OPINION OF ADVOCATE GENERAL COSMAS

delivered on 13 July 1995 *

1. The preliminary question submitted to the Court by the Østre Landsret, Copenhagen, pursuant to Article 177 of the EC Treaty concerns the interpretation of Article 1 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] (hereinafter 'the directive').

2. The question arose in the course of proceedings following an appeal brought by the company Rockfon A/S (hereinafter 'Rockfon') before the Østre Landsret, Copenhagen.

3. That court asks this Court to define the term 'establishment' appearing in the directive so that it may determine whether the company in question acted in accordance with the procedures laid down by the directive when it made a number of workers redundant in November 1989.

* Original language: Greek.

1 — OJ 1975 L 48, p. 29. The directive was amended by Council Directive 92/56/EEC of 24 June 1992 (OJ 1992 L 245, p. 3).

I — Legislation applicable

4. The directive is intended to approximate the laws of the Member States relating to collective redundancies.

5. Article 1(1) provides:

'1. For the purposes of this Directive:

(a) "collective redundances" 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:

— either, over a period of 30 days:

(1) at least 10 in establishments normally employing more than 20 and less than 100 workers;

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

(3) at least 30 in establishments normally employing 300 workers or more;

— or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question.

(b)...'

6. The directive then sets out the consultation procedure which the employer must arrange with the worker's representatives (Article 2) [2] and the procedure for collective redundancies (Articles 3 and 4).

7. The Danish legislature, acting to comply with the provisions of the directive, chose the first of the two options set out in Article 1(1)(a) of the directive. By Law No 38 of 26 January 1977 it added to the Law on Provision of Employment and Unemployment Insurance Chapter 5a, Article 23a(1) of which is worded as follows:

'This Chapter applies to dismissals effected by an employer for one or more reasons not related to the individual workers concerned where the number of planned dismissals over a period of 30 days is:

(1) at least 10 in establishments normally employing more than 20 and less than 100 workers;

2 — The first subparagraph of point 4 of Article 1(2) of Directive 92/56, which amended Directive 75/129, replaced the original Article 2. It states that:
'The obligations laid down in paragraphs 1, 2 and 3 shall apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer.'

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

(3) at least 30 in establishments normally employing 300 workers or more.'

8. Article 23a(3) of the same chapter of the Danish Law mentioned above empowers the Minister of Labour to adopt the rules necessary for the implementation of the Law and provides in particular:

'The Minister of Labour may, after consultations with the Landsarbejdsnævn (National Employment Council), lay down specific rules ... and define the criteria that are to apply in deciding what constitutes an establishment for the purposes of this Chapter.'

9. The Minister of Labour then adopted Order No 74 of 4 March 1977 on the definition of an establishment etc., Article 2(1) of which is worded as follows:

'Definition of establishment

An "establishment" within the meaning of Chapter 5a of the Law shall be a unit which produces, buys or sells goods or services (for example, a workshop, factory, shipyard, shop, office or store) and which has a management which can independently effect large-scale dismissals, within the meaning of Paragraph 23a(1) of the Law.' [3]

II — The facts

10. Rockfon is part of the multinational group Rockwool International which in 1989 employed a total of 5 300 workers, 1 435 of them in Denmark. Of the 1 435 workers in Denmark, 1 085 worked in Hedehusene.

11. In Hedehusene the Rockwell International group consists of four production companies, one of which is Rockfon. A procedure for centralizing recruitment and dismissals in a joint recruitment and dismissal department forming part of Rockwell A/S (one of the four companies in the group) has been established for those four companies. Both Rockfon and Rockwell A/S are subsidiaries of the multinational Rockwell International.

3 — This order was subsequently withdrawn and replaced by Order No 755 of 12 November 1990 which maintained Article 2(1) and added a second sentence, worded as follows: 'A unit which is structured as a subsidiary company within the meaning of Paragraph 2 of the Law on Public Limited Companies and Paragraph 2 of the Law on Private Limited Companies and any other unit with similar links to a parent company is to be regarded as an establishment under Chapter 5a even if the management of the subsidiary company cannot independently effect large-scale dismissals.'

12. Under internal instructions dating from January 1985 on dismissals and voluntary redundancies applicable to Rockfon in the event of the dismissal of workers owing to a shortage of work, it has to be decided, in consultation with the joint personnel department of Rockwell A/S, which employees are to be made redundant and which are to be transferred to another department. The works' supervisors are to inform the worker's representative for the department concerned and ensure that Community quotas are not exceeded. 'Shortage of work' can only be relied on as grounds for dismissal if the personnel department cannot propose other appropriate work.

