OPINION OF ADVOCATE GENERAL COSMAS

delivered on 24 September 1998 *

I — Introduction

1. This reference for a preliminary ruling from the Civilret Hillerød (Denmark), submitted by order of 4 July 1997, seeks an interpretation of the second subparagraph of Article 3(1) and Article 4(4) of Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, [1] as amended by Council Directive 92/56/EEC of 24 June 1992 [2] ('Directive 92/56').

2. Specifically, the case concerns the interpretation of the phrase 'collective redundancies arising from termination of the establishment's activities as a/where this is the result of a judicial decision' contained in the above provisions.

3. The question referred to the Court for a preliminary ruling arose in a dispute between Dansk Metalarbejderforbund, [3] acting on behalf of John Lauge and Others (hereinafter 'the plaintiffs), and Lønmodtagernes Garantifond (Employees' Guarantee Fund, hereinafter 'the defendant').

II — Legal background

A — *The Community provisions*

4. Directive 75/129 concerns the approximation of the laws of the Member States relating to collective redundancies. Many of its provisions were amended by Directive 92/56.

5. Section I of Directive 75/129 is entitled 'Definitions and Scope'; Article 1 gives definitions of the terms 'collective redundancies' and 'workers' representatives' (paragraph 1)

* Original language: Greek.

1 — OJ 1975 L 48, p. 29.

2 — OJ 1992 L 245, p. 3.

3 — Danish Metalworkers' Federation.

and goes on (in paragraph 2) to list the cases in which the Directive does not apply.

6. In particular Article 1(2)(d) of Directive 75/129, in its original form, provided that the Directive was not to apply to 'workers affected by the termination of an establishment's activities where that is the result of a judicial decision'. That provision was repealed by Directive 92/56, [4] which, in the third recital of its preamble, states that 'it should be stipulated that Directive 75/129/EEC applies in principle also to collective redundancies resulting where the establishment's activities are terminated as a result of a judicial decision'.

7. Among the provisions applicable in cases of collective redundancies arising from termination of the establishment's activities as a result of a judicial decision is, consequently, Article 2 of Section II of Directive 75/129, as replaced by Directive 92/56, [5] concerning the consultation procedure. According to that article, where an employer is contemplating collective redundancies, he is to begin consultations with the workers' representatives in good time with a view to reaching an agreement, he must supply them with all relevant information and notify them in writing of a number of facts, [6] and forward to the competent public authority a copy of the elements of the written communication.

8. With regard to Section III of the Directive, which concerns the 'Procedure for collective redundancies', the first subparagraph of Article 3(1) provides that '[e]mployers shall notify the competent public authority in writing of any projected collective redundancies'.

9. The second subparagraph of Article 3(1), which was added by Directive 92/56, lays down that:

'However, Member States may provide that in the case of planned collective redundancies arising from termination of the establishment's activities as a result of a judicial decision, the employer shall be obliged to notify the competent public authority in writing only if the latter so requests.'

10. Article 4(1) of Directive 75/129 provides that projected collective redundancies notified to the competent public authority are to take effect not earlier than 30 days after notification.

4 — Article 1(1)(b).

5 — Article 1(2).

6 — According to Article 2(3), the employer is to notify the workers' representatives *inter alia* of the reasons for the projected redundancies, the numbers [and] categories of workers to be made redundant, the period over which the projected redundances are to be effected, and so forth.

11. Article 4(4), which was added by Directive 92/56, lays down that:

'Member States need not apply this Article to collective redundancies arising from termination of the establishment's activities where this is the result of a judicial decision.'

12. From the above provisions of Directive 75/129, as amended, with regard to consultations with the workers' representatives, information to be supplied to the workers and more generally the procedure to be followed in the event of collective redundancies, it follows that in principle they apply in the case of termination of the establishment's activities as a result of a judicial decision. From this provision it is also clear, moreover, that the Member States are entitled to lay down that certain provisions concerning the procedure for collective redundancies, that is to say, provisions concerning notification to the competent public authority and deferment for at least thirty days of the commencement of the effects of the collective redundancies, do not apply in the event of termination of activities as a result of a judicial decision.

