JUDGMENT OF THE COURT
2 February 1989 *

In Case 22/87

Commission of the European Communities, represented by Enrico Traversa, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Luigi Ferrari Bravo, Head of the Servizio del Contenzioso Diplomatico, acting as Agent, assisted by Oscar Fiumara, avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 rue Marie-Adelaïde,

defendant,

APPLICATION for a declaration that, by failing to adopt within the prescribed period the necessary measures to implement Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (Official Journal 1980, L 283, p. 23), the Italian Republic has failed to fulfil its obligations under the EEC Treaty,

THE COURT

composed of: O. Due, President, R. Joliet, T. F. O'Higgins and F. Grévisse (Presidents of Chambers), Sir Gordon Slynn, G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

* Language of the case: Italian

having regard to the Report for the Hearing and further to the hearing on 11 October 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 15 November 1988,

gives the following

Judgment

1 By an application lodged at the Court Registry on 28 January 1987, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by failing to adopt within the prescribed period the necessary measures to implement Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (Official Journal 1980, L 283, p. 23), the Italian Republic has failed to fulfil its obligations under the EEC Treaty.

2 More particularly, the Commission makes three complaints relating to failure to fulfil the obligations deriving from Articles 3 and 5 of the directive (setting up of guarantee institutions ensuring the payment of employees' outstanding claims resulting from contracts of employment), from Article 7 (guarantee of the payment of the benefits due to employees under statutory social security schemes) and from Article 8 (guarantee of the payment of old-age benefits under supplementary company or inter-company schemes).

3 The period of 36 months provided for in Article 11 of the directive for the implementation by the Member States of the laws, regulations and administrative provisions necessary to comply therewith expired on 23 October 1983. It is not disputed that no measure has been adopted by the Italian Republic in order to implement the directive.

4 The Italian Government contends nevertheless that various provisions of Italian law at present in force are capable of providing workers with protection equivalent, or indeeed superior, to that sought by the directive.

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6 At the outset it must be recalled that, under Article 189 of the Treaty, each Member State to which a directive is addressed is under a duty to adopt, within its national legal order, all the measures needed to ensure that the directive is given full effect, in conformity with the objective pursued by it. The Court has held (in particular in its judgment of 23 May 1985 in Case 29/84 *Commission* v *Federal Republic of Germany* [1985] ECR 1661) that although the implementation of a directive does not necessarily require the adoption of specific legislation or regulations in each Member State, the adoption of such measures cannot be regarded as superfluous unless the existing provisions of national law effectively guarantee that the directive will be applied fully.

7 The purpose of Directive 80/987, which the Italian Republic is accused of failing to implement, is to approximate the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer and for that purpose it provides specific safeguards to ensure the payment of their outstanding claims.

8 It is therefore necessary to consider each of the Commission's three complaints in order to determine whether the Italian legislation relied upon by the defendant has the effect of providing employees with the specific safeguards provided for in Directive 80/987.

The first complaint: failure to implement Articles 3 and 5 of Directive 80/987

9 Under Articles 3 and 5 of the directive, the Member States are required to establish guarantee institutions to ensure payment of employees' outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to a given date determined in accordance with Article 3.

10 According to the Italian Government, the combined application of the various provisions of existing Italian law designed to avoid such adverse consequences as an employee might suffer as a result of the loss of his job provides employees with protection equivalent to that envisaged in Articles 3 and 5 of the directive. The Italian Government cites in particular the provisions on severance pay ('trattamento di fine rapporto') contained in Law No 297 of 29 May 1982 (*Gazzetta ufficiale della Repubblica italiana* (*GURI*) No 148, 7.6.1982) and refers to the system of guaranteed pay provided by the 'Cassa integrazione guadagni — gestione straordinaria' (Fund for Earnings Supplements — special section) established by Law No 164 of 29 May 1975 (*GURI* No 147, 31.5.1975) which constitutes an alternative guarantee system, specifically authorized by Article 1(2) of the directive in conjunction with point IIC 1 of the Annex thereto.

11 It must be pointed out that the severance pay referred to is a benefit of an amount determined according to the length of the employment relationship, corresponding in principle to one month's wages for each year of service, to which all workers are entitled under Article 2120 of the Codice civile (Italian civil code) in the event of termination of their employment relationship. The purpose of the guarantee fund provided for by Article 2 of Law No 297 is to step in for an insolvent employer in order to ensure the payment of that benefit. It does not, however, cover the payment of claims relating to workers' remuneration which has not been paid regularly during the employment relationship because of the employer's insolvency. However, it is the payment of the latter claims that Articles 3 and 5 of Directive 80/987 seek to secure. It follows that the Italian legal provisions on severance pay do not satisfy the obligations imposed by the abovementioned articles of the directive.