13. In 1989 Rockfon, which had 162 employees, dismissed a number of its employees on the ground of difficulties due to shortage of work. More precisely, between 10 and 28 November 1989 it dismissed 24 or 25 workers, of whom 9 were salaried staff and 15 or 16 were members of the Specialarbejderforbundet i Danmark (Union of Semiskilled Workers in Denmark).

14. Those dismissals were carried out without complying with the rules on notification or the consultation procedure to be followed in the case of large-scale redundancies which are laid down in a series of protective measures enacted in the Danish legislation in force. For that reason the workers who had been dismissed first brought the matter before the Arbejdsmarkedsnævnet (Labour Council), which, on 19 December 1989, decided that Rockfon was part of a larger undertaking, the Rockwell group, and that the dismissals effected by Rockfon had to be regarded as having been carried out by an establishment employing more than 300 workers. It concluded that Rockfon had not infringed the law since this required observance of the procedures for providing information and conducting prior consultation only in the case of redundancies involving at least 30 workers effected over a period of 30 days.

15. The Specialarbejderforbundet i Danmark then appealed against that decision to the Arbegssmarkedsstyrelsen (Board of Employment), which, however, upheld the opinion of the Labour Council. For that reason it also brought an action against Rockfon in which it claimed compensation for breach of the provisions on large-scale dismissals.

16. The case was heard at first instance by the Byret (District Court) of Tåstrup before which Rockfon maintained that, although it was indeed an independent production undertaking, it did not have power to make large-scale dismissals independently, that is

to say without reference to the joint recruitment and dismissal department attached to Rockwell A/S and that the provisions protecting workers, laid down by the directive and by the relevant national legislation did not therefore apply in this case.

17. By judgment of 1 October 1992, the Tåstrup District Council held that Rockfon constituted an 'establishment' within the meaning of Law No 38 of 26 January 1977 and the Ministerial Decree adopted for its application because the joint personnel department set up within the Rockwell group had only a consultative role and that Rockfon alone had power to carry out dismissals. Consequently, the redundancies which were effected ought to have been notified to the workers. Since that was not done, the District Court upheld the claims and ordered Rockfon to pay compensation to the workers dismissed.

18. Rockfon appealed against that judgment to the Østre Landsret, claiming that, being part of the Rockwell group at Hedehusene, it was bound, in relation to dismissals, to follow the instructions of the joint personnel department set up within the Rockwell group, that it had no management able to carry out large-scale dismissals independently and that it was not therefore subject to the provisions of the Community legislation nor to those of national legislation.

19. The Specialarbejderforbundet i Danmark, acting on behalf of Mr Søren Nielsen and 13 other workers who had been dismissed (hereinafter 'the respondent') contended that the appeal should be dismissed.

III — The preliminary question

20. In order to decide the proceedings before it, the Østre Landsret, Copenhagen, by order of 16 November 1993, referred the following question to the Court for a preliminary ruling:

'Is Article 1 of Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies to be interpreted as meaning that it precludes two or more interrelated undertakings in a group, neither or none of which has decisive influence over the other or others, from establishing a joint recruitment and dismissal department so that, for example, dismissals

in one of the companies can only be effected with the approval of that department and so that the total number of employees in the companies is accordingly to be taken into account in determining the number of employees under Article 1(1) of that directive?'

IV — Answering the preliminary question

21. My first observation is that the wording of the relevant provisions of the directive, which I consider to be perfectly clear, concern only collective redundancies and the procedure to be followed and that the text lays down no rules relating to the internal organization of undertakings or to the management of their personnel. The directive cannot be considered to have as part of its purpose to impose any restrictions at all on the freedom of undertakings to organize their activities and, more generally, to allocate powers relating to the management of their personnel in the way which appears to best meet their needs, as the United Kingdom and the Commission both submit in their observations.

22. The directive does not therefore prohibit two or more interrelated undertakings in a group, neither or none of which has decisive influence over the other or others, from establishing a joint recruitment and dismissal department so that, for example, dismissals in one of the undertakings can only be effected with the approval of that department. That freedom of the undertakings to manage matters concerning their personnel in the way they wish is subject to one restriction: it must not allow the provisions of the directive for protecting workers in the event of collective redundancies from being circumvented.

