JUDGMENT OF THE COURT (Grand Chamber)

6 September 2011 *

In Case C-108/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Tribunale di Venezia (Italy), made by decision of 4 January 2010, received at the Court on 26 February 2010, in the proceedings

Ivana Scattolon

v

Ministero dell'Istruzione, dell'Università e della Ricerca,

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, J.-J. Kasel and D. Šváby, Presidents of Chambers, G. Arestis, A. Borg Barthet, M. Ilešič (Rapporteur), C. Toader and M. Safjan, Judges,

* Language of the case: Italian.

Advocate General: Y. Bot,
Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 1 February 2011,

after considering the observations submitted on behalf of:

— Ms Scattolon, by N. Zampieri, A. Campesan and V. De Michele, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, and by L. D'Ascia, avvocato dello Stato,

— the European Commission, by C. Cattabriga and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 April 2011

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers

of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26), of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16), and of general principles of law.

2 The reference has been made in proceedings between Ms Scattolon and the Ministero dell'Istruzione, dell'Università e della Ricerca (Ministry of Education, Universities and Research) concerning non-recognition, when Ms Scattolon was transferred to work for that Ministry, of the length of service that she had completed with the Municipality of Scorzè, her original employer.

Legal background

EU law

3 Article 1(1) of Directive 77/187 stated, in its initial version:

'This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.'

4 Article 2 of that directive defines the term 'transferor' as any natural or legal person who, by reason of a transfer within the meaning of Article 1(1) of the same directive, ceases to be the employer, and the term 'transferee' as any natural or legal person who, by reason of such a transfer, becomes the employer.

5 Article 3(1) and (2) of Directive 77/187 provided:

'1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1 (1) shall, by reason of such transfer, be transferred to the transferee.

…

2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions, with the provision that it shall not be less than one year.'

6 Article 4 of Directive 77/187 provided:

'1. The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision

shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the work-force.

…

2. If the contract of employment or the employment relationship is terminated because the transfer within the meaning of Article 1(1) involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.'

7 Following the entry into force of Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187 (OJ 1998 L 201, p. 88), for which the deadline for transposition by Member States expired on 17 July 2001, Article 1(1) of Directive 77/187 was worded as follows:

'(a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.

(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(c) This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive.'

8 Directive 77/187, as amended by Directive 98/50, was, for reasons of codification, repealed by Directive 2001/23.

9 The wording of Article 1(1) of Directive 2001/23 corresponds to that of Article 1(1) of Directive 77/187, as amended by Directive 98/50. The definitions of the terms 'transferor' and 'transferee' are essentially identical to those contained in Article 2 of Directive 77/187.

10 Article 3(1) and (3) of Directive 2001/23 essentially correspond to Article 3(1) and (2) of Directive 77/187. Article 4 of Directive 2001/23 corresponds to Article 4 of Directive 77/187.

National legislation

Article 2112 of the Italian Civil Code

11 In Italy, the implementation of Directive 77/187, and subsequently of Directive 2001/23 is carried out, in particular, by Article 2112 of the Italian Civil Code, which provides that '[i]n the event of transfers of undertakings, the employment relationship shall continue with the transferee and the employee shall retain all rights under that relationship.... The transferee shall apply the... collective agreements … that were in force at the date of the transfer, until their expiry, unless they are replaced by other collective agreements applicable to the transferee's undertaking'.

Article 8 of Law No 124/99 and the implementing ministerial decrees

12 Until 1999, auxiliary services at Italian State schools, such as cleaning, caretaking and administrative assistance, were provided in part by State administrative, technical and auxiliary (ATA) employees and in part by local authorities, such as municipalities. The local authorities operated the services either by means of their administrative, technical and auxiliary employees ('local authority ATA employees'), or by entering into contracts with private undertakings.

13 The local authority ATA employees were paid on the basis of the collective agreement for the regions and local authorities sector (Contratto Collettivo Nazionale di Lavoro – Regioni Autonomie Locali, 'the CCNL for local authority employees'). However, the State ATA employees working in State schools were paid on the basis of the collective agreement for the schools sector (Contratto Collettivo Nazionale di Lavoro della Scuola, 'the CCNL for schools').

14 Law No 124 adopting urgent provisions concerning school employees (Legge No 124, disposizioni urgenti in materia di personale scolastico) of 3 May 1999 (GURI No 107 of 10 May 1999, p. 4; 'Law No 124/99') provided for the transfer, from 1 January 2000, of local authority ATA employees in State schools onto the lists of State ATA employees.

15 In that regard, Article 8(1) and (2) of Law No 124/99 provide:

'1. ATA employees in State schools... shall... be the responsibility of the State. The provisions providing for those employees to be provided by the municipalities and provinces shall be repealed.

2. The employees referred to in Article 8(1), employed by local authorities and working in State educational establishments at the date on which this law enters into force, shall be transferred onto the lists of State ATA employees, and shall be incorporated at the corresponding professional grades and with the corresponding job profiles for the purpose of performing the functions specific to those profiles. Employees for whom there are no corresponding grades and profiles within the State ATA staffing structures shall be permitted to opt for their original local authority, within three months of the entry into force of the present law. The length of service of those employees with the original local authority and the right to retain their place of employment, for an initial period, where a post is available, shall be recognised for legal and financial purposes.'

16 Law No 124/99 was implemented by the Decree concerning the transfer of local authority ATA employees to the State for the purposes of Article 8 of Law No 124/99 (Decreto trasferimento del personale ATA dagli enti locali allo Stato, ai sensi dell'art. 8 della legge 3 maggio 1999, No 124) of 23 July 1999 (GURI No 16, of 21 January 2000, p. 28; 'the Ministerial Decree of 23 July 1999'). Article 3 of that decree provides:

'...

A decree... shall lay down the criteria for incorporation, in the schools sector, intended to align the salary of the employees in question with that of that sector, by reference to remuneration, additional elements of pay and the recognition, for legal and financial purposes, as well as the impact on management planning, of the length of service completed with the local authorities, after the entry into a collective agreement which is to be negotiated... between the [Agenzia per la rappresentanza

negoziale delle pubbliche amministrazioni (Agency for the representation of the public authorities), "ARAN"], and the trade union organisations …'

17 Article 9 of the Ministerial Decree of 23 July 1999 provides:

'From 24 May 1999, the State shall assume the obligations of the local authorities in the contracts which they have entered into, and may have subsequently renewed, in terms of providing ATA functions for State schools, instead of recruiting employees.... Notwithstanding the pursuit of activities of third parties employed... under the legal provisions in force, the State shall assume the obligations under the contracts entered into by the local authorities with the undertakings... in respect of the ATA functions which, by law, must be carried out by the local authorities in the place of the State …'

18 The agreement between ARAN and the trade union organisations provided for in Article 3 of the Ministerial Decree of 23 July 1999 was signed on 20 July 2000 and approved by the Ministerial Decree approving the agreement of 20 July 2000 between ARAN and the representatives of trade union organisations and confederations regarding the criteria for incorporating former local authority employees transferred to the schools sector (decreto recepimento dell'accordo ARAN – Rappresentanti delle organizzazioni e confederazioni sindacali in data 20 luglio 2000, sui criteri di inquadramento del personale già dipendente degli enti locali e transitato nel comparto scuola) of 5 April 2001 (GURI No 162, of 14 July 2001, p. 27; 'the Ministerial Decree of 5 April 2001').

19 That agreement provides:

'*Article 1*

Scope

This agreement shall apply as from 1 January 2000 to employees employed by local authorities who are transferred to the "schools" sector under Article 8 of [Law No 124/99] and... the Ministerial Decree... of 23 July 1999...

Article 2

Contractual system

1. As from 1 January 2000, the [CCNL for local authority employees] shall no longer apply to the employees covered by this agreement...; from that date, those employees shall be covered by the [CCNL for schools], including with regard to all elements relating to additional pay, unless otherwise provided for in the following articles.

...

Article 3

Grading and remuneration

1. The employees referred to in Article 1 of this agreement shall be classified on the pay scale at the salary level corresponding to the professional grades in the schools sector, ... as follows. Those employees shall receive a salary level of an amount equal to or immediately below their annual salary on 31 December 1999, comprising salary

and individual length-of-service payments as well as, for those entitlement thereto, [payments provided for by the CCNL for local authority employees]. Any difference between the amount of remuneration due on the basis of the grading and the salary received by the employee as at 31 December 1999, as stated above, shall be paid on an individual basis and take effect, subject to the reduction of accrued rights, for the purposes of ascertaining the subsequent salary position. Employees affected by this agreement shall receive the special additional payment of the amount applicable as at 31 December 1999 if that payment is greater than the payment made for a corresponding grade in the schools sector. …

…

Article 9

Basic salary and additional pay

1. From 1 January 2000, all the provisions of a financial nature of the [CCNL for schools] shall apply to the employees covered by this agreement, in accordance with the procedures laid down in that CCNL.

2. From 1 January 2000, the employees covered by this agreement shall, on a provisional basis, be paid the additional individual pay consistent with the gross amounts set out in the table... annexed to the [CCNL for schools]. …

…'

20 That legislation gave rise to legal actions brought by transferred ATA employees who claimed full recognition of the length of service they had completed with the local authorities. They submitted, in that regard, that the criteria adopted in the context of the agreement approved by the Ministerial Decree of 5 April 2001 had the effect that, after they became State ATA employees, they were graded and paid in the same way as State ATA employees who had a shorter length of service. According to their line of argument, Article 8 of Law No 124/99 requires that, in respect of each transferred ATA employee, the length of service completed with the local authorities must be maintained, so that each of those employees must receive, from 1 January 2000, the remuneration received by a State ATA employee who has the same length of service.

21 This dispute led to several judgments delivered in 2005 by the Corte Suprema di Cassazione (Court of Cassation), in which that court, in essence, upheld that argument.

