JUDGMENT OF THE COURT (Second Chamber)

26 October 2006 *

In Case C-302/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 28 July 2005,

Commission of the European Communities, represented by B. Schima and D. Recchia, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, and by M. Massella Ducci Teri, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, P. Kūris, J. Klučka (Rapporteur) and G. Arestis, Judges,

Advocate General: M. Poiares Maduro,
Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by providing that a retention of title clause must be confirmed on individual invoices for successive supplies bearing a specific date that is prior to any attachment procedure and is duly entered in the accounting records in order for it to be enforceable against third party creditors of the buyer, the Italian Republic has failed to fulfil its obligations under Article 4(1) of Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payments in commercial transactions (OJ 2000 L 200, p. 35).

Legal context

Community legislation

2 Directive 2000/35 aims to harmonise the laws of the Member States on combating late payments in commercial transactions between undertakings or between undertakings and public authorities in respect of the delivery of goods or the provision of services for remuneration.

3 Article 1 of that directive provides.

'This Directive shall apply to all payments made as remuneration for commercial transactions.'

4 Under Article 2 of the directive:

1. "[C]ommercial transactions" means transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration;

...

3. "retention of title" means the contractual agreement according to which the seller retains title to the goods in question until the price has been paid in full;

...'

5 Article 4(1) of Directive 2000/35 provides:

'Member States shall provide in conformity with the applicable national provisions designated by private international law that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed between the buyer and the seller before the delivery of the goods.'

6 Under recital 21 of the preamble to that directive:

'It is desirable to ensure that creditors are in a position to exercise a retention of title on a non-discriminatory basis throughout the Community, if the retention of title clause is valid under the applicable national provisions designated by private international law.'

National legislation

7 Sale with retention of title is governed under Italian law by Chapter 1(3) of Title III in Book IV of the Civil Code.

8 Under Article 1523 of that code, entitled 'Transfer of title and risk':

'In a sale on instalment credit terms with retention of title, the buyer shall assume ownership of the thing upon payment of the final instalment of the price but shall bear the risks associated with the thing upon delivery of it.'

9 Article 1524(1) of that code provides that retention of title is enforceable against creditors of the buyer only if provision is made for it in writing in a document bearing a specific date that is prior to any attachment procedure. Paragraphs 2 and 3 of that article regulate the means of enforcing that clause against third party purchasers, either where the subject-matter of the sale is a machine with a value greater than ITL 30 000 (approximately EUR 16), or where the sale relates to movable property entered in a public register.

10 Article 11(3) of Legislative Decree No 231 of 9 October 2002 ('the Legislative Decree') is worded as follows:

'The retention of title referred to in Article 1523 of the Civil Code provided for in a prior written agreement between the buyer and the seller shall be enforceable against third party creditors of the buyer if it is confirmed on individual invoices for successive supplies bearing a specific date that is prior to any attachment procedure and is duly entered in the accounting records.'

The pre-litigation procedure

11 The Commission received a complaint in which the complainant maintained that Article 4 of Directive 2000/35 had been incorrectly transposed in Italian legislation. According to that complainant, Article 11(3) of the Legislative Decree imposes significant administrative burdens on the seller.

12 After giving the Italian Republic formal notice to submit its observations on that provision of national legislation in the light of Article 4 of that directive, the Commission issued a reasoned opinion on 18 October 2004 calling upon that Member State to adopt the measures necessary to comply with the reasoned opinion within two months from the date of notification.

13 In the absence of any reply, the Commission decided to bring the present action.

The action

Arguments of the parties

14 The Commission maintains that Article 11(3) of the Legislative Decree is inconsistent with Article 4(1) of Directive 2000/35 and with the spirit of that directive.

15 In its view, the obligation to confirm the retention of title clause on each individual invoice in order for that clause to be enforceable against creditors of the buyer amounts to the imposition of an additional requirement on the seller who, in order to retain title to the goods until the price has been paid in full, is required under Directive 2000/35 only to agree such a clause with the buyer before the delivery of those goods.

16 Moreover, the fact that, pursuant to Article 11(3) of the Legislative Decree, the date on the invoices must be specific and prior to any attachment procedure is also incompatible with Article 4(1) of Directive 2000/35, which places emphasis on the fact that there must be a prior agreement expressly concluded between the buyer and the seller.

17 In reply, the Italian Government submits that the retention of title clause is conceived of as being ancillary to the contract of sale, the validity and effectiveness of which are not dependent on any specific condition as to form, the only condition for validity being that such a clause be agreed at the time when the contract of sale is concluded.

