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Collective action under the Unfair Contract Terms Directive

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Abstract: Case C-372/99 concerns an infringement procedure under Article 226 EC against the Italian Republic (hereinafter also referred to as: Italy) for failing to adopt the necessary measures to enable (consumer) organisations to prevent the use of unfair contract terms. In its ruling, the ECJ reiterated its decision in the famous Océano-case and further developed the idea that the unfairness-test in Article 3 of the Directive on Unfair Contract Terms is to be applied \textit{ex officio}. Finally, it clarified that collective action may not only be undertaken against unfair contract terms that already are being used in practice, but also to prevent the future use of unfair contract terms that not have been made use of just yet.

Résumé: L’affaire C-372/99 concerne une procédure conformément à l’article 226 EC contre la République Italienne (ci-après dénommée également : Italie) pour n’avoir pas adopté les mesures nécessaires pour permettre aux organisations (de consommateurs) de prévenir l’utilisation de clauses abusives. La CJE réitère sa décision de l’affaire Océano et étend plus avant l’idée que le test d’injustice dans l’article 3 de la Directive sur les Clauses abusives dans les contrats conclus avec les consommateurs doit être appliqué \textit{ex officio}. Finalement, elle clarifie le fait qu’une action collective peut non seulement être entreprise contre des clauses abusives qui sont déjà utilisées en pratique, mais également pour éviter que des clauses abusives non encore utilisées le soient à l’avenir.


Introduction

1 Unfair contract terms are widely used in contracts concluded with professionals and consumers alike. Whereas the European Union lacks competence to develop rules...
protecting professional parties when concluding contracts abroad, Article 95 EC Treaty (ex Article 100a) does provide the European Union competence in order to develop rules protecting consumers. The 1993 Unfair Contract Terms Directive explicitly places the need for consumer protection in the promotion of the internal market: consumers do not know the rules of law that govern contracts for the sale of goods or services when a legal system other than their own is applicable to their contract. Because of that, they may be deterred from concluding contracts for the purchase of goods or services in another Member State.\(^3\) A similar argument is, for instance, made in the Consumer Sales Directive.\(^4\) Whether the argument is valid, is questionable: the consumer’s lack of knowledge of his own legal system does not seem to deter him much from concluding contracts. As it is, if a consumer, before or after the conclusion of a contract, is bothered at all with (quasi-) legal questions, his main concern is likely to be whether he is able to invoke a remedy for non-conformity (or, more broadly spoken, non-performance). Especially the concern for access to justice may play an important role in preventing consumers from making use of the internal market.

2 Be that as it may, the Unfair Contract Terms Directive is an important tool for consumer protection on a national and European level and an important instrument in the approximation of national contract laws: the use of unfair contract terms is problematic in many countries, and the existing legislation did differ considerably in the Member State. Yet, in practice, exactly because of the consumer’s ignorance of the law, collective action by consumer organisations is indispensable to combat the use of unfair contract terms. The Directive recognises that importance and requires the Member States to facilitate consumer organisations to initiate proceedings concerning unfair contract terms in contracts concluded with consumers.\(^5\) To that end, the Directive provides in Article 7 (1) that “Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers”. Such means, paragraph (2) adds, “include provisions whereby persons or organizations, 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

\(^3\) Cf. ‘Whereas’ no. 5 in the preamble to the directive: ‘Whereas, generally speaking, consumers do not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods or services whereas this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State’.


\(^5\) Cf. ‘Whereas’ no. 23 in the preamble to the directive.
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.” Such an action may be brought against an individual seller or supplier or against an association that recommends the use of such unfair contract terms, paragraph 3 adds. It is the use of the word “continued use” that has led to Case C-372/99 being brought before the Court of Justice.

**Transposition of the Directive and proceedings before the ECJ**

3 The Unfair Contract Terms Directive was transposed into Italian law by Law No 52/94.6 This law introduced Articles 1469a to 1469e into the Italian Civil Code (hereinafter referred to as: CCi). Under Article 1469e, paragraph 1, CCi, among others, consumer organisations 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. In the course of the proceedings, Italy pointed out that Article 7 of the Directive was also transposed by Article 3 of Law No 281/98.7 Article 3, paragraph 1, of Law 281/98 adds that registered consumer organisations may act to protect collective interests by way of an application to the competent court for, *inter alia*, an order prohibiting actions or conduct infringing the rights of consumers.

4 Taking the view that the Directive had not been fully transposed into Italian law within the prescribed period, the Commission initiated the infringement procedure. In the meantime, Italy amended its legislation in accordance with a part of the requests of the Commission,8 which led the Commission to drop 3 of the 4 complaints against Italy, leaving only the complaint as to the implementation of Article 7 (3) of the Directive.

5 Article 7 of the Directive introduces the right for consumer organisations to prevent the use of unfair terms in contracts concluded between sellers and suppliers and consumers; to that extent, Member States must develop a procedure by which that right may be enforced. The Commission argued that the Directive requires that a consumer organisation need not wait until unfair clauses are actually inserted in a

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particular contract, but that such “collective action” may also be initiated pre-
emptively. The Italian government, on the other hand, emphasised that Article 7
provides that such action may be taken to prevent the use of unfair terms, as follows
from the words “continued use” in paragraph (2). According to the Italian govern-
ment, actual, and not merely potential, use is therefore an essential condition for the
applicability of Article 7 of the Directive.