Law No 266/2005

22 By approval of an amendment emanating from the Italian Government, the Italian legislature included in Article 1 of Law No 266/2005 laying down provisions relating to the drawing up of the annual and multiannual budget of the State (the 2006 Finance Law) [Legge No 266, disposizioni per la formazione del bilancio annuale e pluriennale delle Stato (legge finanziaria 2006)] of 23 December 2005 (Ordinary supplement to GURI No 302, of 29 December 2005; 'Law No 266/2005'), a paragraph 218, worded as follows:

'Article 8(2) of [Law No 124/99] is to be interpreted as meaning that the local authority employees who become State [ATA employees] shall receive the grades and job profiles for the corresponding State posts, on the basis of the full financial remuneration

earned at the time of the transfer, with the payment of a salary equal to or immediately below the annual salary earned as at 31 December 1999, comprising salary, individual length of service allowance and any payments, where appropriate, provided for by the [CCNL for local authority employees] in force at the date of transfer to the State administration. Any difference between the starting salary and the annual salary received by the relevant employees as at 31 December 1999... shall be paid to the individual and regarded as effective, subject to recognition of length of service, for the purposes of moving up the salary scale. This is without prejudice to compliance with judgments handed down as at the date on which the present Law enters into force.'

23 Several courts referred questions to the Corte Costituzionale (Constitutional Court) concerning whether Article 1(218) of Law No 266/2005 complies with the Italian Constitution, and in particular with the rule concerning the autonomy of the courts, which prohibits the legislature from interfering in the function of providing a uniform interpretation of the law, which is reserved for the Corte Suprema di Cassazione.

24 By judgment of 18 June 2007 and by subsequent orders, the Corte Costituzionale ruled that Article 1(218) of Law No 266/2005 was not vitiated by the alleged infringements of general principles of law. It considered in particular that that provision did not constitute an innovative rule in relation to Article 8(2) of Law No 124/99 and that it facilitated the transfer of ATA employees from local authorities to the State, those employees being in a different situation from that of employees already on the State lists at the time of the transfer.

25 During 2008, the Corte Suprema di Cassazione asked the Corte Costituzionale a new question concerning the constitutionality of Law No 266/2005 having regard to the principle of effective judicial protection set out in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

26 By judgment of 16 November 2009, the Corte Costituzionale held that Article 1(218) of Law No 266/2005 did not undermine that principle. It held in particular that that provision constituted one of the possible readings of Article 8(2) of Law No 124/99 and that it did not therefore constitute an unfavourable modification of an acquired right.

27 During 2008 and 2009, three actions were brought before the European Court of Human Rights by ATA employees of local authorities who had been transferred to the Ministero, accusing the Italian Government of infringing, by its adoption of Article 1(218) of Law No 266/2005, Article 6 of the ECHR and Article 1 of the Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms. By judgment of 7 June 2011, the European Court of Human Rights upheld those actions (ECtHR, judgment in *Agrati and Others* v *Italy*).

The dispute in the main proceedings and the questions referred for a preliminary ruling

28 Ms Scattolon, employed by the municipality of Scorzè since 16 May 1980 as a cleaner in State schools, worked as a local authority ATA employee until 31 December 1999.

29 After 1 January 2000, pursuant to Article 8 of Law No 124/99, she was transferred onto the list of State ATA employees.

30 In accordance with the Ministerial Decree of 5 April 2001, Ms Scattolon was placed on a salary scale corresponding, on that list, to nine years of service.

31 Having thus not obtained recognition of her service of about 20 years with the municipality of Scorzè and considering that she had thus suffered a considerable reduction in her remuneration, Ms Scattolon brought an action on 27 April 2005 before the Tribunale di Venezia seeking recognition of the whole of that length of service and classification, in consequence, in the grade corresponding, for State ATA employees, to length of service of between 15 and 20 years.

32 Following the adoption of Article 1(218) of Law No 266/2005, the Tribunale di Venezia stayed the proceedings brought by Ms Scattolon and referred to the Corte Costituzionale the question of the compatibility of that provision with, in particular, the principles of legal certainty and effective judicial protection. By order of 9 June 2008, referring to its judgment of 18 June 2007, the Corte Costituzionale ruled that Article 1(218) of Law No 266/2005 was not vitiated by the alleged infringements of general principles of law.

33 In those circumstances, the Tribunale di Venezia decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1) Must Directive 77/187... and/or Directive 2001/23..., or the various rules of [EU] law considered relevant be interpreted as meaning that the latter are applicable to a situation in which staff providing auxiliary cleaning and maintenance services in State educational establishments are transferred from local authorities

(municipalities and provinces) to the employment of the State, where the transfer has led to the assumption of obligations not only in respect of the activities in question and the legal relationships with all the (cleaning) staff concerned, but also in respect of the contracts entered into with private companies for the provision of those services?