B — *The national legislation*

13. The two directives were transposed into the domestic law of the Kingdom of Denmark by Law No 414 of 1 June 1994 on notification of redundancies ('Varslingsloven'). [7]

14. Denmark availed itself of the right conferred on the Member States under the second subparagraph of Article 3(1) and Article 4(4) of Directive 75/129, as amended by Directive 92/56.

15. Paragraph 1(6) and (7) of Law No 414 provides that the procedure governing collective redundancies, including the condition that these should take effect not earlier than 30 days after the competent public authority has been notified, does not apply in the event of 'redundancies of employees affected by the termination of an establishment's activities as a result of a judicial decision'.

7 — *Lovtidende* 1994, p. 1963.

III — Facts

16. On 2 November 1994 Ideal-Line A/S, a company governed by Danish law whose seat is in Fåborg, petitioned the Skifteret (Bankruptcy and Probate Court) in Fåborg for the company to be wound up.

17. Later on that same day, 2 November 1994, the company's management gave all its hourly-paid employees, including the plaintiffs, verbal notice of redundancy and they were informed that this would take effect from the evening of 2 November 1994. From that date the establishment terminated its operations. The verbal notice of redundancy was confirmed in writing on 3 November 1994.

18. At the hearing the Commission clarified, without any challenge to its assertions in this respect, on the one hand, that prior to the collective redundancies there had been no consultations with the employees' representatives either before or after the winding-up petition had been filed. On the other hand it pointed out that, according to the Skifteret, even though the establishment was not operating normally during the period in question and had already dismissed the hourly-paid employees, nevertheless certain administrative employees had not been dismissed and the Skifteret permitted the provisional administrators of its assets to exercise discretion in relation to the establishment's activities in order to meet certain obligations by completing a number of orders.

19. The redundancies were not notified to the Arbejdsmarkedsråd (Labour Market Board), which is the competent public authority in Denmark for such notifications under Directive 75/129, since the redundancies were put into effect by reference to the fact that the employer had filed a winding-up petition.

20. On 8 November 1994 the Skifteret, Fåborg, issued a winding-up order, as requested in the company's winding-up petition, with 2 November 1994 as the operative date (fristdag).

21. The ten hourly-paid employees who are the plaintiffs considered that, under Council Directive 75/129, as amended by Directive 92/56, and Law No 414/1994 transposing those directives into the domestic law of Denmark, Ideal-Line A/S was obliged to give advance notice of the redundancies in question as laid down therein. They sought 30 days' pay as compensation for the failure to give advance notice.

22. The plaintiffs requested the defendant [8] to meet that claim against the employer.

23. The defendant rejected their claim on the ground that, under the Community [9] and national [10] legislation in force, Ideal-Line A/S was not obliged to notify the redundancies since the plaintiffs were in fact made redundant on termination of the employer's activities as a result of a judicial decision, namely a winding-up order.

24. As is stated in the order for reference, the defendant contended that, under Danish insolvency law, the effects of insolvency are, for a number of legal purposes, calculated from the date on which a winding-up petition is received. [11] According to the defendant furthermore, the fact that the formal winding-up order was not issued on 2 November 1994, the date on which the Skifteret received the winding-up petition, but only six days later, is attributable solely to the purely practical fact that, as a result of the organisation of their work, the Bankruptcy and Probate Courts often do not have the time to deal with winding-up petitions on the same day as they receive them. [12]

25. On 11 April 1995 the plaintiffs instituted proceedings in the Civilret, Hillerød, seeking a ruling requiring the defendant to recognise that the plaintiffs were not dismissed as the result of a judicial decision.

IV — The question referred to the Court

26. By order of 4 July 1997, which was received at the Court Registry on 9 July 1997,

8 — The defendant, Lønmodtagernes Garantifond, is the body responsible for guaranteeing outstanding claims against insolvent employers in Denmark pursuant to 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 (OJ 1980 L 283, p. 23). Directive 80/927 was transposed into Danish law by the Lov om Lønmodtagernes Garantifond (Law on the Employees' Guarantee Fund), which was published in codified form on 12 February 1988 under No 77 (*Lovtidende* 1988, p. 256), as amended by Law No 380 of 6 June 1991 (*Lovtidende* 1991, p. 1499).