12 The Cassa integrazione guadagni — gestione straordinaria, which guarantees the payment of employees' claims up to 80% of their wages in the event of a 'crisis in the undertaking', an expression which includes the case of an employer's insolvency, is undeniably capable of satisfying the requirements of the directive regarding the substantive scope of the guarantee. Nevertheless, as the Commission has pointed out, that guarantee falls short of the requirements laid down by the directive as regards the range of persons covered.

13 It should be noted in the first place that that system applies exclusively to industrial undertakings (Law No 164 of 29 May 1975), undertakings providing catering services for industrial undertakings and commercial undertakings employing more than 1 000 people (Law No 155 of 23 April 1981, *GURI* No 114, 27.4.1981), to undertakings publishing daily newspapers and press agencies operating nationally (Law No 146 of 5 August 1981, *GURI* No 215, 6.8.1981) and, finally, to shipping undertakings (Law No 918 of 9 December 1982), the latter in fact being excluded from the scope of the directive.

14 It follows that employees in all the undertakings not included in any of the above categories are excluded from the guarantee provided by the Cassa integrazione guadagni in the event of their employers' insolvency.

15 It should be noted, secondly, that not all the employees of the abovementioned undertakings are covered by the guarantee system provided by the Cassa integrazione guadagni. In particular, managers, apprentices and out-workers are excluded.

16 The Italian Government contends, however, that those three categories of worker should be excluded from the scope of the directive because of the special nature of their employment contract and, with respect more particularly to managers, because of the existence of highly developed systems of protection under collective agreements.

17 In that regard it must be borne in mind in the first place that, according to the very wording of Article 2(2), the directive is without prejudice to national law regarding the definition of the term 'employee'. However, it is apparent from the provisions of the Italian civil code (Article 2095 for managers, Article 2134 for apprentices and Article 2128 for out-workers) and from the special laws and the case-law cited by the Commission — which was not challenged by the Italian Government on this point — that those three categories of workers are regarded as employees under Italian law.

18 It must also be noted that the possibility of excluding certain categories of worker from the scope of the directive, by reason of the particular nature of their contract of employment, their employment relationship or the existence of guarantees of other kinds providing them with equivalent protection is a possibility provided for by way of exception by Article 1(2) of the directive and is limited by that provision itself to the categories expressly mentioned in the list annexed to the directive. In the case of Italy, that list does not provide for the exclusion of any category of workers for any of the reasons indicated above.

19 It follows that managers, apprentices and out-workers, who are regarded as employees under Italian law, all fall within the scope of the directive.

20 It must be noted in the third place that the guarantee granted to employees of undertakings covered by the system of the Cassa integrazione guadagni is not automatic but depends on certain conditions which must be assessed, case by case, by the Comitato interministeriale per il coordinamento della politica industriale (Inter-ministerial Committee on Industrial Policy).

21 It is apparent both from Article 2 of Law No 675 of 12 August 1977 (*GURI* No 243, 7.9.1977) and from the decision of the Comitato interministeriale per il coordinamento della politica industriale of 12 June 1984 (*GURI* No 18, 22.1.1985), referred to by the Italian Government, that the Cassa integrazione guadagni intervenes in the event of the insolvency of an employer only exceptionally and that its intervention must be decided upon in relation, in particular, to the social importance of the undertaking against the background of the local employment situation and the situation prevailing in the production sector concerned.

22 The Italian Government contends that it follows from the very terms of Article 1(2) of the directive and the list in the annex thereto which, in Italy's case, includes under 'employees covered by other forms of guarantee', who may consequently be excluded from the scope of the directive, 'Employees covered by benefits laid down by law guaranteeing that their wages will continue to be paid in the event that the undertaking is hit by an economic crisis', that all the categories of workers qualifying for the guarantee provided by the Cassa integrazione guadagni are excluded from the scope of the directive. That exclusion affects not just individual employees who have actually enjoyed specific benefits under the guarantee system in question but all employees theoretically qualifying for benefits thereunder.

23 That view must be rejected. It follows both from the aim of the directive, which is to provide a minimum protection for all employees, and from the exceptional nature of the possibility of exclusion allowed for by Article 1(2), that that provision cannot be interpreted broadly in the manner contended for by the Italian Government. Only employees who actually benefit, in the event of their employer's insolvency, from the system of protection provided by the Cassa integrazione guadagni must, therefore, be regarded as excluded from the scope of the directive.