2) Must the continuation of the employment relationship, pursuant to the first subparagraph of Article 3(1) of Directive 77/187 (incorporated, together with Directive 98/50... in Directive 2001/23...), be interpreted as meaning that the transferee's pecuniary payments linked to length of service must take into account all the years worked by the staff transferred, including those in the employment of the transferor?

3) Must Article 3 of Directive 77/187 and/or... Directives 98/50... and 2001/23... be interpreted as meaning that the employee's rights transferred to the transferee also include the advantages acquired by that employee while employed by the transferor, such as those relating to length of service, if rights of a financial nature are attached thereto under the collective agreement applicable to the transferee?

4) Must the general [EU]-law principles of legal certainty, the protection of legitimate expectations, procedural equity, effective judicial protection, and the right to an independent tribunal and, more generally, to a fair hearing, guaranteed by [Article 6 TEU] in conjunction with Article 6 of the [ECHR] and with Articles 46, 47 and 52(3) of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000, as incorporated in the Treaty of Lisbon, be interpreted as precluding the adoption by the Italian State, after a significant period of time (5 years), of a specific interpretative provision which is at variance with the wording to be interpreted and in conflict with the consistent and settled interpretation of the institution responsible for ensuring uniform interpretation of the law, a provision which, moreover, is relevant for the purpose of resolving disputes to which the Italian State is itself a party?'

Procedure before the Court

34 By letter of 9 June 2011, in view of the judgment by the European Court of Human Rights of 7 June 2011 in the cases of *Agrati and Others*, the applicant in the main proceedings applied for reopening of the oral procedure.

35 In that respect, it should be recalled that, according to the consistent case-law of the Court of Justice, the latter may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, inter alia, Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 25; Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 37, and Case C-221/09 *AJD Tuna* [2011] ECR I-1655, paragraph 36).

36 In this case, the Court considers that it has all the information necessary to deal with the reference for a preliminary ruling and that the reference does not need to be examined on the basis of an argument that has not yet been debated in front of it.

37 The applicant's application for a new hearing to be held, and her alternative application for leave to submit additional written observations, must therefore be dismissed.

Consideration of the questions referred

The first question

38 By its first question, the national court asks, in essence, whether the taking over by a public authority of a Member State, of staff employed by another public authority entrusted with the task of supplying schools with auxiliary services, constitutes the 'transfer of an undertaking' within the meaning of EU legislation on maintaining the rights of workers.

39 Since that legislation may be relied upon only by persons who are protected in the Member State concerned as workers under national labour law (see, in particular, Joined Cases C-173/96 and C-247/96 *Hidalgo and Others* [1998] ECR I-8237, paragraph 24, and Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 36), it should be noted at the outset that, according to findings by the national court, which have not been challenged by the Italian Government, ATA employees in State schools in Italy enjoy such protection. It follows that the applicant in the main proceedings is capable of benefiting from EU legislation on maintaining the rights of workers, provided the conditions for applicability specifically set out in that legislation are met.

40 As a preliminary observation, it should also be noted that the employees in question were taken over on 1 January 2000, namely before the expiry of the deadline on Member States for transposing Directive 98/50 and before the adoption of Directive 2001/23. It follows that the question posed by the national court must be examined in the light of Directive 77/187 in its initial version (see, by analogy, Case C-340/01 *Abler and Others* [2003] ECR I-14023, paragraph 5, and Case C-499/04 *Werhof* [2006] ECR I-2397, paragraphs 15 and 16).

41 According to Article 1(1) of that version of Directive 77/187, the latter applied to 'the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger'. It thus needs to be verified whether the taking over by a public authority of a Member State of staff employed by another public authority and entrusted with activities such as those at issue in the main proceedings can bring together all the factors referred to in that provision.

The existence of an 'undertaking' within the meaning of Directive 77/187

42 The term 'undertaking' within the meaning of Article 1(1) of Directive 77/187 covers any economic entity organised on a stable basis, whatever its legal status and method of financing. Any grouping of persons and assets enabling the exercise of an economic activity pursuing a specific objective and which is sufficiently structured and independent will therefore constitute such an entity (Joined Cases C-127/96, C-229/96 and C-74/97 *Hernández Vidal and Others* [1998] ECR I-8179, paragraphs 26 and 27; Case C-175/99 *Mayeur* [2000] ECR I-7755, paragraph 32; *Abler and Others*, paragraph 30; see also, with regard to Article 1(1) of Directive 2001/23, Case C-458/05 *Jouini and Others* [2007] ECR I-7301, paragraph 31, and Case C-151/09 *UGT FSP* [2010] ECR I-7591, paragraph 26).

43 The term 'economic activity' appearing in the definition given in the above paragraph covers any activity consisting in offering goods or services on a given market (Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 19; Case C-82/01 P *Aéroports de Paris* v *Commission* [2002] ECR I-9297, paragraph 79; Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 108).

