JUDGMENT OF THE COURT (Fifth Chamber)
10 May 2001 *

In Case C-144/99,

Commission of the European Communities, represented by P. van Nuffel, acting as Agent, assisted by M. van der Woude and L. Dommering-van Rongen, Advocaten, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by M.A. Fierstra and J. van Bakel, acting as Agents,

defendant,

* Language of the case: Dutch.

APPLICATION for a declaration that, by failing to adopt the laws, regulations and administrative provisions necessary for the full transposition into Netherlands law of Articles 4(2) and 5 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), the Kingdom of the Netherlands has failed to fulfil its obligations under Article 189 of the EC Treaty (now Article 249 EC) and under that Directive,

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet, D.A.O. Edward, P. Jann (Rapporteur) and L. Sevón, Judges,

Advocate General: A. Tizzano,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 23 January 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 21 April 1999, the Commission of the European Cmmunities brought an action under Article 169 of the EC Treaty (now Article 226 EC) seeking a declaration that, by failing to adopt the laws, regulations and administrative provisions necessary for the full transposition into Netherlands law of Articles 4(2) and 5 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29, hereinafter 'the Directive'), the Kingdom of the Netherlands has failed to fulfil its obligations under Article 189 of the EC Treaty (now Article 249 EC) and under that Directive.

The Directive

2 Article 1 of the Directive states that its aim is 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.

3 Article 3 of the Directive defines 'unfair terms'. Pursuant to Article 6, such terms 'shall not be binding on the consumer'.

4 Article 4 of the Directive provides:

'1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

2. 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.'

5 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).'

6 Under Article 10, 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.

The national legislation

7 Book III of the Burgerlijk Wetboek (Netherlands Civil Code; hereinafter 'the BW') sets out the general rules of property law and Book VI the rules governing obligations and contracts in general.

8 Article 35 of Book III of the BW provides:

'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.'

9 Article 231 of Book VI of the BW defines 'standard terms' as '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'.

10 Article 233 of Book VI of the BW provides:

'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.'

11 Article 248 of Book VI of the BW provides:

'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.'

The pre-litigation procedure

12 On the view that the Directive had not been fully transposed into Netherlands law within the prescribed period, the Commission initiated the infringement procedure. After giving the Kingdom of the Netherlands formal notice to submit its comments, the Commission delivered a reasoned opinion on 6 April 1998 calling upon the Netherlands to take the measures necessary to comply with the Directive within two months of receipt of the opinion. Since the Kingdom of the Netherlands failed to comply with the terms of the reasoned opinion, the Commission brought the present action.

Substance

13 The Commission maintains 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.

14 According to the Commission, only in very closely defined circumstances may a directive be deemed to have been transposed into national law simply because provisions in conformity with that directive already exist within the legal system of the Member State in question. Where, as in the present case, the aim of the directive is to protect consumers by conferring upon them specific rights, the implementing measures adopted must be clear and unambiguous. The provisions of the BW relied upon by the Netherlands Government do not meet those requirements.

15 The Commission also maintains that those provisions fail to ensure that Articles 4(2) and 5 of the Directive will be given proper effect in practice.

16 The Netherlands Government disputes that finding, contending that the third paragraph of Article 189 of the Treaty leaves the Member States entirely free to choose the form and methods necessary to transpose a directive into national law. Relying *inter alia* on the judgment in Case 29/84 *Commission* v *Germany* [1985] ECR 1661 (paragraph 23), it contends that specific implementing measures are not indispensable if the national legal system already secures the aims pursued by the directive.

17 It should be borne in mind, in that connection, that, according to settled case-law, whilst legislative action on the part of each Member State is not necessarily required in order to implement a directive, it is essential for national law to guarantee that the national authorities will effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights and, where appropriate, may rely on them before the national courts (Case C-365/93 *Commission* v *Greece* [1995] ECR I-499, paragraph 9).

18 As the Court has already made clear, the last-mentioned condition is of particular importance where the directive in question is intended to accord rights to nationals of other Member States (Case C-365/93, cited above, paragraph 9). That is the position in the present case, it being one of the aims of the Directive, according to the sixth recital in its preamble, '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'.

19 However, for the reasons given by the Advocate General in points 25 and 26 of his Opinion, it appears that the Kingdom of the Netherlands has been unable to show that its legal system contains provisions equivalent to Articles 4(2) and 5 of the Directive.

20 Given that the Netherlands Government has stated that the aims sought by the Directive could be attained through a schematic interpretation of the provisions of Netherlands law, it is enough to point out that, for the reasons set out by the Advocate General in points 26 to 31 of his Opinion, the results intended by the Directive cannot be attained by applying Netherlands law as it stands at present.

21 As regards the argument advanced by the Netherlands Government that, if the Netherlands legislation were interpreted in such a way as to ensure conformity with the Directive — a principle endorsed by the Hoge Raad der Nederlanden (Netherlands) — it would be possible in any event to remedy any disparity between the provisions of Netherlands legislation and those of the Directive, suffice it to note that, as the Advocate General explained in point 36 of his Opinion, even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty. That, moreover, is particularly true in the field of consumer protection.

22 It must therefore be held that, by failing to adopt the laws, regulations and administrative provisions necessary for the full transposition into national law of Articles 4(2) and 5 of the Directive, the Kingdom of the Netherlands has failed to fulfil its obligations under that Directive.

Costs

23 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 Kingdom of the Netherlands has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. Declares that, by failing to adopt the laws, regulations and administrative provisions necessary for the full 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 that Directive;

2. Orders the Kingdom of the Netherlands to pay the costs.

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 10 May 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber