OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 27 November 1984 [1]

Mr President,
Members of the Court,

The case in which I am giving my opinion today is concerned with the interpretation of Council Directive No 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (Official Journal 1975 L 48, p. 29).

A. The facts, for the details of which I refer to the Report for the Hearing, may be summarized as follows:

At the end of February 1980, the management of H. Nielsen & Søn, Maskinfabrik A/S, the defendant in the main proceedings, informed representatives of the trade union at the works that the company was in financial difficulties. On 14 March 1980 the company gave notice to the bankruptcy court that it was suspending payment of its debts. There ensued negotiations between two trade unions, Dansk Metalarbejderforbund and Specialarbejdeforbundet i Danmark, the plaintiffs in the main proceedings, and the management of the undertaking concerning the provision of a bank guarantee for the payment of wages. No such guarantee could be obtained and both trade unions withdrew their members from the undertaking on 19 March. On 21 March the undertaking informed the competent Danish Employment Office that it was intending to dismiss all its workers. On 25 March liquidation proceedings were started and on the following day all the workers were given notice. The workers thereupon resumed work in order to complete the current production.

The plaintiffs in the main proceedings, acting for certain of their members, claimed compensation on the basis of Article 102a (2) of the Danish Law on the Procurement of Employment and Unemployment Insurance (Law No 38 of 26 January 1977, as amended by Law No 444 of 28 July 1982). That provision, which was adopted in order to implement Council Directive No 75/129, states that if an employer does not, as the directive stipulates, give the competent authorities at least 30 days notice of intended collective redundancies, he must pay compensation to the workers equal to their wages for that period.

Following the dismissal of their actions by the bankruptcy court the two trade unions appealed to the Højesteret, which, by judgment of 11 December 1983, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

(1) May a termination of employment which is effected by the employees because the employer has notified the bankruptcy court that he is suspending payment of his debts be treated as dismissal by the employer, with the consequence that the employment falls within the scope of Council Directive No 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, provided that the conditions therefor are otherwise satisfied? The reply should be based on

1 — Translated from the German

the assumption that the employees' termination of their employment was justified under Danish law.

(2) Does Council Directive No 75/129/EEC apply not only where the employer in fact contemplated large-scale redundancies, but also where he ought to have contemplated large-scale redundancies and to have given advance notice thereof but failed to do so?

B. My opinion on these questions is as follows:

I. First question

1. The purpose of this question is to ascertain whether the termination of their employment by the workers on 19 March 1980 falls within the scope of Council Directive No 75/129. That could only be the case, as the national court rightly observes, if the conduct of the workers on that day were to be considered under Danish law as *legally effective* termination of their employment. If, on the other hand, the workers' absence from work were regarded simply as an interruption of their employment, as suggested by the intervener, whose observations are endorsed by the defendant in the main proceedings, the definitive termination of their employment would have taken place *after* the bankruptcy proceedings had commenced. Such cases are, however, expressly excluded from the scope of the directive by Article 1 (2) (d), which provides that the directive is not to apply to workers affected by the termination of an establishment's activities where that is the result of a judicial decision.

A contrario, it follows from that provision that, where the definitive termination of employment takes place before the judicial closure of an undertaking, such termination in principle falls within the scope of the directive. Since on the basis of the judgment of the Højesteret it is to be assumed that the termination of employment took place because the employer gave notice to the bankruptcy court that it was suspending payment of its debts and that such notice is *not* equivalent to closure of the works by the court, it remains to consider whether the termination of employment in question can be regarded as collective redundancy within the meaning of the directive.

2. All the parties rightly assume that, according to the *wording* of the definition of collective redundancies given in Article 1 (1) (a), the directive applies only to 'dismissals effected by an employer' (Entlassungen die ein Arbeitgeber . . . vornimmt, afskedigelser, som foretages af en arbejdsgiver, licenciements effectués par un employeur, ogni licenziamento effettuato da un datore di lavoro, het ontslag door een werkgever). Thus the directive mainly contains obligations for the employer. According to Article 2, workers are to be consulted before collective redundancies are effected and according to Article 3 all projected collective redundancies are to be notified to the competent authorities.

Moreover, the directive contains no express provision that termination of employment by the *workers* is to be treated in certain cases as dismissal by the employer.

It remains further to consider whether, as Specialarbejderforbundet contends, the *object* of the directive, contrary to its wording, requires that termination of their employment by the workers in the specific circumstances of the present case should be

treated as dismissal by the employer. In the view of the trade union, the declared objective of the directive to protect workers in the event of collective redundancies would not be achieved if in a case such as the present, in which the payment of wages is no longer guaranteed on account of suspension of payment of debts, the termination of their employment by the workers were not treated as dismissal by the employer.