23. As the Commission points out in its observations, the term 'collective redundancies' used by the directive in Article 1(1)(a) is defined by applying two criteria, one qualitative and the other quantitative. According to the qualitative criterion, 'collective redundancies' means dismissals 'effected by an employer for one or more reasons not related to the individual workers concerned'. The quantitative criterion concerns the required ratio, in order for the directive to be applicable, between the number of dismissals and the size of the establishment.

24. The question asked by the national court — and this is the nub of the issue — is whether, under the directive, account must

be taken of the total number of workers employed in the company or the group of interrelated companies in determining the number of workers in relation to which the maximum number of dismissals allowed in the event of collective redundancies is calculated.

25. The problem has arisen because the Danish version uses the term 'virksomhed', which normally means 'undertaking', to render the term 'establishment'. Since there are linguistic differences in the translation of the term in question, 'establishment' ('virksomhed') in the various national laws, the meaning of the term 'establishment', which is the key to the interpretation of the directive, must be defined.

26. An examination of the ordinary meaning of the term 'établissement' in the French language reveals that it designates all the facilities established for the operation of an undertaking. [4] However, the term 'entreprise' in the proper sense means a financially independent body having the essential purpose of producing for the markets certain goods or services and which may comprise one or more 'établissements'. [5] So, the term 'entreprise' appears to be a generic term and the 'établissement' appears to be a specific term.

27. In the other Community language versions applying at the time when the directive was adopted, the term in question was translated by 'establishments' in English, 'Betriebe' in German, 'stabilimenti' in Italian, which corresponds to the term 'établissements' in the French version. However, the German term may designate not only an 'établissement' but also the undertaking itself. [6] The Dutch version uses the expression 'plaatselijke eenheden', which means 'local units'. [7]

28. When looking at how the Community legislature has used the term 'establishment' from time to time in various texts in the field of social policy we see that it was seeking to identify something distinct from what the term 'undertaking' designates. We see that, in certain cases, it uses the two terms cumulatively, clearly distinguishing their meanings. Such is the case, for example, in 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 ('entreprises'), businesses ('établissements') or parts of businesses, [8] Article 1(1) expressly provides as follows:

4 — See *Petit Robert*, page 697.

5 — See Cornu Gérard: *Vocabulaire juridique*, Association Henri Capitant, Paris, PUF, 1987, p. 317.

6 — See Dietl, Clara-Erika: *Dictionary of Legal Commercial and Political Terms*, Volume II, Verlag C. H. Beck, p. 148.

7 — Finally, the Greek version uses the term 'επιχείρηση' which corresponds, strictly speaking to the French term 'entreprise'. More properly, the term 'établissement' means in Greek 'εγκατάσταση', but also 'κατάστημα': see Ipiti, Antoniou: Μέγα Γαλλοελληνικόν Λεξικόν, Volume I, page 856. For that reason, use of the term 'επιχείρηση' raises certain questions.

8 — OJ 1977 L 61, p. 26.

'1. This Directive shall apply to the transfer of an undertaking, business or part of a business ...'

29. This distinction between 'undertakings, businesses or parts of businesses' is scattered throughout the legislation. The first recital of the preamble to Directive 77/187 is also significant since it states that '... economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of businesses to other employers as a result of legal transfers or mergers'.

30. Similarly, Article 2(1)(b) of 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 [9] provides that an employer is to be deemed to be in a state of insolvency, in particular, where the competent authority '... has ... established that the employer's undertaking or business has been definitively closed down ...'

31. Thus, in the two aforementioned directives (77/187 and 80/987), the term 'entreprise' is also translated by 'επιχείρηση' and the term 'établissement' by 'εγκατάσταση'. It would appear from a literal interpretation that, where the Community legislature uses the two terms together, the term 'entreprise' seems to have a wider meaning that the term 'établissement', that is to say that the relationship between them is one between a generic term and a specific term.

32. In the case now before us, if the Community legislature had wished that all an undertaking's workers, wherever they are employed, should be taken into account in determining the total number of workers on the basis of which dismissals are to be determined to be lawful or unlawful, it should have used a more appropriate term. This point is in fact made by the United Kingdom in its observations.