9 — Specifically, the second subparagraph of Article 3(1) and Article 4(4) of Directive 75/129, as amended by Directive 92/56.

10 — Paragraph 1(6) and (7) of Law No 414/1994).

11 — More precisely, as is explained in the order for reference, that date determines, *inter alia*, which rules apply to set-off in regard to assets, which transactions can be set aside, and which pay claims can be treated as preferential claims against liquidation assets. Furthermore, in the order for reference it is stated that under the provisions in Paragraph 17 of the Danish Law on Bankruptcy and Winding-up, a debtor's business must be wound up if the debtor so requests and he is insolvent. That Law states that a debtor is insolvent if he is unable to meet his liabilities as they fall due, unless that inability to pay can be regarded as merely temporary.

12 — According to the defendant, it was for that reason, among others, that Danish legislation on bankruptcy and winding-up introduced the system of taking as the operative date that on which the winding-up petition is received, in order to ensure that assets could not be disturbed during the period between the submission of the winding-up petition and the winding-up order.

the Civilret, Hillerød, asked the Court for a preliminary ruling on the following question:

'Does the phrase "collective redundancies arising from termination of the establishment's activities as a result of a judicial decision" (see Article 3(1), second subparagraph, and Article 4(4) of Directive 75/129/EEC, as amended by Directive 92/56/EEC) cover the case in which the collective redundancies occur on the same day as that on which the employer filed a winding-up petition and terminated the undertaking's activities, and the Skifteret subsequently, and without any deferment other than that resulting from the date which the court set for the hearing, issues a winding-up order pursuant to the winding-up petition and takes the date of that winding-up petition as the operative date?'

V — Substance

27. The national court asks whether the phrase 'collective redundancies arising from termination of the establishment's activities as a result of a judicial decision' covers the case of collective redundancies which occur in the conditions described in the order for reference. If the answer is in the affirmative, that would mean that in such situations the Member States may exclude application of the provisions of Directive 75/129, in the version in force after Directive 92/56, relating to the collective redundancy *procedure* (Section III, Articles 3 and 4).

28. In other words, the national court is asking whether collective redundancies occurring on the same day as that on which the employer files a winding-up petition and terminates the activities of the establishment fall within the scope of the second subparagraph of Article 3(1) and Article 4(4) of Directive 75/129, as amended by Directive 92/56, if the competent Skifteret subsequently, and without any deferment other than that resulting from the date which the court sets for the hearing, issues the winding-up order applied for and takes the date of the winding-up petition as the operative date.

29. The defendant suggests that a reply in the affirmative should be given to the question submitted. It contends that the plaintiffs were dismissed after the activities of the establishment ceased because it was wound-up. The fact that the winding-up order was issued on 8 November 1994, that is to say six days after the petition was lodged, does not alter that causal link. The winding-up was already a reality on 2 November 1994 when the petition was filed in the Skifteret. [13]

13 — The defendant, relying on an advisory statement by Sø-og Handelsretten (Maritime and Commercial Court), Copenhagen, made in reply to a request by the Legislation Department of the Danish Ministry of Justice, in the course of the preparatory work for the transposition of Directive 92/56 into Danish law, considers that the dismissal of the establishment's employees which took place immediately prior to the judicial winding-up order constitutes part of the winding-up process. In its view, it was necessary to limit the losses of the insolvent undertaking, in other words to limit further damage to the debtor at the expense of the creditors, since otherwise the cost of the hourly-paid workers for six days would be a further burden on the assets.

30. The defendant also submits that, on a teleological interpretation of the provisions of Directive 75/129, the case of collective redundancies put into effect by an employer who has already filed a winding-up petition and terminated the establishment's operations should be treated in all respects in the same way as a case where collective redundancies take place because a winding-up order has been issued. It concludes from the above that the redundancies fall within the scope of the second subparagraph of Article 3(1) and Article 4(4) of Directive 75/129, as amended by Directive 92/56.

