provided that they also either restrain the parties to the contract from exceeding this period or fix a mandatory dissuasive interest rate for payments made after the expiry of that period. Those two conditions both go to matters that the parties would normally be free to determine contractually. It is, however, clear that the 60-day period is *in itself* not a limitation on freedom of contract but an alternative to the default period in Article 3(1)(b) of the Directive.

30. Such extension of the default period to up to 60 days is less favourable to creditors than the basic 30-day default period which would otherwise apply. The quid pro quo for being able to select a 'maximum of 60 days' as a payment period is that *either* the Member State must exclude freedom to contract for a payment period that exceeds 60 days *or* they must make sure that (whatever the parties might otherwise wish to agree) 'a mandatory interest rate that substantially exceeds the statutory rate' will apply to any such contractually agreed period after the expiry of any such contractually agreed period. Both those conditions are more favourable to creditors.

The Spanish legislation

31. It is clear from the wording of the provisions that the 30-day periods specified in both Article 4 of Law 3/2004 [9] and Article 17(1) of Law 7/1996, as amended by Law 3/2004, [10] operate in the absence of agreement between the parties. In other words, they are default statutory periods. They clearly comply with Article 3(1) of the Directive.

32. In Article 17(3) of Law 7/1996 (as amended), payment for fresh food and perishables 'shall in no case be deferred for more than 30 days'. Payment for other food and consumer products shall 'in no case … be deferred for more than 90 days'. Both the 30-day and 90-day periods thus permit no exceptions. In contrast, the 60-day period also specified in respect of other food and consumer products does permit an exception: payment 'shall not be deferred for a period longer than 60 days, except by an express agreement which provides for economic compensation …'.

33. In order for the Commission's action to be successful, it is necessary for it to establish that the 60- and 90-day periods in Article 17(3)

9 — See point 9 above.
10 — See point 13 above.

of Law 7/1996 (as amended) of which it complains are extensions of the 30-day default period in Article 17(1), just as the 60-day period in Article 3(2) of the Directive is an optional extension of the 30-day default period in Article 3(1)(b).

34. If the 60- and 90-day periods in Article 17(3) of Law 7/1996 (as amended) are *not* extensions of the 30-day default period, but simply limitations of the parties' freedom to contract they are, as Spain has submitted, more favourable to the creditor than the provisions necessary to comply with the Directive. They would therefore be authorised by Article 6(2) whatever other conditions may be attached to them and whatever their date of entry into force.

35. A straightforward reading of Article 17(1) and (3) of Law 7/1996 indicates that the latter interpretation is the more plausible. In the absence of express agreement, Article 17(1) fixes a general default period of 30 days (thus implementing Article 3(1)(a) and (b) of the Directive), while Article 17(3) provides that payment is in no case to be deferred for more than 30, 60 or 90 days, depending on the category of product concerned (with a possibility of extending the 60-day period up to 90 days subject to agreed compensation to the supplier). The natural interpretation is that those three periods are limitations on the parties' freedom to determine a date or period in their contract.

36. The Commission has advanced no reasoning before the Court sufficient to support the contrary reading of the Spanish legislation, to the effect that the 60- and 90-day periods are extensions of the 30-day default period applicable in the absence of express agreement between the parties. Nor has it adduced any evidence that the legislation has been interpreted in that way by the Spanish courts.

37. In those circumstances, I am not prepared to conclude that the Commission has succeeded in establishing that the legislative arrangements made by Spain infringe Article 3(2) of the Directive.

Infringement of Article 3(1) of the Directive

38. In its application, the Commission also alleges that the 90-day extension in Article 17(3) of Law 7/1996 (as amended)

infringes Article 3(1), but fails to say how. It will be clear from the analysis that I have just set out that I consider that the Commission has failed to establish that Article 17(1) of Law 7/1996 (as amended) does other than apply to *all contracts without exception*. It follows that there is no breach of Article 3(1) of the Directive.

Did Spain infringe Article 3(1), (2), and (4) of the Directive by postponing the entry into force of certain provisions until 1 July 2006?

39. The Commission repeats that Article 17(3) of Law 7/1996 (as amended) seeks to transpose Article 3(2) of the Directive. However, it defers the application of the 60-day limit until 1 July 2006. The Directive does not permit the partial or progressive application of its provisions. The deferral of the limit thus infringes Article 3(1), (2) and (4) of the Directive.

40. It follows from my conclusions about the Commission's first head of claim that the second should in my view also be rejected. Since that 60-day limit does not transpose any provision of the Directive, Spain was under no Community obligation to bring it into force by the end of the transposition period of the Directive, or indeed at all.

41. I therefore conclude that Spain did not infringe Article 3(1), (2) and (4) by postponing the entry into force of certain provisions until 1 July 2006.

Costs

42. 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. I am of the view that the application should be dismissed, and Spain has applied for costs against the Commission.

Conclusion

43. I therefore consider that the Court should:

— dismiss the application;

— order the Commission to bear the costs.