33. The Court has had occasion in the past to consider the problem of the existence of

9 — OJ 1980 L 283, p. 23.

differences in the translation of terms or expressions used in the legislation of the Community institutions. In its judgment in the *Stauder* case [10] it stated that: 'When a single decision is addressed to all the Member States the necessity for uniform application and accordingly for uniform interpretation makes it impossible to consider one version of the text in isolation but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light in particular of the versions in all four languages'. [11] The Court went on to state that: 'It cannot, moreover, be accepted that the authors of the decision intended to impose stricter obligations in some Member States than in others'. [12]

34. In the case now before us, the necessity for the protection granted to workers by the directive in question in the event of collective redundancies to be uniform in all the Member States means that the purpose of the provision in question must be sought so that, for this additional reason, the obligations of the Member States do not vary and, consequently, the protection of the workers concerned does not depend on the language version adopted by the Member State.

35. The expressions used in the various Community languages to translate the term in question, 'establishment' ('virksomhed', 'établissement'), entail in this case a narrow variant and a broad variant. The term 'establishment', which strictly speaking means a local work unit, is the narrow variant whilst the term 'entreprise', which designates the body as a whole, is the broad variant.

36. In order to resolve this problem, we can refer to the case-law of the Court which, in its judgment in Case 100/84 *Commission* v *United Kingdom*, [13] concerning an action to establish a Member State's breach of obligations, held that 'a comparative examination of the various language versions of the regulation does not enable a conclusion to be reached in favour of any of the arguments put forward and so no legal consequences can be based on the terminology used'. In its judgment in the *Cricket St Thomas* case, [14] the Court held that one of the language versions of a Community text (in that case, the English version) 'cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in this regard. Such an approach would be incompatible with the requirement for the uniform application of Community law'. And it has held that 'in the case of divergence between the language versions the provision in question must be interpreted by

10 — Judgment in Case 29/69 *Stauder* v *Ulm* [1969] ECR 419.

11 — Judgment in *Stauder*, paragraph 3. Cf. the judgment in Case 19/67 *Van der Vecht* [1967] ECR 345.

12 — Judgment in *Stauder* paragraph 4.

13 — Judgment in Case 100/84 *Commission* v *United Kingdom* [1985] ECR 1169, paragraph 16.

14 — Judgment in Case C-372/88 *Cricket St Thomas* [1990] ECR I-1345, paragraph 18.

reference to the purpose and general scheme of the rules of which it forms part'. [15]

37. My first observation is that the purpose of the directive is to regulate collective redundancies. It was adopted on the basis of Article 100 of the EC Treaty, on the approximation of legislation, but also on the basis of Article 117, concerning the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained.

38. Another observation is that a guiding principle emerging from the general scheme of the directive is the protection of workers in the event of collective redundancies. That is to say that, applying a systematic interpretation of the provisions of the directive, we direct ourselves towards an interpretation of the term in question, 'establishment' ('virksomhed'), which would accord with that guiding principle of protecting workers in the event of collective redundancies.

39. It is then necessary, in the present case, to identify the aim pursued by the Community legislature in using the provision in question, so as to reach, applying that teleological interpretation, certain conclusions concerning the meaning of the term 'establishment' in question.

40. In seeking to identify the purpose of the first indent of Article 1(1)(a) of the directive we must look at the circumstances in which the directive was adopted and examine why the Council preferred that formulation.

41. As regards the circumstances in which the directive was adopted, I refer first of all to the Council resolution of 21 January 1974 concerning a social action programme. [16] In the preamble to that resolution it is stated that 'economic expansion is not an end in itself but should result in an improvement of the quality of life as well as of the standard of living'. The Council went on to consider that 'social objectives should be a constant concern of all Community policies'. At that time the Council took the initiative of adopting measures for the 'improvement of living and working conditions so as to make possible their harmonization while the improvement is being maintained' in order to 'protect workers' interests, in particular with regard to the retention of rights and advantages in the case of mergers, concentrations or rationalization

15 — See paragraph 17 of the judgment in Case 100/84 *Commission* v *United Kingdom*, cited above in footnote 13, and the judgment in Case C-100/90 *Commission* v *Denmark* [1991] ECR I-5089, paragraph 8. On this question, in the case of preliminary rulings, compare the judgment in Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 14, the judgment in Case 173/88 *Henriksen* [1989] ECR 2763, paragraph 11, the Opinion of Advocate General Jacobs in that case, paragraph 12 et seq., and the judgment in Case C-372/88 *Cricket St Thomas*, cited above in footnote 14, paragraph 18, and the Opinion of Advocate General Tesauro, paragraph 6 et seq.

16 — OJ 1974 C 13, p. 1.

operations' (eleventh indent). The resolution concludes by stating that the Commission has already submitted to the Council a proposal for a directive on the approximation of the laws of the Member States relating to collective redundancies.