44 Excluded in principle from classification as economic activity are activities which fall within the exercise of public powers (see, in particular, Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 24 and case-law cited, and, concerning Directive 77/187, Case C-298/94 *Henke* [1996] ECR I-4989, paragraph 17). By contrast, services which, without falling within the exercise of public powers, are carried out in the public interest and without a profit motive and are in competition with those offered by operators pursuing a profit motive have been classified as economic activities (see, in that respect, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 22; *Aéroports de Paris* v *Commission*, paragraph 82; *Cassa di Risparmio di Firenze and Others*, paragraphs 122 and 123).

45 In the present case, as is apparent from Article 8 of Law No 124/99, the group of workers taken over by the State consists of local authority ATA staff employed in State schools. It is also apparent from the documents before the Court that the activities of those employees consist in providing auxiliary services which schools need in order to carry out their task of education in optimal conditions. Those services concern, in particular, cleaning and maintenance of the premises and administrative assistance tasks.

46 It is further apparent from the information supplied by the national court, and from Article 9 of the Ministerial Decree of 23 July 1999, that those services are in some cases subcontracted to private operators. Moreover, it is undisputed that those services do not fall within the exercise of public powers.

47 It is thus apparent that the activities carried out by the transferred workers in question in the main proceedings are of an economic nature for the purposes of the case-law referred to above, and pursue a specific objective, which consists in the provision of necessary technical and administrative services to schools. Moreover, it is undisputed that ATA staff have been viewed as a structured group of employees.

48 It also needs to be verified, having regard to the case-law referred to in paragraph 42 of this judgment and the written observations of the Italian Government, first, whether the classification of the personnel concerned as an 'undertaking' is called into question by the absence of assets, secondly, whether that group of workers is sufficiently independent to be regarded as an 'economic entity' and thus an undertaking, and, thirdly, whether the fact that those workers form part of the public administration has any influence.

49 Concerning, first, the absence of assets, the Court has repeatedly held that, in certain sectors, the activity is essentially based on manpower. In such circumstances, a structured group of workers may, despite the absence of significant material or immaterial assets, correspond to an economic entity for the purposes of Directive 77/187 (see in particular, concerning cleaning services, *Hernández Vidal and Others*, paragraph 27, and *Hidalgo and Others*, paragraph 26; see also, with regard to Directive 2001/23, Case C-463/09 *CLECE*, [2011] ECR I-95, paragraph 39).

50 That case-law may be transposed to the situation at issue in the main proceedings, where none of the activities carried out by the group of workers appears to require the availability of significant assets. Classification of the group of workers as an economic entity cannot therefore be excluded by reason of the fact that that entity does not comprise, apart from that personnel, material or immaterial assets.

51 Concerning, secondly, the question whether a group of workers such as that at issue in the main proceedings is sufficiently independent, it is sufficient to note that, in the context of EU legislation on maintaining the rights of workers, the concept of independence refers to the powers, granted to those in charge of the group of workers concerned, to organise, relatively freely and independently, the work within that group and, more particularly, to give instructions and allocate tasks to subordinates within the group, without direct intervention from other organisational structures of

the employer (see, in that regard, *UGT-FSP*, paragraphs 42 and 43). Whilst the presence of a sufficiently autonomous entity is not affected by the fact that the employer imposes precise obligations on that group of workers and thus has an extensive influence on its activities, it is nevertheless necessary that that group possess a certain freedom to organise and carry out its tasks (see, to that effect, *Hidalgo and Others*, paragraph 27).

52 In this case, it appears, subject to verification by the national court, that the ATA staff of local authorities employed in schools constituted, within the administration of the local authorities, an entity capable, relatively freely and independently, of organising and carrying out their tasks, by means, in particular, of instructions given by members of that ATA staff with responsibilities for coordination and direction.

53 Concerning, thirdly and finally, the fact that the transferred staff and their activities are integrated within the public administration, it should be noted that that fact alone cannot take that entity outside the application of Directive 77/187 (see, to that effect, *Collino and Chiappero*, paragraphs 33 and 35). The opposite conclusion would not be consistent with the case-law cited in paragaph 42 of this judgment, according to which any sufficiently structured and autonomous grouping of persons and assets enabling the exercise of an economic activity pursuing a specific objective constitutes an 'undertaking' for the purposes of Directive 77/187, whatever its legal status and method of financing.

54 Whilst it is true that, as the Italian Government has pointed out, the Court has excluded from the scope of Directive 77/187 the 'reorganisation of structures of the public administration' and the 'transfer of administrative functions between public administrative authorities' and that that exclusion has subsequently been confirmed

in Article 1(1) of that directive in the version resulting from Directive 98/50, and in Article 1(1) of Directive 2001/23, the fact remains, as the Court has already pointed out, and as the Advocate General points out in paragraphs 46 to 51 of his Opinion, the scope of those expressions is limited to cases where the transfer concerns activities which fall within the exercise of public powers (*Collino and Chiappero*, paragraphs 31 and 32 and case-law cited).

