JUDGMENT OF THE COURT (Sixth Chamber)

5 June 2003 *

In Case C-145/01,

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 U. Leanza, acting as Agent, and by D. Del Gaizo, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by maintaining in force Article 47(5) and (6) of Law No 428 of 29 December 1990 laying down provisions for compliance with the obligations arising from Italy's membership of the European Communities (Community Law for 1990) (ordinary supplement to GURI No 10 of 12 January 1991, p. 5), which:

* Language of the case: Italian.

— allow for the non-application of the automatic transfer of all contracts of employment or employment relationships, from the transferor to the transferee, in respect of undertakings subject to an approved composition procedure involving the transfer of assets or a special administration procedure, where those undertakings pursue their activity after the transfer, and

— in respect of undertakings declared to be 'in a situation of economic crisis', do not provide for the transfer, from the transferor to the transferee, of employees and debts arising from a contract of employment or employment relationship,

the Italian Republic has failed to fulfil its obligations under 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), in particular Articles 3 and 4 thereof,

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet (Rapporteur), President of the Chamber, R. Schintgen, C. Gulmann, F. Macken and J.N. Cunha Rodrigues, Judges,

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

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 10 April 2003,

gives the following

Judgment

1 By application lodged at the Registry of the Court on 29 March 2001, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by maintaining in force Article 47(5) and (6) of Law No 428 of 29 December 1990 laying down provisions for compliance with the obligations arising from Italy's membership of the European Communities (Community Law for 1990) (ordinary supplement to GURI No 10 of 12 January 1991, p. 5, 'Law No 428/1990'), which:

— allow for the non-application of the automatic transfer of all contracts of employment or employment relationships, from the transferor to the transferee, in respect of undertakings subject to an approved composition procedure involving the transfer of assets or a special administration procedure, where those undertakings pursue their activity after the transfer, and

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Legal background

2 In the version in force at the date on which the Commission gave the Italian Republic formal notice to submit its observations on the alleged failure to fulfil its obligations, that is, on 16 July 1997, Section II of Directive 77/187, entitled 'Safeguarding of employees' rights', provided as follows:

'*Article 3*

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... shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer... and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.

2. Following the transfer... 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.

...

Article 4

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.

...'

3 Directive 77/187 was amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88). In accordance with Article 3 of that directive, it entered into force on 17 July 1998 and was thus applicable at the date on which the Commission issued its reasoned opinion concerning the alleged failure to fulfil obligations, namely on 4 August 1999.

4 Directive 98/50 amended *inter alia* the second subparagraph of Article 3(1) of Directive 77/187, which now reads as follows:

'Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.'

5 Directive 98/50 also introduced Article 4a into Directive 77/187, which is worded as follows:

'1. Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority).

2. Where Articles 3 and 4 apply to a transfer during insolvency proceedings which have been opened in relation to a transferor (whether or not those proceedings have been instituted with a view to the liquidation of the assets of the transferor) and provided that such proceedings are under the supervision of a competent public authority (which may be an insolvency practitioner determined by national law) a Member State may provide that:

(a) notwithstanding Article 3(1), the transferor's debts arising from any contracts of employment or employment relationships and payable before

the transfer or before the opening of the insolvency proceedings shall not be transferred to the transferee, provided that such proceedings give rise, under the law of that Member State, to protection at least equivalent to that provided for in situations covered by 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,

and, or alternatively, that,

(b) the transferee, transferor or person or persons exercising the transferor's functions, on the one hand, and the representatives of the employees on the other hand may agree alterations, in so far as current law or practice permits, to the employees' terms and conditions of employment designed to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or business.

3. A Member State may apply paragraph 2(b) to any transfers where the transferor is in a situation of serious economic crisis, as defined by national law, provided that the situation is declared by a competent public authority and open to judicial supervision, on condition that such provisions already exist in national law by 17 July 1998.

...

4. Member States shall take appropriate measures with a view to preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights provided for in this Directive.'

6 Article 2112 of the Codice Civile (Civil Code), in the version in force during the pre-litigation procedure, provided as follows:

'Transfer of an undertaking

(1) On the transfer of an undertaking, the employment relationship shall continue with the transferee and the employee shall retain all rights under that relationship.

(2) The transferor and the transferee shall be jointly and severally liable in respect of all rights which the employee had on the date of the transfer. The employee may agree to release the transferee from the obligations flowing from the employment relationship, in accordance with the procedures provided for in Articles 410 and 411 of the Codice di Procedura Civile (Code of Civil Procedure).