31. The defendant's line of argument cannot be accepted. I consider that a negative reply should be given to the question raised by the national court. I am led to that conclusion by a literal, teleological and systematic construction of the Community provisions referred to above.

32. First of all, on a literal construction, it follows from the second subparagraph of Article 3(1) and Article 4(4) of Directive 75/129, as amended by Directive 92/56, that both those provisions are applicable to "collective redundancies arising from termination of the establishment's activities *as a/where this is the result of a judicial decision*" (emphasis added). In other words, those provisions are expressly applicable to cases in which the termination of the activities of an establishment occurs after the judicial decision.

33. Consequently, the formulation of those provisions prescribes a chronological order and a causal relationship, in the sense that the termination of the activities of an establishment occurs *after* the issue of a judicial decision, and either it is ordered by that decision, or it at least constitutes the necessary consequence of that decision, as rightly pointed out by the Commission, with which view the Dansk Metalarbejderforbund also agreed at the hearing.

34. In particular, with regard to the winding-up order, it is beyond any doubt that the provisions in question apply to the case where the activities of an establishment are terminated *after* a winding-up order is issued and where termination of its activities constitutes the consequence of that decision.

35. Moreover, I consider that there is nothing in the letter of the provisions here interpreted which would enable us to consider that the derogations also apply to a case such as that before the national court. In the latter case the activities of the establishment were terminated not as a result of a judicial decision but on the initiative of the employer itself, on the same day as that on which it filed the winding-up petition, in other words *before*

the winding-up order was issued, regardless whether that in fact took place a few days later, as happened in this case.

36. Consequently, a winding-up petition whether filed by the employer or by someone else, for example a creditor, is not, according to the letter of the provisions, sufficient to bring them into play, since they introduce a derogation from the requirement to notify planned redundancies to the competent authority. In addition, the fact that, according to the Skifteret, certain legal consequences of the winding-up take effect earlier, before the winding-up order is issued, and are retroactive to the date on which the petition was submitted, cannot be decisive for application of those provisions of the Directive which, as their content clearly shows, are derogations.

37. The above conclusions, drawn on the basis of a literal construction of the provisions of the second subparagraph of Article 3(1) and Article 4(4) of Directive 75/129, as amended by Directive 92/56, are confirmed by a teleological construction, in other words by the objective which the Directive seeks to achieve.

38. According to its preamble, the aim of Directive 75/129 is to afford greater protection to workers in the event of collective redundancies. [14] That aim was clearly reinforced by the amendment brought about by Directive 92/56, the third recital in the preamble to which states that Directive 75/129/EEC should in principle apply also to collective redundancies resulting where the establishment's activities are terminated as a result of a judicial decision.

39. In my view, that means that, after Directive 92/56 was adopted, the provisions of Directive 75/129 protecting employees are also to apply in principle, apart from the possible derogations expressly provided for, to collective redundancies resulting where the establishment's activities are terminated as a result of a judicial winding-up decision.

40. Consequently the provisions concerning the necessary consultations and information to be provided to the workers' representatives [15] apply, without any possibility of derogation, whenever the employer is contemplating collective redundancies and such consultations must take place in good time.

14 — See the Opinion of Advocate General Lenz in Case 284/83 *Dansk Metalarbejderforbund* v *Nielsen & Søn* [1985] ECR 553, at p. 556; judgment in the case was delivered on 12 February 1985.

15 — Section II (Article 2) of Directive 75/129, as substituted by Directive 92/56.