55 It is true that the documents before the Court show that the taking over by the Ministero of the ATA staff of local authorities fell within the context of a reorganisation of public administration in Italy. However, far from holding that any transfer connected with or falling within the context of a reorganisation of public administration must be excluded from the scope of Directive 77/187, the Court merely stated, in the case-law cited by the Italian Government, that the reorganisation of structures of the public administration and the transfer of administrative functions between public administrative authorities do not in themselves and as such constitute a transfer of an undertaking for the purposes of that directive (*Henke*, paragraph 14; *Collino and Chiappero*, paragraph 31; Mayeur, paragraph 33).

56 The Court has held in particular that the creation of a grouping of municipalities and the taking over by the latter of certain competences of municipalities forming part of that grouping constitutes a rearrangement of the exercise of public powers and cannot therefore fall within Directive 77/187 (see *Henke*, paragraphs 16 and 17), while holding in other cases that the transfer of staff carrying out activities of an economic nature within a public administration falls within that directive (see, in particular, *Hidalgo and Others*, paragraph 24; *Collino and Chiappero*, paragraph 32).

57 There is nothing to justify developing that case-law in the direction that public employees, protected as workers under national law and subject to a transfer to a new employer within the public administration, should not be able to benefit from the

protection offered by Directive 77/187 solely on the ground that that transfer falls within the context of a reorganisation of that administration.

58 It is important to note in that regard that, if such an interpretation were accepted, any transfer imposed upon such workers could be removed by the public authority concerned from the scope of Directive 77/187 simply by invoking the fact that the transfer forms part of a staff reorganisation. Important categories of workers carrying out economic activities within the meaning of the Court's case-law would thus risk being deprived of the protection provided for by Directive 77/187. That result would be difficult to reconcile both with the wording of Article 2 of the latter, according to which the transferor and the transferee may be any physical or legal person having the capacity of employer, and with the need, bearing in mind the objective of social protection pursued by the directive, to interpret exceptions to its application strictly (see, in relation to Directive 2001/23, Case C-561/07 *Commission* v *Italy* [2009] ECR I-4959, paragraph 30 and case-law cited).

59 It should, finally, be emphasised that the application of the rules set out by Directive 77/187 in situations such as those in the main proceedings does not affect the power of Member States to rationalise their public administrations. The only effect of the applicability of that directive is to prevent transferred workers from being placed, by reason only of the transfer, in a less favourable position than they were in before the transfer. As the Court has held many times and as is apparent, moreover, from Article 4 of Directive 77/187, the latter does not deprive the Member States of the possibility of allowing employers to modify working relations in an unfavourable direction, notably as regards protection against dismissal and the conditions of remuneration. The directive only prohibits such modifications from taking place on the occasion of and because of the transfer (see to that effect, in particular, Case 324/86 *Foreningen af Arbejdsledere i Danmark*, '*Daddy's Dance Hall*' [1988] ECR 739, paragraph 17; Case C-209/91 *Watson* [1992] ECR I-5755, paragraph 28, and *Collino and Chiappero*, paragraph 52).

The existence of a 'transfer' 'as a result of a legal transfer or merger' within the meaning of Directive 77/187

60 In order to determine whether there is a 'transfer' of the undertaking within the meaning of Article 1(1) of Directive 77/187, the decisive criterion is whether the entity in question keeps its identity after being taken over by the new employer (see, in particular, Case 24/85 *Spijkers*, [1986] ECR 1119, paragraphs 11 and 12; *UGT-FSP*, paragraph 22).

61 If that entity functions without significant assets, the maintenance of its identity following the transaction affecting it cannot depend on the transfer of such assets (*Hernández Vidal and Others*, paragraph 31; *Hidalgo and Others*, paragraph 31; *UGT-FSP*, paragraph 28).

62 In that case, which is, as held in paragraph 50 of this judgment, that which is relevant to the dispute in the main proceedings, the group of workers in question maintains its identity where the new employer pursues the activities and takes over a major part, in terms of their numbers and skills, of those workers (*Hernández Vidal and Others*, paragraph 32; *UGT-FSP*, paragraph 29).

63 Concerning the expression 'as a result of a legal transfer or merger', which also appears in Article 1(1) of Directive 77/187, it should be noted that the Court of Justice has, on account of the differences between the language versions of that directive and the divergences between the laws of the Member States with regard to the concepts to which the latter refer, given that expression a sufficiently flexible interpretation in keeping with the objective of the directive, which is to safeguard employees in the event of a transfer of their undertaking (Case C-29/91 *Redmond Stichting* [1992] ECR I-3189, paragraphs 10 and 11; Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253, paragraph 28; *Jouini and Others*, paragraph 24). It has thus ruled that the fact that the transfer results from unilateral decisions of public

authorities rather than from an agreement does not render the directive inapplicable (see, in particular *Redmond Stichting*, paragraphs 15 to 17; *Collino and Chiappero*, paragraph 34; *UGT-FSP*, paragraph 25).

