JUDGMENT OF THE COURT (Fifth Chamber)
24 January 2002 *

In Case C-372/99,

Commission of the European Communities, represented by P. Stancanelli, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented initially by U. Leanza, acting as Agent, assisted by P.G. Ferri, Avvocato dello Stato, and, subsequently, by U. Leanza, assisted by G. de Bellis, Avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION for a declaration that, by failing to adopt the measures necessary to:

— apply the provisions of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) to all contracts concluded between consumers and sellers or suppliers;

— transpose the third sentence of Article 5 of that directive, and

— transpose in full Articles 6(2) and 7(3) of that directive,

the Italian Republic has failed to fulfil its obligations under that directive,

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, D.A.O. Edward and A. La Pergola, 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 20 September 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 6 October 1999, the Commission of the European Communities brought an action under Article 226 EC for a declaration that by failing to adopt the measures necessary to:

— apply the provisions of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts to all contracts concluded between consumers and sellers or suppliers (OJ 1993 L 95, p. 29, hereinafter 'the Directive'),

— transpose the third sentence of Article 5(3) of that Directive, and

— transpose in full Articles 6(2) and 7(3) of that Directive,

the Italian Republic has failed to fulfil its obligations under the Directive.

The Directive

2 Article 1(1) of the Directive states that its purpose 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 7 of the Directive states:

'1. Member States shall ensure that, in the interests of consumers and competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

3. With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.'

4 Under Article 10(1), 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

5 The Directive was transposed into Italian law by Law No 52, Disposizioni per l'adempimento di obblighi derivanti dall'appartenanza dell'Italia alle Comunità europee — legge comunitaria 1994 (law laying down provisions for the fulfilment of obligations deriving from Italy's membership of the European Communities — Community law for 1994) of 6 February 1996 (GURI No 34, of 10 February 1996, Ordinary Supplement No. 24). This law introduced Articles 1469a to 1469e into the Italian Civil Code (hereinafter 'the Civil Code').

6 The first paragraph of Article 1469e of the Civil Code provides that:

'Associations representing consumers, sellers and suppliers as well as chambers of commerce, industry, trade crafts and agriculture may bring proceedings against a supplier or seller or against an association of sellers or suppliers using contract terms drawn up for general use and may request the competent court to prohibit the use of such terms where the unfairness of the terms in question has been established within the meaning of this chapter'.

7 In the course of the present proceedings, the Italian Republic pointed out that Article 7 of the Directive was also transposed by Article 3 of Law No 281, Disciplina dei diritti dei consumatori e degli utenti (law concerning the rights of consumers and users) of 30 July 1998 (GURI No 189, of 14 August 1998, hereinafter 'Law No 281/98').

8 The first paragraph of Article 3 of Law No 281/98 provides that:

'Consumers and users associations registered on the list referred to by Article 5 have *locus standi* to act to protect collective interests by way of an application to the competent court

(a) for an order prohibiting actions or conduct infringing the rights of consumers and users;

...'

9 Article 5 of Law No 281/98 sets out the conditions to be fulfilled by consumers' associations in order to be registered on the list referred to in Article 3. The list is maintained by the Minister of Industry, Commerce and Trade Crafts.

Pre-Litigation Procedure

10 Taking the view that the Directive had not been fully transposed into Italian law within the prescribed period, the Commission initiated the infringement procedure. Having given the Italian Republic formal notice to submit its observations, on 18 December 1998 the Commission sent it a reasoned opinion requesting it to take the measures necessary to comply therewith within two months of the date of notification. As it considered the Italian Republic's response was unsatisfactory, the Commission initiated the present action.

11 Since the Italian Government explained in its defence that Law No 526, Dispozisioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee — legge comunitaria 1999 (law concerning provisions for the enforcement of obligations arising from Italy's membership of the European Communities — Community law 1999) of 21 December 1999 (GURI No 13, of 18 January 2000, Ordinary Supplement No 15) introduced into Chapter XIVa of the Civil Code the amendments requested by the Commission in respect of the first three grounds of complaint, the Commission informed the Court by a document issued on 17 May 2000 that, in accordance with Article 78 of its Rules of Procedure, it was in part discontinuing its action, which would be pursued only in respect of the ground of complaint relating to Article 7(3) of the Directive.

Substance

Scope of the obligation laid down in Article 7(3) of the Directive

12 The Commission submits that Article 7 of the Directive regulates one of the fundamental aspects of protection introduced by that act, that is to say the

procedure intended to 'prevent' the use of unfair terms in contracts concluded between sellers and suppliers and consumers. It is a requirement of that objective that it should be possible to initiate that procedure not only against sellers or suppliers using such clauses, but also against professional bodies or other traders who recommend the use of such clauses. It is not necessary to wait until clauses drawn up with a view to general use are actually inserted in a particular contract.

13 The Italian Government disputes this interpretation. It maintains that the procedure provided for in Article 7 of the Directive is designed to prevent the 'use' of unfair terms. Actual, and not merely potential, use is therefore an essential condition.

14 It should be noted that in its judgment in Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial et Salvat Editores* [2000] ECR I-4941, paragraph 27) the Court held that the system of protection laid down by the Directive is based on the notion that the imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract. That is why Article 7 of the Directive, paragraph 1 of which requires Member States to implement adequate and effective means to prevent the continued use of unfair terms, specifies in paragraph 2 that those means are to include allowing authorised consumer associations to take action in order to obtain a decision as to whether contract terms drawn up for general use are unfair and, where appropriate, to have them prohibited.

15 The deterrent nature and dissuasive purpose of the measures to be adopted, together with their independence from any particular dispute mean, as the Court held, that such actions may be brought even though the terms which it is sought to have prohibited have not been used in specific contracts, but have only been recommended by suppliers and sellers or their associations (*Océano Groupe Editorial*, cited above, paragraph 27).

