JUDGMENT OF THE COURT (First Chamber)

11 December 2008 *

In Case C-380/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 15 September 2006,

Commission of the European Communities, represented by B. Schima and S. Pardo Quintillán, acting as Agents,

applicant,

v

Kingdom of Spain, represented by F. Díez Moreno, acting as Agent,

defendant,

THE COURT (First Chamber),

composed of P. Jann, President of Chamber, M. Ilešič, A. Tizzano (Rapporteur), A. Borg Barthet and J.-J. Kasel, Judges,

* Language of the case: Spanish.

Advocate General: E. Sharpston,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 February 2008,

after hearing the Opinion of the Advocate General at the sitting on 17 July 2008,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests that the Court declare that, by authorising a period of 90 days for the payment of certain foods 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 Directive 2000/35/EC 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).

Legal context

Community legislation

2 Article 3 of Directive 2000/35, entitled 'Interest in case of late payment' states:

'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;

…

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.

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, when all circumstances of the case, including good commercial practice and the nature of the product, are considered, it is grossly unfair to the creditor. In determining whether an agreement is grossly unfair to the creditor, it will be taken, inter alia, into account whether the debtor has any objective reason to deviate from the provisions of

paragraphs 1(b) to (d) and 2. 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.

…'

3 Article 6 of that directive, entitled 'Transposition', provides:

'1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 8 August 2002. They shall forthwith inform the Commission thereof.

…

2. Member States may maintain or bring into force provisions which are more favourable to the creditor than the provisions necessary to comply with this Directive.

…'

National legislation

4 Law 3/2004 of 29 December 2004 on combating late payment in commercial transactions (BOE No 314 of 30 December 2004, p. 42334) is intended to transpose Directive 2000/35 into Spanish law.

5 Article 17 of Law 7/1996 of 15 January 1996 on retail trade (BOE No 15 of 17 January 1996, p. 1243) lays down rules governing the payment of trade suppliers.

6 The first additional provision of Law 3/2004, entitled 'Payments system in retail trade', states that payments to retail trade suppliers are principally governed by Article 17 of Law 7/1996, and that Law 3/2004 is supplementary in character.

7 Article 17 of Law 7/1996, as amended by paragraph 1 of the second final provision of Law 3/2004, provides:

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

8 The second transitional provision of Law 7/1996, inserted by paragraph 2 of the second final provision of Law 3/2004, reads as follows:

'The period fixed for fresh food and perishables shall remain the 30-day period already prescribed. The limit of 60 days maximum, set out in Article 17(3) of the present law, shall apply as from 1 July 2006. Until that date, 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.'

The pre-litigation procedure

9 Following a complaint, the Commission sent a letter of formal notice on 13 July 2005, calling on the Kingdom of Spain to submit to it within two months its observations on the compatibility of Law 3/2004 with Article 3(1), (2), (4) and (5) of Directive 2000/35.

10 Since the Commission received no reply from the Kingdom of Spain, on 19 December 2005, it sent a reasoned opinion to that Member State, in which in particular it claims that:

— the period of 90 days for the payment of certain foods and consumer products authorised by Article 17(3) of Law 7/1996, as amended by paragraph 1 of the second final provision of Law 3/2004, is contrary to the provisions of Article 3(1) and (2) of Directive 2000/35, and

— the second transitional provision of Law 7/1996, inserted by paragraph 2 of the second final provision of Law 3/2004, to the extent that it defers until 1 July 2006 the application of the maximum period of 60 days, is incompatible with Article 3(1), (2) and (4) of that Directive, the transposition period for which expired on 8 August 2002, without any derogation in that respect having being permitted.

11 Since the Commission was not satisfied with the replies provided by the Kingdom of Spain, it brought this action for failure to fulfil obligations before the Court.

The action

The first complaint

Arguments of the parties

12 The Commission asserts that Article 17(3) of Law 7/1996, as amended by paragraph 1 of the second final provision of Law 3/2004, infringes Article 3(1) and (2) of Directive 2000/35, by providing that the maximum payment period for the price of food, other than fresh or perishable food, and consumer products can be extended to up to 90 days, on the sole condition that provision is made for 'economic compensation to the supplier equivalent to the longer period'.

13 That provision allows the extension of the maximum payment period of 60 days, referred to in Article 3(2) of Directive 2000/35, without however providing, contrary to the requirements of that provision, for 'a mandatory interest rate that substantially exceeds the statutory rate'. In that respect, the economic compensation equivalent to the longer period, provided for by the national provision in question, cannot be compared to the application of such an interest rate, because the formulation used by the Spanish legislature lacks precision.

14 The Kingdom of Spain points out, first of all, that the objective of Directive 2000/35 is to introduce measures favourable to creditors, which restrict late payments in commercial transactions while respecting the freedom of contract of the parties.

15 By absolutely prohibiting provision by contract for a period exceeding 90 days, the provisions at issue in actual fact put in place a regime which is more restrictive and more favourable to the creditor than that suggested by Directive 2000/35, Article 3(2) of which allows agreement on a period longer than 60 days, without however fixing a maximum limit. For this reason, the national legislation in question is also compatible with Article 6(2) of that directive, since it allows the Member States to maintain or bring into force provisions which are more favourable to the creditor than the provisions which are necessary to comply with that directive.

