OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 17 April 1986

My Lords,

Council Directive 77/187 is concerned with the rights of employees in the event of transfers of undertakings, businesses or parts of businesses (Official Journal 1977, L 61 p. 26).

In this application, brought pursuant to Article 169 of the Treaty, the Commission claims that Italy has failed properly to implement either the second subparagraph of Article 3(3) or Article 6(1) and (2) of the directive. The two grounds of complaint are independent of one another.

Article 3

By virtue of Article 3(1) the transferor's rights and obligations arising from the contract of employment or from an employment relationship shall pass to the transferee in the event of the transfer of the undertaking, business or part of a business. According to Article 3(2), in such an event the transferee shall observe the terms and conditions agreed in a collective agreement.

Article 3(3) provides:

'Paragraphs 1 and 2 shall not cover employees' rights to old age, invalidity or survivors' benefits under supplementary, company or inter-company pension schemes outside the statutory social security schemes in Member States.

Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer within the meaning of Article 1(1) in respect of rights conferring on them immediate or prospective entitlement to old age benefits, including survivors' benefits, under supplementary schemes referred to in the first subparagraph.'

The obligation enshrined in the second subparagraph of Article 3(3) differs in certain respects from that in Article 3(1). Thus, the second subparagraph of Article 3(3) provides quite generally that the interests concerned must be protected. Unlike Article 3(1), Article 3(3) does not simply stipulate that this burden passes to the transferee. In addition, the second subparagraph of Article 3(3) is expressed to extend to the interests of 'persons no longer employed in the transferor's business at the time of the transfer', whereas Article 3(1) applies only to persons employed on the date of the transfer (Case 19/83 *Wendelboe* v *LJ Music APS* [1985] ECR 457, judgment of 7 February 1985).

It is common ground between the parties that Italy did not adopt any legislation specifically to implement the second subparagraph of Article 3(3). Italy contends that the pre-existing provisions of its Civil Code transfer the obligations concerned to the transferee and thereby conform to this subparagraph, an assertion which is contested by the Commission.

Article 2117 of the Civil Code provides:

'The special insurance and aid funds established by the head of the undertaking, even if the employees have not contributed thereto, may not be used for purposes other than those for which they were intended and may not be attached by the creditors of the head of the undertaking or the employee.'

The Commission maintains that, while this provision puts the insurance funds out of reach of creditors, it does not bind the transferee to obligations subsumed by the transferor in respect of such funds. This is not seriously contested by the Italian Government which relies instead on the first two subparagraphs of Article 2112 of the Civil Code. These read as follows:

'Where an undertaking is transferred, contracts of employment will continue to be valid as against the transferee unless the transferor has given the required notice and employees retain the rights flowing from the seniority acquired before the transfer.

The transferee is liable for any debt which the transferor may have *vis-à-vis* employees at the time of the transfer arising from work carried out, including debts arising from notice given by the transferor, to the extent that the transferee had knowledge of them at the time of the transfer or that the debts appear in the books of the undertaking transferred or on the employee's personal file.'

If it could be shown that Italian courts had construed Article 2112 as transferring quite generally rights conferring on employees, or persons no longer employed, immediate or prospective entitlement to the benefits referred to in the second paragraph of Article 3(3), it seems to me that it would be right to regard the legislation as sufficiently implementing the directive.

The Italian Government has relied on a number of judgments of the Court of Cassation holding that employees' rights in such funds must be regarded as arising out of the contract of employment or employment relationship for the purposes of other provisions of Italian law.

For instance, judgment No 1061 of 9 February 1983 of that court was concerned with the third paragraph of Article 429 of the Code of Civil Procedure according to which, when making an order for the payment of a 'labour debt', a court is required to consider whether to grant special compensation in addition to the normal interest due on the debt. It was held in that case that sums due in respect of such funds were 'labour debts' for this purpose.

Also, in judgment No 3817 of 3 August 1978 the same court held that an action brought by an employee of the Bank of Italy against that bank concerning such a fund fell within the jurisdiction of the administrative courts because it related to a matter arising out of the employment relationship. In that court's judgment of 5 July 1984, such funds were also held to arise out of the employment relationship for the purposes of determining which courts had jurisdiction to hear actions relating to them.

There is, however, as I understand it no specific decision that rights to the benefits specified in the second paragraph of Article 3(3) of the directive always constitute a debt from the transferor to his employees 'arising from work carried out' within the meaning of Article 2112. Article 2112 does not mention specifically rights to insurance benefits. There may be cases where the employer agrees in the contract of employment that he will pay such benefits and where the obligation to pay these can

be seen as a debt. If on the other hand, the employer agrees to procure the payment of a pension by a third party (e.g. an insurance company) it is at the least arguable that the obligation of the third party to pay the pension is not a 'debt' from the transferor to his workers, whatever may be the position in regard to the payment of premiums. Moreover, Article 2112 appears to be limited to cases where the transferee had knowledge of the debt at the time of transfer or the debts appeared in the books of the undertaking transferred or on the employee's personal file. This may well cover most pension arrangements; it is not certain that it must necessarily do so. Finally, as the Commission contends, there may be cases where entitlement to the benefit in question does not arise as a debt 'arising from work carried out' even if it can be seen to constitute a debt from the employer.

In Case 29/84 *Commission* v *Germany* (nurses) [1985] ECR 1661 (judgment of 23 May 1985) the Court said in paragraph 23 of its judgment that:

'It follows from (Article 189 of the Treaty) that the implementation of a directive does not necessarily require legislative action in each Member State. In particular the existence of general principles of constitutional or administrative law may render implementation by specific legislation superfluous, provided however that those principles guarantee that the national authorities will in fact apply the directive fully and that, where the directive is intended to create rights for individuals, the legal position arising from those principles is sufficiently precise and clear and the persons concerned are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before the national courts.'

In the present case it seems to me that Article 2112 lacks the clarity and precision necessary to constitute proper implementation of the directive.

Article 2560 of the Civil Code has also been referred to. This does not in my view remove the defect which seems to me to exist in Article 2112 since, so far as concerns the liability of the transferee, it is limited to commercial undertakings where the debts are contained in accounts which the law requires to be kept. That does not cover all employees.

In my view, therefore, despite the arguments of the Italian Government, it cannot be said that Article 3(3) is implemented by pre-existing Italian legislation.

Article 6

Article 6(1) of the directive requires the transferor and the transferee to inform the representatives of their respective employees affected by a transfer of the reasons for the transfer, of the legal, economic and social implications of the transfer for the employees and of the measures envisaged in relation to the employees. Article 6(2) provides that:

'If the transferor or the transferee envisages measures in relation to his employees, he shall consult his representatives of the employees in good time on such measures with a view to seeking agreement.'

The Commission alleges that Italy has failed properly to implement these provisions. It is true that Article 1(2) of Law No 215 of 26 May 1978 lays down the following requirement:

'As from the entry into force of this law, the regional labour office for the place in which the undertaking is situated shall, where such undertaking is in crisis and where a solution to the crisis appears possible through a transfer of the undertaking, seek to arrange meetings between the employers and the trades union organizations most representative of the employees in order to arrive at an agreement as to the arrangements for transfer and the time limit within which it may be carried out in regard to the effects which such a transfer would have on the mobility of workers and employment.'

Nevertheless, this provision applies only to undertakings 'in crisis'. Moreover, it is common ground that no other Italian legislation implementing the provisions of the directive referred to exists.

The Italian Government relies on the fact that the most important and the most widespread collective bargaining agreements contain clauses to the same effect as Article 6(1) and (2). Since by that government's own account this applies only to the most important and the most widespread agreements, it is manifest that some employees in Italy do not enjoy the benefit of such clauses.

In any event, a directive cannot be implemented by collective bargaining agreements unless they are given the force of law by legislation. As Advocate General Verloren van Themaat said in Case 91/81 *Commission* v *Italy* (collective redundancies) [1982] ECR 2133 at p. 2145, a collective bargaining agreement is not a 'method' for implementing a directive under Article 189 of the Treaty. Similarly, in Case 96/81 *Commission* v *Netherlands* (bathing water) [1982] ECR 1791 at p. 1804 the Court held that the provisions of a directive must be implemented by 'national provisions of a binding nature'. What is more, collective bargaining agreements are not 'laws', 'regulations' or 'administrative provisions' within the meaning of Article 8 of Directive 77/187.

I conclude therefore that Italy has failed to implement Article 6(1) and (2) of that directive.

Conclusion

In the light of these considerations I conclude that both the Commission's complaints must be upheld, and that Italy should pay the costs of these proceedings.