JUDGMENT OF THE COURT (Fifth Chamber)

7 May 2002 *

In Case C-478/99,

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

applicant,

v

Kingdom of Sweden, represented by L. Nordling and A. Kruse, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Kingdom of Denmark, represented by J. Molde, acting as Agent, with an address for service in Luxembourg,

and by

* Language of the case: Swedish

Republic of Finland, represented by T. Pynnä and E. Bygglin, acting as Agents, with an address for service in Luxembourg,

interveners,

APPLICATION for a declaration that, by failing to adopt the laws, regulations and administrative provisions necessary to implement in its national legal system the annex referred to in Article 3(3) 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 Sweden 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 M. Wathelet, Judges,

Advocate General: L.A. Geelhoed,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 25 October 2001,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 16 December 1999, the Commission of the European Communities brought an action under Article 226 EC seeking a declaration that, by failing to adopt the laws, regulations and administrative provisions necessary to implement in its national legal system the annex referred to in Article 3(3) 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 Sweden has failed to fulfil its obligations under that Directive.

The Directive

2 Under Article 1 thereof, the purpose of the Directive is to approximate the laws, regulations and adminstrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer. Article 8, however, provides that Member States may adopt or retain more stringent provisions to ensure a higher degree of protection for the consumer.

3 Article 3 of the Directive reads as follows:

'1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

2. ...

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.'

4 The Directive includes an annex entitled 'Terms referred to in Article 3(3)', which sets out 17 types of contractual term. The 17th recital of the Directive specifies that, 'for the purposes of this Directive, the annexed list of terms can be of indicative value only and, because of... the minimal character of the Directive, the scope of these terms may be the subject of amplification or more restrictive editing by the Member States in their national laws.'

5 According to Article 10 of the Directive, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive no later than 31 December 1994.

National legislation

6 The Directive has been implemented into Swedish law by the lagen (1994:1512) om avtalsvillkor i konsumentförhallanden (Law on terms of contract in relations with consumers) and by the lagen (1994:1513) om ändring i lagen (1915:218) om avtal och andra rättshandlingar pa förmögenhetsrättens omrade (Law amending the Law on contracts and other legal transactions in property law).

7 The annex to the Directive has not been reproduced in the text of those laws. It appears, with a commentary, in the statement of reasons for the draft of lagen (1994:1512).

The procedure

8 Taking the view that the Directive had not been fully implemented in Swedish law within the time-limit, the Commission initiated the infringement procedure. Having given the Kingdom of Sweden formal notice to submit its observations, on 6 April 1998 the Commission sent a reasoned opinion calling upon that Member State to take the measures necessary to comply with it within a period of two months from notification. Since the Kingdom of Sweden did not respond to that opinion, the Commission has brought the present action.

9 By orders of the President of the Court of 26 May and 4 July 2000, the Republic of Finland and the Kingdom of Denmark were granted leave to intervene in support of form of order sought by the Kingdom of Sweden.

Substance

10 The Commission points out that the Directive has a twofold objective: on the one hand, as evidenced by its Article 1 and the second recital in its preamble, to approximate the provisions in force in the Member States relating to unfair terms in contracts concluded with consumers; and on the other hand, as indicated by its fifth and eighth recitals, to improve consumer information on the applicable rules of law.

11 The fact that the list of unfair terms set out in the annex to the Directive is, as noted in Article 3(3), 'non-exhaustive' means that, in accordance with Article 8 of the Directive, it may be subject to amplification or more restrictive formulations by the Member States in their national laws. Similarly, the fact that this list is, as specified in Article 3(3), 'indicative', merely means that the terms listed therein should not automatically be considered unfair but that the competent national authority must be free to assess their character in light of the general criteria defined in Articles 3(1) and Article 4 of the Directive.

12 In any event, in order to achieve the twofold objective pursued and to satisfy the requirements of legal certainty, it is essential for this list to be published as an integral part of the provisions of the Directive. A mere mention in the preparatory work for a law cannot suffice, as is clear from Case 143/83 *Commission* v *Denmark* [1985] ECR 427, paragraph 11. It is doubtful whether the members of the public concerned — not only consumers but also Swedish and foreign traders, and the national authorities responsible for applying the measures for implementing the Directive — have easy access to that preparatory work or are aware of its existence and importance.

13 The Swedish Government, supported in all its pleas and arguments by the Danish and Finnish Governments, points out that, under Article 249 EC, Member States enjoy considerable latitude as regards the form and methods of implementing a directive. This case differs from *Commission* v *Denmark* cited above in that the list contained in the annex to the Directive, which serves only as an aid to interpreting the general criteria defined by Articles 3(1) and 4 of the Directive, is not in itself intended to create rights and obligations for individuals.