42. Following those declarations, having regard to the need to adopt measures for the protection of workers in the field of collective redundancies, the Council adopted the directive in question, the first recital of which expressly states that: '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'. In the second recital the Council states that: 'despite increasing convergence, differences still remain between the provisions in force in the Member States of the Community concerning the practical arrangements and procedures for such redundancies and the measures designed to alleviate the consequences of redundancy for workers'.

43. Consequently, the purpose of the directive, as it emerges from an analysis of the context in which it was adopted, is to provide effective protection for workers by approximating the laws of the Member States relating to collective redundancies, and it is in the light of that objective that the provision in question, Article 1(1), should be interpreted.

44. It is also useful to refer to the *travaux préparatoires* which led to the adoption of the provision in question, as the Commission points out in its observations. It appears that, in the original proposal for a directive, the Commission had used the term 'undertaking' and that, in the last subparagraph of Article 1(1) of the proposal, it had defined that term as a 'local employment unit' ('unité locale d'emploi', 'örtliche Beschäftigungseinheit'). [17] The Council still decided to replace the term 'undertaking' by the term 'establishment' and, following that change the definition initially contained in the proposal was considered to be unnecessary and was taken out. Bearing in mind the foregoing considerations, that argument supports the view that, if the Community legislature had wanted account to be taken of the number of workers employed in the entire undertaking and not in the local employment unit in determining whether the procedure laid down by the directive in the event of collective redundancies had been complied with, it would have made its intention clear, by using appropriate terminology.

17 — In the opinion which it gave on the Commission's original proposal for a directive, the Economic and Social Committee had added that it had to be made clear that the term 'undertaking' appearing in Article 1 of the proposal concerned the 'local employment unit' (OJ 1973 C 100, p. 11).

45. My analysis also finds support in the judgment in the *Botzen* case, [18] as the Commission points out. In that judgment, the Court, examining the question whether the rights and obligations resulting from the employment relationship are transferred at the same time as the undertaking, held that 'an employment relationship is essentially characterized by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties'. I consider that the term 'establishment' used in the directive characterizes that place, that part of the undertaking, and that it is on the basis of the number of workers employed in that part that it is necessary to determine whether the procedures laid down by the directive in the event of collective redundancies have been complied with.

46. Finally, since the appellant, Rockfon, has raised the question as to the extent to which an undertaking may be regarded as an 'establishment' for the purposes of the directive if it has no power to decide on collective redundancies, I would observe that it does not follow at all from the analysis set out above that, in order to be classified as an 'establishment', within the meaning of Article 1(1)(a) of the directive, the unit must be able to decide for itself on collective redundancies. It is quite possible that such a power could have been conferred on a department external to the 'establishment'. Laying down such a condition would open wide the door to breach of the protection measures provided for by the directive since undertakings could, in a specious way, get out of their obligations and proceed to effect collective redundancies at will.

47. As the Commission rightly points out, the provision in question clearly distinguishes the term 'employer' and the term 'establishment'. The term 'employer' designates in principle the natural or legal person with whom the worker has an employment relationship and who normally exercises the powers specific to the employer. The question who is the employer is relevant once a decision is taken to effect collective redundancies because that person has certain obligations under the directive and, more particularly, the obligation not only to provide specified information to the competent authority but also to conduct consultations with the workers' representatives.

48. It may certainly be important to ascertain whether the decision to effect collective redundancies is being taken directly by the employer himself, or at a higher level, because the employer could have difficulties in complying with the directive if he does not receive the necessary information from the body which took the decision concerning collective redundancies.

18 — Judgment in Case 186/83 *Botzen and Others* v *Rotterdamsche Droogdok Maatshappij* [1985] ECR 519, paragraph 15.

This case is envisaged in Directive 92/56 which expressly provides that the obligations to provide information and to consult apply independently of the fact that the decision originates from the employer or an undertaking which controls the employer.

V — Conclusion

49. In view of the considerations which I have set out above, I propose that the Court should give the following reply to the preliminary question:

Article 1(1)(a) of Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies does not prohibit two or more interrelated undertakings in a group, neither or none of which have decisive influence over the other or others, from establishing a joint recruitment and dismissal department so that dismissals in one of the undertakings can only be effected with the approval of that department. It means, however, that account must be taken, when the number of workers is calculated in the event of collective redundancies in an establishment, of the total number of workers employed in the unit in which the employment relationship of the persons made redundant is manifest, irrespective whether the unit concerned may effect collective redundancies independently.