The ECJ’s ruling
6 The ECJ commenced its decision by reiterating its judgment in the Océano-case. In
paragraph 27 of that decision, “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 uncon-
nected with the actual parties to the contract”. In Commission v. Italian Republic,
the ECJ explained that because of that, the obligation to implement adequate and
effective means to prevent the continued use of unfair terms (Article 7, paragraph 1,
of the Directive) is specified in paragraph 2 as to include measures “allowing autho-
rised 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”.9 It then added that “the deterrent nature and dissuasive purpose
of the measures to be adopted, together with their independence from any particular
dispute mean 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”.10 From that, the
ECJ concluded that Article 7, paragraph 3, of the Directive must be interpreted as
requiring the setting up of procedures which may also be directed against conduct
confined to the (mere) recommending of the use of unfair contract clauses.11

7 As to the Italian implementation of the Directive, the ECJ pointed out that the
wording of Article 1469e CCi affords a legal remedy only where unfair terms are used.
Although the Advocate General pointed out that Italian case-law interprets the
notion of “use” widely enough to cover also the recommendation of such clauses, the
ECJ concluded from some of the cases he cited that the Italian case-law cannot be
considered as unanimous or at least as sufficiently well established to make certain
such an interpretation. Article 1469e CCi therefore does not sufficiently transpose
Article 7, paragraph 3, of the Directive.12

10 ECJ 24 January 2002, Case C-372/99, Commission v. Italian Republic, paragraph 15, referring to
ECJ 27 June 2000, joined Cases C-240/98 to C-244/98, Océano Grupo Editorial et Salvat
8 The ECJ recognised that the wording of Article 3 of Law No 281/98 does not exclude the bringing of an action against the mere recommendation of the use of unfair terms. However, case law does not seem to explicitly deny the Italian governments’ interpretation of Article 3 of Law No 281/98, according to which the admissibility of an action against a party making such a recommendation depends on actual use of the unfair terms recommended. As the ECJ had already indicated in paragraph 16, such an interpretation is not in conformity with Article 7, paragraph 3, of the Directive. Moreover, the ECJ noted, the relationship between Article 1469c CCi and Article 3 of Law No 281/98 is no unambiguous. And even if the latter provision could be applicable and could allow for a consumer organisation to prevent the recommendation of unfair contract terms, such would not be sufficiently clear und thus not meet the requirements of legal certainty. Consequently, Italy was considered not to have taken the measures necessary to fully transpose Article 7, paragraph 3, of the Directive and thus having failed to fulfil its obligations under the Directive.

Comments

9 The Court’s ruling in Commission v. Italian Republic does not come as a surprise. The case is reported here primarily because it is provides some indicative answers as to the extent of the Océano-case of 2000, however, without definitively settling them. In its Océano-ruling the ECJ first established that the jurisdiction clause in question was unfair. It then considered that the aim of Article 6 of the Directive, which requires Member States to lay down that unfair terms are “not binding” on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms, for their would be “a real risk that the consumer, particularly because of ignorance of the law, will not challenge the term pleaded against him on the grounds that it is unfair”. It followed, the Court ruled, that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion. Such examination of unfair contract terms by its own motion may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers.

From the Océano-case it becomes clear that a national court is competent to examine jurisdiction clauses of its own motion. However, the scope of that decision remained unclear: is the court obliged or merely allowed to examine clauses of its own motion, and is that obligation or competence restricted to jurisdiction clauses or does it extend to all (possibly) unfair contract terms?

In Commission v. Italian Republic an answer to these questions appears to be given. The Court reiterates 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” (emphasis added, MBML). Such positive action may exist in a consumer organisation being able to combat the use or recommendation of unfair contract terms in a collective action, or in a national court examining an unfair contract term of its own motion in a concrete case between a seller or supplier and a consumer, as was the case in Océano. Moreover, in reiterating the Océano-case, the Court used generic terms, implying that the scope of Océano is not restricted to jurisdiction clauses but extends to all unfair contract terms. In its 2002-ruling in the Cofidis-case, the ECJ explicitly confirmed that impression.

Still, is a court obliged or merely competent to examine a clause of its own motion? Especially in proceedings where the consumer is not present to defend its case, an examination of an unfair contract term by the court of its own motion is the only “adequate and effective means” to prevent an unfair contract term from being binding on the consumer, as Article 6 of the Directive requires. That indicates that at least in such cases an obligation to that extent would exist. Yet, the ECJ’s reference to the real risk that a consumer out of ignorance of the law would not challenge an unfair term indicates that even when the consumer is present, such examination by the court of its own motion may be necessary.

This view is supported by the ECJ’s ruling in the recent Cofidis-case, where the Court invokes just that argument to support the national court’s power to examine a clause of its own motion. However, a final answer to the question – obligation or mere competence - still was not provided in the Cofidis-case, since in that particular case the national court had actually examined the term (and had qualified it as being unfair), but wondered whether it was allowed to do so, given the fact that a provision of procedural law required a claim to that extent to be made within two years after the conclusion of the contract, which period had at that time already lapsed.

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20 ECJ 21 November 2002, Case C-473/00 (Cofidis/Fredout), paragraph 34.
22 ECJ 21 November 2002, Case C-473/00 (Cofidis/Fredout), paragraphs 32-34.
An explicit and final answer by the ECJ to the question is badly needed, for the Consumer Sales Directive\textsuperscript{23} raises the same question. Article 7, paragraph 1, of that Directive explicitly provides that “Any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller’s attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, not be binding on the consumer” (emphasis added, MBML). The emphasised part of the provision is identical to that of Article 6, paragraph 1, of the Unfair Contract Terms Directive. Bearing that in mind, one can only hope that a prejudicial question forcing the ECJ to explicitly speaking its mind will be put to the ECJ shortly.