JUDGMENT OF THE COURT (Second Chamber)
16 October 2003 *

In Case C-32/02,

Commission of the European Communities, represented by A. Aresu, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by M. Mari, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by not adopting the necessary provisions in respect of employers engaged in non-profit-making activities, the Italian Republic has failed to fulfil its obligations under Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16),

* Language of the case: Italian.

THE COURT (Second Chamber),

composed of: R. Schintgen, President of the Chamber, V. Skouris and N. Colneric (Rapporteur), Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

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

gives the following

Judgment

1 By application lodged at the Court Registry on 5 February 2002, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by not adopting the necessary provisions in respect of employers engaged in non-profit-making activities, the Italian Republic has failed to fulfil its obligations under Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16).

Legal background

Community legislation

2 Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1975 L 48, p. 29), as amended by Council Directive 92/56/EEC of 24 June 1992 (OJ 1992 L 245, p. 3) was codified by Directive 98/59. No further time-limit for implementation was set by the latter.

3 As set out in the second recital to Directive 98/59, 'it is important that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community'.

4 Article 1(1) of the directive provides:

'For the purposes of this Directive:

(a) "collective redundancies" means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:

(i) either, over a period of thirty days:

— at least 10 in establishments normally employing more than 20 and less than 100 workers;

— at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers;

— at least 30 in establishments normally employing 300 workers or more;

(ii) or, over a period of ninety days, at least 20, whatever the number of workers normally employed in the establishments in question;

...'.

5 Article 1(2) of Directive 98/59 provides:

'This Directive shall not apply to:

(a) collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts;

(b) workers employed by public administrative bodies or by establishments governed by public law (or, in Member States where this concept is unknown, by equivalent bodies);

(c) the crews of seagoing vessels.'

6 Where an employer is contemplating collective redundancies, it must fulfil the information and consultation obligations laid down in Article 2 of Directive 98/59, and comply with the procedure set out in Articles 3 and 4 of the directive, which provide for the involvement of the competent public authority.

National legislation

7 Articles 4, 15a and 24 of Law No 223 of 23 July 1991 relating to provisions on technical lay-offs, mobility, unemployment benefit, implementation of Community directives, employment services and other provisions relating to the employment market (GURI No 175 of 27 July 1991, Ordinary Supplement), as amended by Legislative Decree No 151 of 26 May 1997, implementing Directive 92/56/EEC on the approximation of the laws of the Member States relating to collective redundancies (GURI No 135 of 12 June 1997; hereinafter 'Law No 223/91') consistently denote 'undertakings' ('imprese') as having the information and consultation obligations in connection with collective redundancies, and the obligation to comply with the special procedure on mobility laid down in that law.

8 Article 2082 of the Codice Civile ('the Italian Civil Code') provides:

'An entrepreneur ("imprenditore") is any person who, in a professional capacity, engages in economic activity in order to produce or exchange goods or services.'

Pre-litigation procedure

9 Taking the view that the abovementioned Italian legislation is in part incompatible with the provisions of Directive 98/59, the Commission initiated infringement proceedings. Having sent a letter of formal notice to the Italian Republic to submit its observations, on 20 April 2001 the Commission issued a reasoned opinion calling upon Italy to adopt the measures necessary to comply with it within two months of its notification.

10 The Commission did not receive any reply from the Italian Republic and therefore brought the present action.

Procedure before the Court

11 Since the Italian Republic did not lodge a defence within the time-limit laid down, the Court Registry asked the Commission if it intended to avail itself of the procedure for judgment by default provided for in Article 94(1) of the Rules of Procedure.

12 By letter of 28 June 2002, the Commission informed the Court that it would not avail itself of that possibility and would not oppose late lodgement of the Italian Republic's defence.

13 The defence of the Italian Republic was received at the Court by telefax on 8 July 2002.

14 Having asked that a hearing be held, on 29 April 2003, by fax, the Italian Republic withdrew that request on the ground that, although an enabling law had been adopted on 3 February 2003, the legislative decree intended to ensure full implementation of the directive had not yet been adopted.

The action

15 It should be noted at the outset that the Italian Republic's defence may not be taken into consideration. It was not lodged within the time-limit laid down in Article 40 of the Rules of Procedure, which was not extended by the President under Article 40(2), the Member State not having applied for an extension. The Commission's agreement to late lodgement may not be taken into consideration, since the time-limit is not a matter for the parties to decide. Moreover, the Italian Republic's defence does not comply with the formal requirements under Article 37(1) and (6) of the Rules of Procedure, since it was lodged with the Registry only by telefax, without the original being lodged no later than 10 days thereafter.

Commission's arguments

16 The Commission claims that, in Italian commercial law, the courts have consistently held that the concept of 'entrepreneur' in Article 2082 of the Italian Civil Code essentially covers any person engaging, in a business capacity, exclusively or primarily, in organised economic activity producing or exchanging goods and services with the specific intention of paying for the means of production. This activity should be with a view to profit, namely to generate profit in return for the risk taken by the undertaking.