64 Whilst not calling into question either the case-law referred to in paragraphs 60 to 63 of this judgment or the fact that the transfer operation at issue in the main proceedings is based on Law No 124/99 and thus arises from a unilateral decision of the public authorities, the Italian Government argues that, in this case, the takeover of the staff concerned by the Italian State was only voluntary, since members of that staff could choose to remain with the local authorities with which they had been employed. In those circumstances, there was no transfer for the purposes of Directive 77/187.

65 That observation of the Italian Government is, however, based on a factual premiss that is contradicted both by the order for reference and Law No 124/99 itself. It is apparent, in particular, from Article 8(2) of the latter that the only ATA staff members with the possibility of opting to remain with their original employer were those whose qualifications and profiles found no correspondence in the services of the transferee. It follows from that rule, and from the wording of the other provisions of the said Article 8 that the local authority ATA staff employed in schools was, globally and in principle, subject to the transfer.

66 Having regard to the whole of the above observations, the answer to the first question is that the takeover by a public authority of a Member State of staff employed by another public authority and entrusted with the supply to schools of auxiliary services including, in particular, tasks of maintenance and administrative assistance constitutes a transfer of an undertaking falling within Directive 77/187, where that staff consists in a structured group of employees who are protected as workers by virtue of the domestic law of that Member State.

The second and third questions

67 By its second and third questions, which it is appropriate to examine together, the national court asks, in essence, whether Article 3 of Directive 77/187 is to be interpreted as meaning that, in order to calculate the remuneration of workers who have been subject to a transfer within the meaning of that directive, the transferee must take account of length of service completed by those workers with the transferor.

68 In that respect, it is necessary, as a preliminary, to examine the relevance, for a situation such as that at issue in the main proceedings, of the judgment in *Collino and Chiappero*, in which the Court ruled on a question concerning the recognition of length of service in the case of a transfer of an undertaking and on which both the applicant in the main proceedings and the Italian Government rely in their submissions to the Court.

69 In that judgment, it was held that, whilst the transferred employees' length of service with their former employer does not as such constitute a right which they may assert against the new employer, the fact remains that, in certain cases, it is used to determine certain financial rights of employees, and that those rights must then, in principle, be maintained by the transferee in the same way as by the transferor (*Collino and Chiappero*, paragraph 50).

70 Whilst recalling that the transferee may, in situations other than the transfer of an undertaking and in so far as national law so allows, alter the conditions of remuneration in a manner unfavourable to employees, the Court held that Article 3(1) of Directive 77/187 must be interpreted as meaning that, in calculating rights of a financial nature, the transferee must take into account the entire length of service of the employees transferred, in so far as his obligation to do so derives from the employment relationship between those employees and the transferor, and in accordance with the terms agreed in that relationship (*Collino and Chiappero*, paragraphs 51 and 52).

71 In the case between Ms Scattolon and the Ministero, it is undisputed that the rights and obligations of the transferred employees and the transferor were contained in a collective agreement, namely the CCNL for local authority employees, the application of which was replaced, from 1 January 2008, which is the date of the transfer, by that of the collective agreement in force with the transferee, namely the CCNL for schools. In those circumstances, unlike what may have been the case in *Collino and Chiappero*, the interpretation sought of Directive 77/187 cannot concern only Article 3(1) of that directive, but must also, as the Advocate General pointed out in point 75 of his Opinion, take account of Article 3(2), that latter provision concerning, in particular, the case where application of the convention in force with the transferor is abandoned in favour of that in force with the transferee.

72 According to the first subparagraph of Article 3(2), the transferee must continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement. The second subparagraph of Article 3(2) provides that Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year.

73 As the Court has already stated, the rule in the second subparagraph of Article 3(2) of Directive 77/187 cannot deprive the first subparagraph of Article 3(2) of its substance. That second subparagraph does not therefore prevent the working conditions in the collective agreement to which the employees concerned were subject before the transfer from ceasing to be applicable before the expiry of one year after the transfer, or indeed immediately on the date on which the transfer takes place, in the presence of one of the situations referred to in the first subparagraph of Article 3(2), namely the termination or expiry of the collective agreement or the entry into force or application of another collective agreement (see Case C-499/04 *Werhof* [2006] ECR I-2397, paragraph 30, and, with regard to Article 3(3) of Directive 2001/23, Case C-396/07 *Juuri* [2008] ECR I-8883, paragraph 34).

74 Therefore, the rule in the first subparagraph of Article 3(2) of Directive 77/187, according to which 'the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of... application of another collective agreement' must be interpreted as meaning that it is lawful for the transferee to apply, from the date of the transfer, the working conditions laid down by the collective agreement in force with him, including those concerning remuneration.

75 Although it follows from the above that Directive 77/187 leaves a margin for manoeuvre allowing the transferee and the other contracting parties to arrange the salary integration of the transferred workers in such a way that the latter is duly adapted to the circumstances of the transfer in question, the fact remains that the arrangements chosen must be in conformity with the aim of that directive. As the Court has repeatedly held, that objective consists, in essence, of preventing workers subject to a transfer from being placed in a less favourable position solely as a result of the transfer (Case C-478/03 *Celtec* [2005] ECR I-4389, paragraph 26 and case-law cited; and, in relation to Directive 2001/23, order in Case C-386/09 *Briot* [2010] ECR-8471, paragraph 26).