24 It follows from the foregoing that the Commission's first complaint must be upheld.

The second complaint: failure to implement Article 7 of the directive

25 Article 7 of the directive provides:

'Member States shall take the measures necessary to ensure that non-payment of compulsory contributions due from the employer, before the onset of his insolvency, to their insurance institutions under national statutory social security schemes does not adversely affect employees' benefit entitlement in respect of these insurance institutions inasmuch as the employees' contributions were deducted at source from the remuneration paid.'

26 The Italian Government contends that Article 2116 of the Codice civile embodies the principle of the automatic nature of benefits, which guarantees that employees will receive benefits even where the employer has failed to pay his contributions.

27 As the Commission has correctly pointed out, the principle of the automatic nature of benefits recognized by the abovementioned article of the Codice civile is subject to the provisions of the applicable special laws. Pursuant in particular to Article 23 *ter* of Law No 485 of 11 August 1972 (*GURI* No 223, 26.8.1972) 'the obligation to pay contributions, giving rise to entitlement to old-age, invalidity or survivors' benefits, is deemed to have been fulfilled even if the contributions have not actually been paid but remain due within the limitation period of 10 years'. It follows that employees' entitlement to old-age, invalidity and survivors' benefits is not secured where an insolvent employer's debt to the insurance institution has become time-barred.

28 The argument that employees may ensure that employers' debts are not time-barred by monitoring due payment of the employer's contributions recorded in the annual statements which the Istituto nazionale della previdenza sociale has to send to employees cannot be accepted. Article 7 of the directive makes the guarantee of employees' entitlement to benefits subject to only one condition, namely that the employees' contributions have been deducted from the remuneration paid.

29 The Italian Government also contends that Article 13 of Law No 1338 of 12 August 1962 (*GURI* No 229, 11.9.1962) makes it possible to deal with those specific cases where the non-payment of contributions makes it necessary to ensure that employees receive a pension. Under that provision, where the employer has not paid his contributions and the corresponding debt is time-barred, the Istituto nazionale della previdenza sociale may, at the request of the employer or employee concerned, provide for a life annuity equal to the pension or part-pension corresponding to the compulsory insurance which would have been due to the employee in respect of the unpaid contributions.

30 It must be pointed out that the provision of such an annuity is dependent, under the law, upon payment by the employee or employer of the mathematical reserve to the special adjustment fund within the Istituto nazionale della previdenza sociale. It follows that where the employer is insolvent, the provision of the life annuity will depend upon the contributions made by the employee himself. Consequently, the legal provision relied upon by the Italian Government cannot compensate for the deficiencies of the principle of the automatic nature of benefits measured against the requirements of Article 7 of the directive.

31 The Italian Government also contends that Article 6 of the directive allows the Member States to exclude from the scope of the directive the entitlement of employees to the benefits provided for both by statutory schemes and by supplementary social security schemes.

32 That interpretation of Article 6, which would in effect allow the Member States unilaterally to limit the scope of the obligations deriving from the directive, cannot be upheld. It is apparent from the very wording of Article 6 that it merely authorizes the Member States not to impose upon the guarantee institutions provided for in Articles 3 and 5 responsibility for the contributions not paid by an insolvent employer, by allowing them to choose for that purpose another system for guaranteeing employees' entitlement to social security benefits.

33 It follows from the foregoing that the Commission's second complaint must be upheld.

The third complaint: failure to implement Article 8 of the directive

34 In response to the Commission's complaint concerning the lack of any Italian legal provision implementing the obligation deriving from Article 8 of the directive, whereby the Member States must protect employees' entitlement to old-age and

survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes, the Italian Government points out that such supplementary schemes are almost non-existent in Italy.

35 It need merely be stated in that regard that that fact cannot justify the failure to discharge the obligation imposed by Article 8 of the directive.

36 The Italian Government also put forward an argument based on its interpretation of Article 6 of the directive which has already been rejected in the course of the consideration of the Commission's second complaint.

37 It follows from the foregoing that the Commission's third complaint must also be upheld.

38 Having regard to all the foregoing considerations, it must be held that, by failing to adopt within the prescribed period the necessary measures to implement Council Directive 80/987 of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, the Italian Republic has failed to fulfil its obligations under the EEC Treaty.

Costs

39 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the defendant has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that, by failing to adopt within the prescribed period the necessary measures to implement Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (Official Journal 1980, L 283, p. 23), the Italian Republic has failed to fulfil its obligations under the EEC Treaty;

(2) Orders the Italian Republic to pay the costs.

Due Joliet O'Higgins Grévisse

Slynn Mancini Schockweiler Moitinho de Almeida Rodríguez Iglesias

Delivered in open court in Luxembourg on 2 February 1989.

J.-G. Giraud
Registrar

O. Due
President