41. In addition, the provisions concerning the procedure for collective redundancies [16] and, in particular, notification to the competent public authority and the period by which the commencement of the effects of the collective redundancies must be deferred, in other words when they take effect, also apply to cases where the activities of an establishment are terminated as a result of a judicial decision, unless the Member States have availed themselves of the right to provide for derogations conferred on them by the second subparagraph of Article 3(1) and Article 4(4) of Directive 75/129, as amended by Directive 92/56, as the Kingdom of Denmark did in this case. In fact, since what is involved is a derogation from a general provision, the derogations laid down must be interpreted narrowly and with the aim of not jeopardising the fulfilment of the basic aim of the Directive, which is to provide a minimum level of protection for employees in the case of collective redundancies decided upon by their employer. [17]

42. Consequently the conclusion to be drawn from the aim of the Directive is that the derogations introduced to the detriment of workers in the second subparagraph of Article 3(1) and Article 4(4) of Directive 75/129, as amended by Directive 92/56, must be interpreted narrowly, so that those provisions apply to cases where the activities of an establishment are terminated only after a judicial decision.

43. In order to corroborate the above conclusions based on a literal and teleological construction we may, I think, draw arguments from a systematic construction as well. In other words, we can interpret the provisions of the second subparagraph of Article 3(1) and Article 4(4) of Directive 75/129, as amended by Directive 92/56, in the context of the whole body of rules laid down in those directives, in relation to the various stages of procedure to be followed by an employer who wishes to effect collective redundancies.

44. It must be pointed out that Directive 75/129 does not restrict the employer's freedom to effect collective redundancies or otherwise. [18] Where, however, he intends to do so, he must comply with the formalities provided for in those provisions. The Directive does not, moreover, fix a point in time at which the employer is bound to commence the consultation procedure. The only restriction which Article 2, as replaced by Directive 92/56, lays down is that the employer must begin consultations with the workers' representatives *in good time* with a view to reaching

16 — Section III (Articles 3 and 4) of Directive 75/129.

17 — I would point out that under Article 5 of Directive 75/129, as supplemented by Directive 92/56, the right of Member States to apply or to introduce provisions which are more favourable to workers or to promote or allow the application of collective agreements more favourable to workers is not affected.

18 — See *Dansk Metalarbejderforbund* v *Nielsen & Søn*, cited above in footnote 14.

an agreement. Moreover, it should be noted out that, according to Article 2(2), '[t]hese consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, *inter alia*, at aid for redeploying or retraining workers made redundant.'

45. The possible subsequent stage under the provisions of the Directive (Articles 3 and 4), where, that is to say, the employer decides on collective redundancies, consists in the notification of the projected collective redundancies to the competent public authority, which then has at least thirty days to seek solutions to the problems raised by the projected redundancies. Collective redundancies which have already been put into effect before the end of that period are not valid unless the period of thirty days has expired.

46. In order to achieve the aim of the Directive, which consists in the protection of workers, the rules which it lays down must fully maintain their effectiveness with regard to the successive stages of the procedure for collective redundancies for which the Directive provides (consultations between the employer and the workers' representatives where the former is contemplating collective redundancies, all essential information to be supplied to them and a copy of all the written communications to be forwarded to the competent public authority, notification to that authority of any projected collective redundancies). [19]

47. The effectiveness of the Directive's provisions would not, however, be safeguarded were we to consider that the derogating provisions in the second subparagraph of Article 3(1) and Article 4(4) of Directive 75/129, as amended by Directive 92/56, meant that the employer's obligation to notify the competent public authority of any projected collective redundancies came to an end when a petition was filed seeking a judicial decision winding up the activity of the establishment, as the Commission moreover rightly concludes. That interpretation *contra legem* could, therefore, operate as a Trojan horse in the sense that in that situation the procedure provided for in Directive 75/129, as amended, which must be followed in the event of collective redundancies, would not have to be complied with after a petition had been filed for a judicial decision, rather than after a judicial decision winding up the activities of the establishment had been delivered. [20]

19 — I would point out that at the hearing the Commission emphasised that in this dispute the management of the establishment which was subsequently wound up never at any point, that is to say either before or after the filing of the winding-up petition, began the consultation procedure with the employees' representatives.

20 — At the hearing the Commission stated that, according to the Skifteret, even though the establishment was not operating properly at the time when the hourly-paid workers had already been made redundant, nevertheless certain administrative employees had not been dismissed and the Skifteret had allowed the provisional administrators of its assets to exercise their discretion and continue the activities of the undertaking in order to meet certain of its obligations by completing certain orders.