76 Implementation of the option to replace, with immediate effect, the conditions which the transferred workers enjoy under the collective agreement with the transferor with those laid down by the collective agreement in force with the transferee cannot therefore have the aim or effect of imposing on those workers conditions which are, overall, less favourable than those applicable before the transfer. If it were otherwise, achievement of the objective pursued by Directive 77/187 could easily be called into question in any sector governed by collective agreements, which would undermine the effectiveness of that directive.

77 On the other hand, Directive 77/187 cannot usefully be invoked in order to obtain an improvement of remuneration or other working conditions on the occasion of a transfer of an undertaking. Moreover, as the Advocate General has pointed out in

point 94 of his Opinion, that directive does not prevent there being certain differences in salary treatment between the workers transferred and those who were already, at the time of the transfer, employed by the transferee. Whilst other instruments and principles of law might prove relevant in order to examine the legality of such differences, Directive 77/187 itself is aimed merely at avoiding workers being placed, solely by reason of a transfer to another employer, in an unfavourable position compared with that which they previously enjoyed.

78 In the present case, there is no dispute that the measures implementing Article 8(2) of Law No 124/99 laid down the rules for the transfer of local authority ATA staff to the services of the Ministero in such a way that the collective agreement in force with the latter, namely the CCNL for schools, is applicable as from the transfer date to the transferred employees, without however the latter receiving the salary position corresponding to the length of service completed by them with the transferor.

79 The fact that, rather than recognising that length of service as such and in its entirety, the Ministero calculated a 'notional' length of service for each transferred worker, has played a decisive role in fixing the conditions of remuneration henceforth applicable to the staff transferred. Following the CCNL for schools, salary position and progression depend to a large extent on the length of service as calculated and recognised by the Ministero.

80 Nor is it disputed that the tasks carried out before the transfer in State schools by local authority ATA staff were similar, or even identical, to those carried out by the ATA staff employed by the Ministero. Thus the length of service completed with the transferor by a transferred staff member could have been classified as equivalent to that completed by an ATA staff member having the same profile and employed, before the transfer, by the Ministero.

81 In such circumstances, characterised by the possibility, by means of at least partial recognition of the length of service of the transferred workers, of preventing the latter from suffering a substantial reduction in salary compared with their situation immediately before the transfer, it would be contrary to the objective of Directive 77/187, as described in paragraphs 75 to 77 of this judgment, not to take account of that length of service in so far as is necessary approximately to maintain the level of remuneration received by those workers with the transferor (see, by analogy, Case C-425/02 *Delahaye* [2004] ECR I-10823, paragraph 34).

82 It is for the national court to verify whether the applicant in the main proceedings suffered such a loss of salary at the time of her transfer. For that purpose, that court will need to examine in particular the argument of the Ministero that the calculation defined in paragraph 79 of this judgment is capable of ensuring that the ATA staff concerned are not, solely by reason of the transfer, placed in a position which is, overall, unfavourable compared with their situation immediately before the transfer.

83 In the light of the above, the answer to the second and third questions is that, where a transfer within the meaning of Directive 77/187 leads to the immediate application to the transferred workers of the collective agreement in force with the transferee, and where the conditions for remuneration are linked in particular to length of service, Article 3 of that directive precludes the transferred workers from suffering, in comparison with their situation immediately before the transfer, a substantial loss of salary by reason of the fact that their length of service with the transferor, equivalent to that completed by workers in the service of the transferee, is not taken into account when determining their starting salary position with the latter. It is for the national court to examine whether, at the time of the transfer at issue in the main proceedings, there was such a loss of salary.

Fourth question

84 Having regard to the answer to the second and third questions, there is no longer any need to examine whether the national legislation at issue, such as applied to the applicant in the main proceedings, infringes the principles mentioned by the national court in its fourth question. Therefore, there is no need to answer that last question.

Costs

85 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **The takeover by a public authority of a Member State of staff employed by another public authority and entrusted with the supply to schools of auxiliary services including, in particular, tasks of maintenance and administrative assistance constitutes a transfer of an undertaking falling within Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, where**

that staff consists in a structured group of employees who are protected as workers by virtue of the domestic law of that Member State.

2. Where a transfer within the meaning of Directive 77/187 leads to the immediate application to the transferred workers of the collective agreement in force with the transferee, and where the conditions for remuneration are linked in particular to length of service, Article 3 of that directive precludes the transferred workers from suffering, in comparison with their situation immediately before the transfer, a substantial loss of salary by reason of the fact that their length of service with the transferor, equivalent to that completed by workers in the service of the transferee, is not taken into account when determining their starting salary position with the latter. It is for the national court to examine whether, at the time of the transfer at issue in the main proceedings, there was such a loss of salary.

[Signatures]