That teleological interpretation assumes, in my opinion, a purpose which the directive does not have. The directive does not have the objective of guaranteeing a form of social security for workers whose employer encounters financial difficulties, but seeks, as is apparent from the preamble, simply to strengthen the protection of the worker against unilateral acts by the employer in the form of *collective redundancies.* As is apparent from Article 2 of the directive, *prior consultations with representatives of the workers* are intended to contribute to avoiding or reducing collective redundancies and alleviating their consequences. The *obligation to give notice* of projected collective redundancies contained in Articles 3 and 4 of the directive is intended to put the competent authorities in a position to seek solutions to the problems caused by the projected collective redundancies in good time.

Achievement of that objective would, as the intervener in the main proceedings and the Commission stress, at least be made more difficult, if not altogether frustrated, if unilateral termination of employment by the workers, on account of the employer's notifying the bankruptcy court that payment of his debts is being suspended, were to be treated as equivalent to dismissal by the employer. In such an event the workers would have the power to bring about collective redundancies even contrary to the intention of the employer and without the employer being able to fulfil his obligations under the directive in respect of consultations and notice. The directive's intention of avoiding or reducing collective redundancies by means of consultations and the requirement of notification to the competent authorities would be stood on its head. If Council Directive No 75/129 were applied to cases such as the present, *the worker* would ultimately *be at liberty* to create *the conditions* giving rise to the *claim for compensation* under national law.

Moreover, application of Council Directive No 75/129 to a case such as the present might jeopardize the objective of notice to the bankruptcy court or suspension of the payment of debts. That procedure is intended as far as possible to prevent the consequences associated with insolvency. The application of the rules on collective redundancies to such a case would however be likely to hasten the liquidation of an undertaking.

In conclusion, it therefore remains to observe that the *purpose* of Council Directive No 75/129 does not require that it should be applied, contrary to its unambiguous and clear wording, to termination of their employment by the workers in the circumstances described. The question whether a different answer would be called for, as the Commission proposes, if the employer, without seriously trying to stay in business, had forced the workers to give notice in order to escape the obligations

imposed by the directive, need not be discussed in the present case, since the request for a preliminary ruling contains no grounds for such an assumption.

II. Second question

1. Although the relevant Danish provision apparently deals only with the failure to comply with Article 3 of the directive, the national court wishes to know, in relation to Article 2 (1), whether the directive applies to collective redundancies which ought to have been contemplated in view of the financial position of the undertaking but were not so contemplated and consequently the procedure for consultation provided for in the directive was also not complied with.

2. The consultation prior to collective redundancies must take place, according to the wording of Article 2 in all the language versions except the German, where an employer *is contemplating* collective redundancies (*pataenker* at foretage, *envisage* d'effectuer, *prevede* di effettuare, *overweegt*,). On the other hand, the employer is only required to inform the competent authority under Article 3 if, after consultations with the workers' representatives, he draws up a plan for collective redundancies (Plan einer Massenentlassung, enhver plan om kollektive afskedigelser, tout projet de licenciement collectif, ogni progetto di licenziamento, elk plan voor collectief ontslag, any projected collective redundancies). From that *linguistic distinction* it may be inferred that the employer must give notice to the competent authorities if he actually plans to make collective redundancies, whereas representatives of the workers must be consulted at an earlier stage.

3. Legal consequences might at most be attached to the failure to consult representatives of the workers if there were an obligation in the directive to contemplate collective redundancies in certain circumstances. I concur, however, with the Commission and the intervener in the main proceedings in not being able to see, either in the directive or in other Community measures, any such obligation to contemplate collective redundancies in the event of financial difficulties. On the contrary, the directive contains no provisions specifying the cases in which the employer must contemplate collective redundancies and it does not restrict his discretion in determining whether and when he should contemplate or plan such measures.

Moreover, such an obligation could, as I have already observed, even run counter to the directive's declared objective of protecting employment as far as possible if an employer, while trying to overcome financial difficulties, were compelled to contemplate collective redundancies.

4. The interpretation proposed by the plaintiffs in the main proceedings would have the further consequence, as the Commission rightly observed, that each undertaking which has to cease trading after insolvency and failed to contemplate collective redundancies and consult representatives of the workers in good time would incur the penalties provided under national law in implementation of the directive. As is apparent however from Article 1 (2) (d), the directive does not apply to *collective redundancies* connected with bankruptcy proceedings.

C. In conclusion I propose that the Court should therefore answer the two questions as follows:

(1) Termination of employment by the employees because the employer has notified the bankruptcy court that he is suspending payment of his debts is not to be treated as dismissal by the employer within the meaning of Council Directive No 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies.

(2) The said directive does not provide that an employer ought to have contemplated collective redundancies before initiating bankruptcy proceedings and consequently ought to have informed representatives of the workers.