17 The Commission alleges that the Italian Republic has not correctly implemented Directive 98/59 in relation to the persons to whom it applies. Whereas the directive applies to collective redundancies effected by an 'employer', the provisions of Law No 223/91 refer exclusively to collective redundancies effected by undertakings or traders who may be categorised as 'entrepreneurs' within the meaning of Article 2082 of the Italian Civil Code.

18 The Commission points out that, in Italian law, persons, bodies or businesses governed by public or private law not operating for gain cannot be covered by the concept of entrepreneur nor, as a result, be categorised as 'undertakings' for the purposes of application of Law No 223/91, since that term has a specific requirement, namely the pursuit of profit in return for the risk taken by the undertaking. Consequently, the Italian provisions implementing Directive 98/59 introduce a statutory exception for all employers engaged in non-profit-making activities, even if they employ several hundred people and have considerable economic significance. As examples, the Commission cites trade unions, foundations, political parties, partnerships, cooperatives and non-governmental organisations.

19 The Commission claims that it has received many complaints which have brought its attention to specific cases of non-application of the Italian legislation on collective redundancies to the salaried employees of non-profit-making bodies, such as the National Confederation of Farmers (Coldiretti) and the National Confederation of Commercial Undertakings (Confcommercio). These two unions, however, employ several hundred people.

20 The Commission takes the view that Directive 98/59, even if it does not give any definition of the term 'employer', applies to any employer, whether or not it is operating for gain.

21 It cites paragraph 17 of Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121, according to which the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.

22 Given that Article 1(2) of Directive 98/59 lays down specific exceptions in relation to its scope, Member States may not narrow this down by a restrictive interpretation of certain terms referred to in the provision, in particular the term 'employer'. Such an approach introduces a difference in treatment as between workers which cannot be justified by the nature of their activity, status or social situation.

23 The Commission is therefore of the opinion that Directive 98/59 applies to collective redundancies effected by any employer or natural or legal person party to an employment relationship, even if they are not operating for gain. The Italian legislation, in particular Law No 223/91 limiting the application of the

guarantees offered to workers to undertakings alone, unjustifiably excluding all employers engaged in non-profit-making activities, appears therefore to be incompatible with the directive.

24 In support of its arguments, the Commission draws attention to the case-law of the Court on the scope 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), as amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88), and codified by Council Directive 2001/23/EC of the Council of 12 March 2001 (OJ 2001 L 82, p. 16). It claims that Directive 77/187 refers constantly to 'undertaking' and 'entrepreneur' which have a somewhat commercial connotation, but makes clear in Article 1(1)(c), in the version resulting from Directive 98/50, that it 'shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain'. This new provision was a result of Case C-29/91 *Redmond Stichting* [1992] ECR I-3189, paragraphs 3 and 4, and Case C-382/92 *Commission* v *United Kingdom* [1994] ECR I-2435. The Commission points out that in the latter the Court found that the United Kingdom of Great Britain and Northern Ireland had failed to fulfil its obligations by excluding non-profit-making undertakings from the scope of the national regulations implementing Directive 77/187, holding in paragraph 45 of the judgment that the fact that an undertaking is engaged in non-profit-making activities is not in itself sufficient to deprive such activities of their economic character or to remove the undertaking from the scope of the directive.

25 According to the Commission, as Directive 77/187, which refers to 'undertakings', can be applied to natural and legal persons not operating for gain, then, *a fortiori*, Directive 98/59, which designates 'employers' as having the obligations arising from the directive, should also apply to natural and legal persons engaged in non-profit-making activities while party to an employment relationship within the meaning of Community law.

Findings of the Court

26 The term 'employer' within the meaning of Article 1(1)(a) of Directive 98/59 also covers employers engaged in non-profit-making activities. It is clear from the actual wording of Article 1 of the directive that the provision applies to redundancies effected by 'an employer', without further distinction, so that it applies to all employers. An interpretation to the contrary would not be consistent with the aims of the directive, as they are apparent from the second recital.

27 The Commission has shown that this category of employers is not covered by the provisions of the Italian legislation implementing the directive.

28 It must therefore be held that, by not adopting the necessary provisions in respect of employers engaged in non-profit-making activities, the Italian Republic has failed to fulfil its obligations under Directive 98/59.

Costs

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

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Declares that, by not adopting the necessary provisions in respect of employers engaged in non-profit-making activities, the Italian Republic has failed to fulfil its obligations under Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies;**

2. **Orders the Italian Republic to pay the costs.**

Schintgen Skouris Colneric

Delivered in open court in Luxembourg on 16 October 2003.

R. Grass
Registrar

V. Skouris
President