18 Article 11(3) of the Legislative Decree was adopted in order to supplement the provisions of the Civil Code and is concerned only with the rules governing the enforceability of a retention of title clause against creditors of the buyer and not against third party buyers. It merely serves as a supplement to Article 1524(1) of the Civil Code. On that point, the Italian Government states that the amendment made by Article 11(3) of the Legislative Decree concerns only certain categories of contracts of sale, in particular sale with delivery by instalments whereby the supplies may be staggered over a period of time and may cover goods that can be valued individually and be of substantial economic value. In addition, it points out that that provision is directed at certain mixed contractual arrangements whereby the seller is

required to issue a large number of invoices, which are also staggered over a long period of time.

19 According to the Italian Government, the purpose of the obligation to confirm the retention of title clause in documents attesting to the subsequent performance of the original contract is, in particular, to comply with the principle of legal certainty and to protect third parties who enter into business relations with a party in possession of goods which are the property of another.

20 Lastly, the Italian Government relies on the rules on evidence laid down by the Civil Code. According to the case-law of the Italian Court of Cassation, it is possible to have recourse to any factual evidence to establish that a document came into existence at an earlier date. According to that case-law, that includes, inter alia, knowledge of a document on the part of a person against whom it is intended to be raised.

21 On that last point, the Commission takes note that the specific date may easily be proved but persists with its complaint that the conditions laid down by Article 11(3) of the Legislative Decree are incompatible with Article 4(1) of Directive 2000/35.

Findings of the Court

22 In order to determine whether the Commission's application is well founded, it is necessary to analyse Article 4(1) of Directive 2000/35 and to ascertain whether that provision affects the rules adopted by a Member State concerning the enforceability of retention of title clauses against third parties.

23 It is to be noted at the outset that that directive does not harmonise all the rules relating to late payments in commercial transactions since it governs only certain specific rules intended to combat such delays, namely, rules on interest for late payments (Article 3), retention of title (Article 4) and procedures for recovery of unchallenged claims (Article 5).

24 Moreover, that directive refers to a number of areas in which national law is to apply. It is clear from recitals 15 and 19 in the preamble that that is the case in particular with regard to the various procedures of forced execution of an enforceable title, the conditions under which forced execution of such a title can be stopped or suspended and the way contracts are concluded.

25 With regard to retention of title clauses, in respect of which a reference is made to national law, Article 4(1) of Directive 2000/35 provides that Member States are to provide in conformity with the applicable national provisions designated by private international law that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed between the buyer and the seller before the delivery of the goods.

26 It is apparent from its wording that that provision prescribes the effects of a retention of title clause on the buyer and the seller, the latter being able to retain title to the goods until they are fully paid for. It also establishes that, in order to be valid, such a clause must have been expressly agreed between the buyer and the seller before the goods are delivered.

27 It should also be added that the reference to national provisions designated by private international law in Article 4(1) of Directive 2000/35 is directed at conditions of validity for retention of title clauses.

28 According to that provision, read in conjunction with recital 21 in the preamble to Directive 2000/35, the Community legislature considered it desirable to ensure that creditors are in a position to exercise a retention of title on a non-discriminatory basis throughout the Community if the retention of title clause is valid under the applicable national provisions designated by private international law. The availability of such a clause to creditors may be considered to be a specific contribution to combating late payments in commercial transactions.

29 In view of the wording of Article 4(1) of Directive 2000/35 and the purpose of that directive, it cannot be inferred from that provision that it is intended to affect any rules other than those which expressly provide, firstly, that it is possible for the seller and the buyer expressly to agree a retention of title clause before the goods are delivered and, secondly, that it is possible for the seller to retain title to the goods until they have been paid for in full.

30 Accordingly, the rules in question in the present case, which concern the enforceability of retention of title clauses against third parties, whose rights are not affected by Directive 2000/35, are still governed exclusively by the national legal orders of the Member States.

31 In those circumstances, by providing that a retention of title clause must be confirmed on individual invoices for successive supplies bearing a specific date that

is prior to any attachment procedure and is duly entered in the accounting records in order for it to be enforceable against third party creditors of the buyer, the Italian Republic has not failed to fulfil its obligations under Article 4(1) of Directive 2000/35.

32 The Commission's action must therefore be dismissed.

Costs

33 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 Italian Republic has applied for costs, and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

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

1. Dismisses the action;

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

[Signatures]