16 The Kingdom of Spain then states, that since the period of 90 days can apply only if economic compensation equivalent to the longer period is provided for, the requirement under Article 3(2) of Directive 2000/35 for the payment of interest for late payment at a rate substantially higher than the statutory rate is indeed complied with.

Findings of the Court

17 As a preliminary point it should be noted that, as is clear from Article 3(1)(a) of Directive 2000/35, the parties are generally free to fix in their contract the date or the period for payment.

18 It is therefore only in the absence of a relevant contractual clause that the statutory period of 30 days prescribed by Article 3(1)(b) of that directive must apply.

19 Article 3(2) of Directive 2000/35 then allows the Member States to extend that 30-day period, but makes that possibility subject to a twofold condition. First, the option must be limited to certain categories of contracts. Second, with regard to the duration of the derogating period, it may be extended to a maximum of 60 days, if the parties are prohibited from derogating from this by contract or on condition that a mandatory interest rate that substantially exceeds the statutory rate is applicable.

20 Therefore, it is in the light of the content and the general scheme of the provisions of Directive 2000/35 noted in the preceding paragraphs that the arguments put forward by the Commission with regard to the national provisions at issue should be examined.

21 First, Article 17(3) of Law 7/1996, as amended by paragraph 1 of the second final provision of Law 3/2004, allows, for food which is neither fresh nor perishable and for consumer products, the possibility of extending up to 60 days the 30-day payment period applicable, under Article 17(1), in the absence of an express agreement between the parties. Second, the second sentence of Article 17(3), to which the Commission's argument relates, allows for the possibility of an additional extension of the 30-day period up to 90 days, if an express agreement exists between the parties which provides for economic compensation to the supplier equivalent to the longer period.

22 The Court finds that, according to the very wording of the contested provision, the possibility of extending the payment period beyond 60 days is conditional on an 'express agreement' in that regard between the parties.

23 In those circumstances, the Commission's argument, intended to show that the national provision in question infringes Article 3(2) of Directive 2000/35 in that it allows for certain products the extension of the payment period from 60 to 90 days without fulfilling the conditions laid down in that provision, cannot succeed.

24 As has been pointed out in paragraphs 18 and 19 of this judgment, Article 3(2) of Directive 2000/35 governs exclusively the possibility afforded to Member States of fixing, in certain limited cases, a statutory period exceeding the 30-day period applicable in the absence of a contractual clause on the date or the period of payment. In other words, only where the parties are silent on the matter does the situation fall within the scope of Article 3(2) of that directive.

25 On the other hand, Article 17(3) of Law 7/1996, as amended by paragraph 1 of the second final provision of Law 3/2004, specifically requires, if the payment period is to be extended to a maximum of 90 days, the making of an 'express agreement' to that effect. The application of such a period, contractually agreed between the parties, cannot therefore, contrary to the Commission's assertion, be regarded as subject to the conditions laid down in Article 3(2) of Directive 2000/35.

26 It follows from the foregoing considerations that the first complaint is unfounded and must therefore be dismissed.

The second complaint

Arguments of the parties

27 The Commission claims that the second transitional provision of Law 7/1996, inserted by paragraph 2 of the second final provision of Law 3/2004, improperly postpones until 1 July 2006 the application of the maximum payment period of 60 days referred to in Article 3(2) of Directive 2000/35.

28 Article 6(1) of that directive fixes the time-limit for transposition of the directive at 8 August 2002, without providing for any possibility to derogate from this provision or to postpone the time-limit.

29 The deferment provided for by the Spanish legislation also infringes Article 3(4) of Directive 2000/35, pursuant to which Member States are to 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.

30 The Kingdom of Spain essentially replies to those arguments that the transitional regime established by the second transitional provision of Law 7/1996, inserted by paragraph 2 of the second final provision of Law 3/2004, is intended only to determine the moment of entry into force of the provisions of Law 7/1996, concerning retail trade and introducing an even more restrictive regime than that required by Directive 2000/35. As a result, the effect of the provision in question is not to delay the

application of the provisions of Law 3/2004, which transposes that directive and whose compatibility with Community law has not been questioned.

Findings of the Court

31 In this respect, it is sufficient to hold that the national provision in question concerns exclusively the application of the 60-day period referred to in Article 17(3) of Law 7/1996, as amended by paragraph 1 of the second final provision of Law 3/2004.

32 For the reasons set out in paragraphs 22 to 25 of the present judgment, Article 17(3) is outside the scope of Article 3 of Directive 2000/35 and it cannot therefore be a measure transposing that directive.

33 It follows that the postponement of the application of the national provision at issue is not likely to affect the compliance of the Kingdom of Spain with its obligations under Article 3.

34 Accordingly, the second complaint must also be dismissed as unfounded.

35 Since neither of the two complaints relied on by the Commission is well founded, the application must be dismissed in its entirety.

Costs

36 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 been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the Kingdom of Spain.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]