48. I consider that it is not possible to reach a different conclusion on the basis of the fact that under Danish law the period between the filing of a winding-up petition and the issue of the judicial decision winding up the company is very brief. That conclusion would be the same even if the intervening period was, by reason of particular features of the national legal systems, longer. The protection afforded to employees by Directive 75/129, as amended, may in no event depend on the particular features of national law, because that would be contrary both to the safeguarding of the practical effectiveness of the provisions of that Directive [21] and more generally to the principle of the supremacy of Community over national law.

49. Moreover, it is precisely at the stage at which a decision is awaited as to whether the activities of the establishment are to be continued, restructured or finally terminated [22] that the need to protect employees in accordance with the provisions of the Directive becomes especially urgent. [23] Consequently it is wholly in accordance with the aim of the Directive that the obligations resulting from the provisions concerning the procedure to be followed in the event of collective redundancies should continue to bind the employer in any case until the judicial decision has been delivered. In the contrary case, the collective redundancies are unlawful, with all the legal consequences thus entailed. [24]

50. In summary, I consider that the second subparagraph of Article 3(1) and Article 4(4) of Directive 75/129, as amended by Directive 92/56, apply solely to the case of collective redundancies due to the termination of the activities of an establishment subsequent to the date on which a judicial decision is given, which is the necessary consequence of that decision.

21 — I would point out that in its judgment in Joined Cases C-58/95, C-75/96, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 *Gallotti and Others* [1996] ECR 1-4345, paragraph 14, the Court emphasised that the Member States are required, within the bounds of the freedom left to them by the third paragraph of Article 189 of the EC Treaty, to choose the most appropriate forms and methods to ensure the effectiveness of directives (see also Case 48/75 *Royer* [1976] ECR 497, paragraph 75), whilst Article 5 of the Treaty requires the Member States, in the abovementioned conditions, to take all measures necessary to guarantee the application and effectiveness of Community law (see Cases C-382/92 *Commission* v *United Kingdom* [1994] ECR I-2435, paragraph 55, and C-383/92 *Commission* v *United Kingdom* [1994] ECR I-2479, paragraph 40).

22 — The Commission underlines the fact that there may be a judicial decision within the meaning of the Directive not only in the context of the winding-up procedure but also in any procedure which, under national law, is aimed at the overall satisfaction of debts (paiement global) in respect of the employer's creditors. As stated, it is possible for a judicial decision to be adopted, for example concerning the maintenance of work-place safety requirements, environmental protection or compliance with special manufacturing conditions for the protection of public health.

23 — As the Commission noted, moreover, at the hearing, after the petition has been lodged it is possible that there will be a settlement between the debtor and creditors and that prospect might result in the postponement of the judicial decision. Also it should not escape notice that a winding-up petition will frequently be lodged by a creditor and that means that the court dealing with the matter will have to decide whether the petition is well founded which will certainly have an effect on the length of the procedure.

24 — As the Commission states (both at paragraph 40 of its written observations and at the hearing), without being contradicted, the sole fact that the management of the undertaking does not appear to have carried out the necessary consultations with the workers' representatives, despite the fact that it was contemplating collective redundancies, is sufficient to bring about the consequences of Article 11 of Law No 414 of 1994 on compensation of workers and Article 12 providing for a penalty in the form of a fine.

VI — Conclusion

51. Consequently, in view of the foregoing analysis, I would suggest that the Court answer the question referred to it for a preliminary ruling by the Civilret, Hillerød, as follows:

On a proper construction of the second subparagraph of Article 3(1) and Article 4(4) of Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, as amended by Council Directive 92/56/EEC of 24 June 1992, the phrase 'collective redundancies arising from termination of the establishment's activities as a/where this is a result of a judicial decision' does not cover the case in which the collective redundancies occur on the same day as that on which the employer filed a winding-up petition and terminated the establishment's activities, and the Skifteret subsequently, albeit without any deferment other than that resulting from the date which the court set for the hearing, issues a winding-up order pursuant to the winding-up petition and takes the date of that winding-up petition as the operative date.