16 It follows that Article 7(3) of the Directive must be interpreted as requiring the setting up of procedures which may also be directed against conduct confined to the recommending of the use of unfair contract clauses.

Transposition of Article 7(3) of the Directive into Italian law

17 The Commission claims that Article 1469e of the Civil Code allows actions to be brought against sellers, suppliers or their associations only where they actually use unfair terms, which restricts the preventive effects of the prohibition procedure provided for by Article 7 of the Directive.

18 Point (a) of the first paragraph of Article 3 of Law No 281/98 does not provide any means of overcoming that problem. Firstly, as the measures laid down by this provision are of a more general nature than those in Article 1469e of the Civil Code, the latter must take precedence in cases involving unfair terms. Next, even if the proceedings provided for by Article 3 of Law No 281/98 can be brought against persons recommending the use of unfair terms, this would involve an interpretation which is either strained or directly contradicts the wording of the provision, which would not satisfy the demands of clarity and precision required in respect of national implementing measures. Finally, the definition in Article 3 of the category of persons with *locus standi* to bring actions is more limited than that in Article 1469e, thus involving a disparity in treatment, between those using unfair terms and those recommending their use, contrary to Article 7 of the Directive.

19 The Italian Government argues that conduct consisting of recommending the use of unfair contract terms may be brought within the definition of actual use of unfair terms on the basis of Article 3 of Law No 281/98 which refers to 'conduct which infringes the interests of consumers and users'. The principle that a special rule derogates from a general rule is irrelevant for the purpose of defining the relationship between Article 1469e of the Civil Code and Article 3 of Law No 281/98 so far as this relates to procedural rather than material provisions. As regards the definition of persons entitled to request the prohibition of unfair terms, the Italian Government points out that Article 7(3) of the Directive refers to national law.

20 In this respect, it should be borne in mind that, according to the case-law of the Court, the scope of national laws, rules or administrative provisions must be assessed in the light of the of the interpretation given to them by national courts (see, in particular, Case C-382/92 *Commission* v *United Kingdom* [1994] ECR I-2435, paragraph 36, and C-300/95 *Commission* v *United Kingdom* [1997] ECR I-2649, paragraph 37).

21 In the present case, in relation firstly to Article 1469e of the Civil Code, it should be noted that the wording of this provision affords a legal remedy only where unfair terms are used. However, the Advocate General pointed out in paragraph 30 of his Opinion that Italian case-law interprets the notion of 'use' widely enough to cover also the recommendation of such clauses.

22 However, it is clear from the decisions of the Italian courts, mentioned in footnotes 10 and 11 of the Advocate General's Opinion, that this recent case-law cannot be considered as unanimous or at least as sufficiently well established to make certain such an interpretation.

23 Secondly, with respect to Article 3 of Law No 281/98, it should be noted that the wording of this provision does not exclude the bringing of an action against recommending the use of unfair terms. The Advocate General also pointed out at paragraph 40 of his Opinion that Italian case-law recognises the admissibility of such actions.

24 However, the decision mentioned in footnote 14 of the Advocate General's Opinion (which does not concern the mere recommendation of the use of unfair terms) is not of such a nature as to contradict the interpretation of Article 3 of Law No 281/98 put forward by the Italian Government during the course of the present proceedings, according to which the admissibility of an action against a party making such a recommendation depends on an actual use of the unfair terms recommended. Such a condition is incompatible with the interpretation which should be given to Article 7(3) of the Directive (see paragraph 16 above).

25 These concerns are even more serious, since as the Advocate General observed in paragraph 54 of his Opinion, the relationship between Article 1469e of the Civil Code and Article 3 of Law No 281/98 is not free of ambiguity. As he noted, it appears that certain Italian courts consider that in relation to unfair terms, Article 1469e, as a special law, takes precedence over Article 3 of Law No 281/98. Such an interpretation involves consequences as regards the group of bodies empowered to act, as the two provisions do not have the same field of application in that respect.

26 In view of the doubts raised by the case-law as a whole, which comprises decisions of courts of first instance, it does not appear to have been established that the interpretation of Article 1469e of the Civil Code and Article 3 of Law No 281/98 given by the Italian courts makes it possible to attain the object of Article 7(3) of the Directive, as set out in paragraph 16 of the present judgment.

27 In any event, even if the latter provision refers to persons or to approved consumers' organisations with legal knowledge in the field of consumer protection, it must be considered that the transposition of Article 7(3) into the Italian legal system does not take sufficient account of the principle of legal certainty.

28 Consequently, it must be held that, by failing to take the measures necessary to transpose fully Article 7(3) of the Directive, the Italian Republic has failed to fulfil its obligations under the Directive.

Costs

29 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 in respect of the ground of complaint under Article 7(3) of the Directive.

30 Under to the first subparagraph of Article 69(5) of those Rules, upon application by a party who discontinues the proceedings, the costs are to be borne by the other party if this appears justified by the conduct of that party. Having regard to the conduct of the Italian Republic, which adopted the amendments necessary to remedy the first three grounds of complaint set out in the application only after the action was brought, it must be ordered to pay the costs of the proceedings in so far as they relate to those grounds of complaint.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, by failing to adopt the measures necessary to transpose in full Article 7(3) of Council Directive 93/13/CEE of 5 December 1993 on unfair terms in consumer contracts, the Italian Republic has failed to fulfil its obligations under the Directive;**

2. **Orders the Italian Republic to pay the costs.**

Jann Edward La Pergola

Delivered in open court in Luxembourg on 24 January 2002.

R. Grass

Registrar

P. Jann

President of the Fifth Chamber