(3) The transferee shall be bound to apply the economic and regulatory measures provided for in collective agreements, including company agreements, 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.

(4) The provisions of this article shall also apply in the case of usufruct or lease in respect of the undertaking.'

7 Article 47(5) and (6) of Law No 428/1990, the subject-matter of this action for failure to fulfil obligations, provide as follows:

'Where the transfer concerns an undertaking or production unit declared by the CIPI [Inter-Ministerial Committee for the Coordination of Industrial Policy] to be in a "crisis situation" pursuant to the fifth paragraph under (c) of Article 2 of Law No 675 of 12 August 1977 or an undertaking which has been declared insolvent or has been the subject of an approved composition involving the transfer of assets, a compulsory liquidation or a special administration procedure — whether or not provision has been made for the continuation of the business or the consultation referred to in the foregoing paragraphs has resulted in any agreement providing for the continued employment of personnel, even in part —, Article 2112 of the Civil Code shall not, unless that agreement lays down more favourable conditions, apply to employees whose employment relationship continues with the transferee. Such an agreement may additionally provide that surplus personnel are to be excluded from the transfer and that the latter are to continue, wholly or in part, in the service of the transferor.

Those employees who are not recruited by the transferee, the lessee or the new operator have a right of priority in respect of vacancies filled by the latter during a period of one year from the transfer or during a longer period fixed by collective agreement. Article 2112 of the Civil Code does not apply to those abovementioned employees, who are recruited by the transferee, the lessee or the new operator after the transfer of the undertaking.'

Pre-litigation procedure

8 The letter of formal notice of 16 July 1997 from the Commission to the Italian Republic alleges incorrect implementation of Articles 3(1) and 4(1) of Directive

77/187 by reason of the content of Article 47(5) and (6) of Law No 428/1990. In support of its analysis, the Commission refers in particular to the Court's interpretation of that directive, especially in Case C-472/93 *Spano and Others* [1995] ECR I-4321. The Commission adds:

'On 24 February 1997, an amended proposal for a directive amending Directive 77/187/EEC (Document COM(97) 60 final) was presented to the Commission. That proposal envisages allowing for greater flexibility for transfers effected under insolvency procedures, which in some ways is similar to the Italian legislation. I would, however, in any event point out that the Italian legislation will have to be adapted, even if the amendment to the directive is adopted as proposed by the Commission. The mere fact that a situation of "economic crisis" has been declared by an administrative authority is not affected by the proposal for a directive, since the revised provisions require there to be an insolvency procedure.'

9 Having examined the response of the Italian authorities given in a letter of 16 September 1997, the Commission issued its reasoned opinion on 4 August 1999. It concluded as follows:

'... by maintaining in force Article 47(5) and (6) of Law No 428 of 29 December 1990, which:

— allow for the non-application of the automatic transfer of all contracts of employment or employment relationships, from the transferor to the transferee, in respect of undertakings subject to an approved composition procedure involving the transfer of assets or a special administration procedure, where those undertakings pursue their activity after the transfer, and

— in respect of undertakings declared to be "in a situation of economic crisis", do not provide for the transfer, from the transferor to the transferee, of employees and debts arising from a contract of employment or employment relationship,

the Italian Republic has failed to fulfil its obligations under Directive 77/187... and in particular Articles 3 and 4 thereof. In accordance with the second paragraph of Article 226 EC, the Commission requests the Italian Republic to take the measures necessary to comply with this reasoned opinion within two months of its notification.'

10 In paragraph 4 of the considerations set out in its reasoned opinion, the Commission recalls the Court's case-law referred to in the letter of formal notice. It adds in paragraph 5:

'The Commission next wishes to point out that the new Directive 98/50/EC, whilst allowing for a certain amount of flexibility in respect of transfers of undertakings in difficulty, is not so close to the Italian legislation as to render the latter fully compatible with Community law....'

11 Paragraphs 5 and 6 of the reasoned opinion contain an analysis aimed at substantiating that finding as regards the effects of the introduction by Directive 98/50 of Article 4a into Directive 77/187.

Admissibility of the action

12 Without formally raising a preliminary issue under Article 91 of the Rules of Procedure, the Italian Government submits principally that the action is inadmissible. It claims that, after the letter of formal notice but prior to notification of the reasoned opinion, Directive 77/187 was substantially amended by Directive 98/50, particularly as regards the application of Articles 3 and 4 in the context of transfers taking place during liquidation or insolvency proceedings or rescues of undertakings in difficulty. In the reasoned opinion the Commission took account of those amendments and did not limit in time the complaints addressed to the Italian Republic. Thus the content of those complaints was, if not expanded, at least different from that set out in the letter of formal notice.