14 When the Directive was being implemented, the question of the annex was the subject of extensive discussion. According to a legal tradition well established in Sweden and common to the Nordic countries, the preparatory work is an important aid to interpreting legislation. The incorporation of the annex to the Directive in the preparatory work thus seemed the most suitable solution. Swedish courts have already held most of the terms set out in the annex to be unfair, where necessary by referring to the list in question, and the members of the concerned public are informed of its existence in various ways.

15 In that respect, it should be recalled that, according to settled case-law, each of the Member States to which a directive is addressed is obliged to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective it pursues (see in particular Case C-336/97 *Commission* v *Italy* [1999] ECR I-3771, paragraph 19, and Case C-97/00 *Commission* v *France* [2001] ECR I-2053, paragraph 9).

16 In this case, Article 6 of the Directive requires Member States to take the necessary measures to ensure that unfair terms used in a contract concluded with a consumer by a seller or supplier are not binding on the consumer. Article 7 also

requires them to put in place adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

17 Article 3 of the Directive generally defines the factors that make a term unfair. Article 4 specifies that this unfairness is to be assessed taking into account the circumstances attending the conclusion of the contract. Article 5 lays down a requirement for clarity in the drafting of the terms offered to the consumer.

18 Those provisions, which are intended to grant rights to consumers, define the result sought by the Directive. According to settled case-law, it is essential that the legal situation resulting from national implementing measures be sufficiently precise and clear and that individuals be made fully aware of their rights so that, where appropriate, they may rely on them before the national courts (see, in particular, Case C-365/93 *Commission* v *Greece* [1995] ECR I-499, paragraph 9, and Case C-144/99 *Commission* v *Netherlands* [2001] ECR I-3541, paragraph 17). As the Court has already made clear, the latter condition is of particular importance where the directive in question is intended to confer rights on nationals of other Member States as is the case here (*Commission* v *Netherlands*, paragraph 18).

19 The Commission is not claiming that the Kingdom of Sweden has failed to meet its obligations under those provisions of the Directive.

20 As regards the annex referred to in Article 3(3) of the Directive, implementation of which is the subject of this action, the annex in question is, according to the

terms of Article 3(3), to contain an indicative and non-exhaustive list of terms which may be regarded as unfair. It is not disputed that a term appearing in the list need not necessarily be considered unfair and, conversely, a term that does not appear in the list may none the less be regarded as unfair.

21 In so far as it does not limit the discretion of the national authorities to determine the unfairness of a term, the list contained in the annex to the Directive does not seek to give consumers rights going beyond those that result from Articles 3 to 7 of the Directive. It in no way alters the result sought by the Directive which, as such, is binding on Member States. It follows that, contrary to the argument put forward by the Commission, the full effect of the Directive can be ensured in a sufficiently precise and clear legal framework without the list contained in the annex to the Directive forming an integral part of the provisions implementing the Directive.

22 Inasmuch as the list contained in the annex to the Directive is of indicative and illustrative value, it constitutes a source of information both for the national authorities responsible for applying the implementing measures and for individuals affected by those measures. As noted by the Advocate General in paragraph 48 of his Opinion, Member States must therefore, in order to achieve the result sought by the Directive, choose a form and method of implementation that offer a sufficient guarantee that the public can obtain knowledge of it.

23 In the present case, the Annex to the Directive has been reproduced in its entirety in the preparatory work for the law implementing the Directive. The Swedish Government has claimed that, according to a legal tradition that is well established in Sweden and common to the Nordic countries, preparatory work constitutes an important aid to interpreting legislation. It has also stated that such preparatory work may easily be consulted and that, in addition, information

concerning terms that are considered or may be considered to be unfair is provided to the public by various means. The Commission has not disputed those statements but has confined itself to maintaining that those factors cannot compensate for the fact that the list in the annex to the Directive is not an integral part of the provisions implementing the Directive.

24 The Commission has therefore failed to establish that the measures taken by the Kingdom of Sweden do not offer a sufficient guarantee that the public can obtain knowledge of the list contained in the annex to the Directive.

25 It follows from the foregoing that the Commission has not shown that the Kingdom of Sweden has failed to adopt the measures necessary to implement in its national law the annex referred to in Article 3(3) of the Directive.

26 The application must therefore be dismissed.

Costs

27 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 Kingdom of Sweden has applied for costs against the

Commission and the latter has been unsuccessful in its action, it must be ordered to pay the costs. Pursuant to Article 69(4) of the Rules of Procedure, the Kingdom of Denmark and the Republic of Finland will bear their own costs.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. **Dismisses the application;**

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

3. **Orders the Kingdom of Denmark and the Republic of Finland to bear their own costs.**

Jann Edward Wathelet

Delivered in open court in Luxembourg on 7 May 2002.

R. Grass

Registrar

P. Jann

President of the Fifth Chamber