13 The Commission counters that the infringements of Community law of which it complains are the same in the reasoned opinion and in the letter of formal notice, namely infringement of Articles 3 and 4 of Directive 77/187. The reference to the provisions of Directive 98/50 in the reasoned opinion and the application is intended solely to strengthen the Commission's position by showing that the infringements of Directive 77/187 have not been eradicated by the entry into force of Directive 98/50 but, on the contrary, continue exactly as before. It would, incidentally, be ironic if the entry into force of a directive which amended a previous directive were to authorise a Member State to continue to infringe the first directive when the amending directive did not make any substantive changes to the first directive.

14 The Commission's line of argument on this point cannot be accepted.

15 It is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion (see, *inter alia*, Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299, paragraph 13;

and Case C-299/01 *Commission* v *Luxembourg* [2002] ECR I-5899, paragraph 11). In accordance with the second paragraph of Article 226 EC, if a Member State has put a stop to the infringement before the end of that period, the Commission may no longer bring an action before the Court of Justice.

16 In this case, it is the situation prevailing in October 1999, that is, two months after notification of the reasoned opinion to the Italian Republic, which falls to be examined by the Court. At that time, however, Directive 98/50 had been in force for more than a year. As was pointed out in paragraph 5 of this judgment, that directive introduced Article 4a into Directive 77/187 which, to a certain extent and in certain circumstances, allows a Member State not to apply Articles 3 and 4 of that directive. Article 47(5) and (6) of Law No 428/1990, the subject-matter of this action by the Commission, may well, at least partially, correspond to the situations contemplated in Article 4a. The reasoned opinion does in fact devote two entire paragraphs to showing that, notwithstanding the introduction of that article, the Italian legislation remains contrary to Articles 3 and 4 of Directive 77/187 (see paragraphs 10 and 11 of this judgment). However, the Commission's letter of formal notice, issued in July 1997, does not contain — and, moreover, could not contain — any analysis of that legislation in the light of Article 4a of Directive 77/187, a provision which did not yet exist. As indicated in paragraph 8 of this judgment, in that letter the Commission confined itself to referring to the amended proposal for a directive amending Directive 77/187, the text of which, moreover, was not retained as such by the Council when it adopted Directive 98/50. The Italian authorities, who responded diligently in September 1997 to the Commission's letter of formal notice, were thus unable, at that stage of the pre-litigation procedure, to defend the Italian Republic by taking Article 4a of Directive 77/187 into account, yet that provision, which had the effect of lessening the obligations imposed on the Member States, was in force in October 1999 at the end of the time-limit fixed in the reasoned opinion and was likely to have affected the assessment of whether the Italian legislation was compatible with Directive 77/187.

17 It should be borne in mind that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity to comply with its obligations

under Community law or to avail itself of its right to defend itself against the complaints made by the Commission (see Case 293/85 *Commission* v *Belgium* [1988] ECR 305, paragraph 13; and order in Case C-266/94 *Commission* v *Spain* [1995] ECR I-1975, paragraph 16). The proper conduct of that procedure thus constitutes an essential guarantee required by the EC Treaty in order to protect the rights of the Member State concerned. It is only when that guarantee is observed that the contentious procedure before the Court can enable it to judge whether the Member State has in fact failed to fulfil the obligations which the Commission alleges it has breached (order in *Commission* v *Spain*, paragraphs 17 and 18). More specifically, the purpose of the letter of formal notice in the pre-litigation procedure is to delimit the subject-matter of the dispute and to indicate to the Member State, which is invited to submit its observations, the factors enabling it to prepare its defence.

18 It follows that the reasoned opinion and the application made to the Court pursuant to the second paragraph of Article 226 EC are flawed, with regard to the rights of the defence, since they refer to rules of Community law other than those cited in the letter of formal notice and since the change in the legal situation is likely to have affected the assessment of the compatibility of the national legislation in question with Community law.

19 It follows from all the foregoing that the Commission's application must be dismissed as inadmissible.

Costs

20 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 Italian Republic has asked that the Commission be ordered to pay the costs and the latter has been unsuccessful in its pleadings, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the Commission of the European Communities to pay the costs.**

Puissochet Schintgen Gulmann

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 5 June 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber