OPINION OF ADVOCATE GENERAL TIZZANO
delivered on 11 March 2004 [1]

I — Introduction

1. In these proceedings, brought by the Commission of the European Communities ('the Commission') under Article 226 EC, the Court is requested to determine whether the Portuguese Republic has failed to fulfil its obligations under Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies ('the Directive'). [2] It is necessary to determine whether the definition of collective redundancies in the Directive includes all dismissals for any reason not related to the individual workers concerned or whether that definition may be restricted to dismissals arising for structural, technological or cyclical reasons.

1 — Original language: Italian.

2 — OJ 1998 L 225, p. 16. This Directive is a codification of Directive 75/129/EEC of 17 February 1975, as amended by Directive 92/56/EEC of 24 June 1992 (OJ 1992 L 245, p. 3).

II — The legal background

A — *The Community legislation*

2. The Directive is based on Article 100 of the EC Treaty (now, after amendment, Article 94 EC), and was adopted in order to alleviate the effects on the functioning of the internal market of differences between national laws (fourth recital in the preamble). The Directive is intended to afford greater protection to workers, taking into account the need for a high level of economic and social development within the Community, as well as the principles of social policy enshrined in the 1989 Community Charter of the fundamental social rights of workers and Article 117 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) (second and sixth recitals in the preamble).

3. For the purposes of this case, particular reference should be made to the first

subparagraph of Article 1(1) of the Directive, which provides:

'For the purposes of this Directive:

(a) "collective redundancies" 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:

(i) either, over a period of 30 days:

— at least 10 in establishments normally employing more than 20 and less then 100 workers,

— at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers,

— at least 30 in establishments normally employing 300 workers or more,

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

4. The second subparagraph of Article 1(1) of the Directive deals with so-called redundancies by assimilation. It provides that 'for the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies'.

5. Article 3, in turn, provides that:

'1. Employers shall notify the competent public authority in writing of any projected collective redundancies.

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.

This notification shall contain all relevant information concerning the projected collective redundancies and the consultations with workers' representatives provided for in Article 2, and particularly the reasons for the redundancies, the number of workers to be made redundant, the number of workers normally employed and the period over which the redundancies are to be effected.

2. Employers shall forward to the workers' representatives a copy of the notification provided for in paragraph 1.

The workers' representatives may send any comments they may have to the competent public authority.'

6. Finally, Article 4 provides:

'1. Projected collective redundancies notified to the competent public authority shall take effect not earlier than 30 days after the notification referred to in Article 3(1) without prejudice to any provisions governing individual rights with regard to notice of dismissal.

Member States may grant the competent public authority the power to reduce the period provided for in the preceding subparagraph.

2. The period provided for in paragraph 1 shall be used by the competent public authority to seek solutions to the problems raised by the projected collective redundancies.

3. Where the initial period provided for in paragraph 1 is shorter than 60 days, Member States may grant the competent public authority the power to extend the initial period to 60 days following notification where the problems raised by the projected collective redundancies are not likely to be solved within the initial period.

Member States may grant the competent public authority wider powers of extension.

The employer must be informed of the extension and the grounds for it before expiry of the initial period provided for in paragraph 1.

4. 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.'

B — *The national legislation*

7. The Directive was transposed into Portuguese law by Decree-Law No 64-A/89 of 27 February 1989 concerning the legal rules governing the termination of individual employment contracts and the conclusion and *expiry* of fixed-term employment contracts ('the LCCT'), as amended by Law No 32/99 of 18 May 1999.

8. Portuguese law contemplates two forms of collective redundancy: (a) 'collective redundancy' in the narrower sense (Section I, Article 16 et seq., of the LCCT) and (b) 'the termination of the employment relationship where jobs have been lost for *economic, market-related, technological or cyclical reasons* [3] in cases which do not involve collective redundancy' (Section II, Article 26 et seq., of the LCCT).

9. Collective redundancy in the narrower sense is defined in Article 16 of the LCCT as:

'the termination, on the employer's initiative, of individual employment contracts concerning, either simultaneously or in succession, at least two workers within a three-month period in the case of an undertaking employing up to 50 persons or at least five in the case of an undertaking employing more than 50 workers, provided that such termination is based on the definitive closure of the undertaking, of one or more departments of the latter or on staff reductions effected *for structural, technological or cyclical reasons*'. [4]

10. Jobs are said to be lost for the economic, market-related, technological or cyclical reasons mentioned in Section II when the requirements of Article 16 of the LCCT are not fulfilled, that is, when the number of workers made redundant is less than the minimum necessary for a collective redundancy.

11. As far as the present case is concerned, Article 3 of the LCCT first sets out a prohibition on redundancies without just cause and then lists the possible grounds for termination of an employment contract. These include the *expiry* of the employment contract, which brings about the automatic termination of the employment relationship. [5]

3 — Emphasis added.

4 — Emphasis added.

5 — *Caducidade* in the original version, *expiration* in the French translation.

12. An absolute and definitive inability on the part of either the worker to perform his duties or the employer to benefit from them is amongst the various ways in which the employment contract may *expire* (Article 4 of the LCCT).

13. The employment contract also *expires* on the death of the employer if his heirs do not continue the business for which the worker was employed and the undertaking is not sold (Article 6 of the LCCT).

III — Facts and procedure

14. In a letter of formal notice dated 28 April 1999, the Commission informed the Portuguese Republic that, in its opinion, by restricting the concept of collective redundancy to dismissals arising for structural, technical or cyclical reasons, but omitting other forms of redundancy for any reason not related to the individual workers concerned, the Portuguese Republic had failed to fulfil its obligations under the Directive.

15. On 18 June 1999, the Portuguese Government replied to the letter of formal notice, stating that it had fulfilled its obligations.

16. As it was not satisfied by this answer, the Commission, on 29 December 2000, sent a reasoned opinion to Portugal reaffirming its point of view.

17. In a letter dated 2 April 2001, the Portuguese authorities recognised the need for a partial amendment to the national rules. However, they rejected the criticism that the Directive should apply in situations where an undertaking definitively ceases trading for reasons beyond the control of the employer.

18. The Commission, dissatisfied with Portugal's answers, brought the present action before the Court on 22 February 2002.

IV — Legal appraisal

19. As we have seen, in this case, the Commission criticises the Portuguese Republic for not having correctly transposed the Directive, in that it has restricted the concept of collective redundancy to dismissals arising for structural, technological or cyclical reasons, thereby rendering the protection guaranteed under the Directive narrower in scope than that set out in Article 1 of the Directive itself.

20. According to the Commission, the Portuguese legislation would, in particular, have the effect of removing that protection in cases of bankruptcy, winding-up and similar procedures, expropriation, fire or other causes of *force majeure*, or where the undertaking has ceased trading on the death of its owner.

21. The Portuguese Republic recognises that the Commission's objections are founded in respect of cases in which employment contracts are terminated where an undertaking has ceased trading following a bankruptcy order, where the winding-up procedure leads to the closure of an undertaking which has not been fully disposed of.

22. On the other hand, the defendant government rejects the other criticisms. Indeed, in its opinion, of the other situations mentioned by the Commission, some do not constitute collective redundancies because they are not attributable to a voluntary act on the part of the employer, [6] one is not subject to the Directive because it should be regarded as a redundancy by assimilation, [7] and the others are already regulated by the Portuguese legislation on collective redundancy.

23. Let me say at once that I am not convinced by the Portuguese Government's defence for reasons I shall explain, and that I find the Commission's action to be well founded, despite a number of uncertainties in its arguments.

24. In the first place, I cannot agree with what appears to me to be the starting point of the defendant government's reasoning, that is to say, the argument that, since the Directive fails to define the concept of 'redundancy', it is for the national legislature to define this concept.

25. It seems to me to be clear, in fact, that this line of argument would have damaging consequences, because if each Member State were at liberty to produce its own definition of redundancy, the scope of the concept would vary according to the different national rules of the Member States, creating the risk that the Directive's harmonisation objectives would be seriously undermined.

6 — The following cases are concerned: separate sale of the goods of an undertaking subject to bankruptcy and winding-up where the establishments have not been entirely disposed of by sale; winding-up of credit institutions, holding companies, investment companies and investment fund management companies; dissolution of public economic establishments by decree law, expropriation of immovable property leading to the definitive cessation of the business carried out therein; destruction by fire of the undertaking's premises, making it impossible for the employer to benefit from the worker's duties.

7 — The Portuguese Government refers to instances where the employment relationship ceases on the death of the owner where his heirs refuse to continue trading.

26. I note that the lesson to be drawn from the Court's rulings in cases where terms are used but not defined in Community texts is quite different. The Court has in fact held that 'The need for a uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the relevant regulations'. [8]

27. The definition of 'redundancy' in the Directive must therefore, as with all concepts of Community law, be given an 'independent' and uniform construction, based as stated before on the criteria referred to by the Court.

28. With the false premiss I have just mentioned as its basis, however, the Portuguese Government formulates its own definition of redundancy which is deemed to be a *voluntary* act on the part of the employer, intended to put an end to the employment relationship. An essential requirement of this definition is therefore that the measure should be 'voluntary' in nature. From this premiss the Portuguese Government draws the conclusion that the majority of the cases to which the Commission objected cannot be regarded as 'redundancies', given that they involved termination of employment relationships arising not from a voluntary act on the part of the employer but rather by operation of law.

29. However, that conclusion is not in my opinion in line with a series of factors which I shall now try to set out.

30. First, in general terms, that conclusion does not appear consistent with the aims of the Directive, as specifically laid down in its second recital, which explains that the Directive was enacted because 'it is important that greater protection should be afforded to workers ...'. This should be attained in conformity with the Community Charter of fundamental social rights, specifically mentioned in the Directive's sixth recital, which provides that 'the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community ... The improvement must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundan-

8 — Case 327/82 *Ekro* [1984] ECR 107, paragraph 11. See also, most recently Case C-201/02 *Wells* [2004] ECR I-723, paragraph 37, in which the Court had occasion to rule on the concept of development consent within the meaning of Article 1(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment: 'a provision of Community Law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope is normally to be given throughout the Community an autonomous and uniform interpretation ...'.

cies ...'. This aim would be only partially achieved if workers were deprived of the Directive's protection where the termination of the employment relationship is imposed by circumstances beyond the employer's control.

31. In my view, certain significant judicial precedents are also based on a construction similarly intended to foster the protection of workers. I refer specifically to the ruling in *Commission* v *Italy* in which the scope of the Directive as set out in the second recital was taken as its basis by the Court in adopting a broad construction of the definition of employer for the purposes of Article 1 of the Directive. Those engaged in non-profit-making activities are, thus, also covered. [9]

32. I also note the Court's ruling in *Commission* v *United Kingdom* as an example of a non-restrictive approach to the scope of the Directive. In that judgment the Court recognised that the United Kingdom had infringed the Directive by limiting its application to redundancies made for economic reasons, and thus to instances — entirely comparable to the redundancies made for structural, technological or cyclical reasons in the present case — which do not exhaust the scope of the Directive. [10]

33. In the light of the foregoing, I am therefore inclined to the view that no restriction on the scope of the protection provided by the Directive may be presumed or deduced indirectly, but must be clearly set out in the legislative text. This should also apply to any construction intended to deprive workers of the Directive's protection where the termination of the employment relationship is imposed by circumstances beyond the employer's control.

34. Above all, and more specifically, it seems to me that the argument that it is an essential requirement of the concept of 'redundancy' that it should result from a voluntary act is contradicted by the Directive itself. Indeed, the ninth recital in the preamble and the second subparagraph of Article 3(1) make it clear that the termination of an employment relationship arising from a judicial decision is covered by the definition of collective redundancy in the Directive. It is, I think, clear that in such a case one cannot talk of redundancy as being 'voluntary'. If, therefore, the Directive incorporates this argument, then redundancy within the meaning of the Directive does not necessarily require a voluntary termination of the employment relationship. The obvious consequence of this is that, contrary to the arguments of the Portuguese Government, no termination of an employment relationship may escape the provisions of the Directive solely because it was imposed by circumstances beyond the employer's control.

9 — Case C-32/02 [2003] ECR I-12063, paragraph 26.

10 — Case C-383/92 [1994] ECR I-2479, paragraph 32: 'The concept of "redundancy" ... does not cover all the cases of "collective redundancy" covered by the Directive.'

35. I may therefore conclude on this point that 'redundancy' within the meaning of the Directive includes any termination of the employment relationship not desired by the worker and due to causes which may also be beyond the employer's control.

36. The concept of redundancy thus defined clearly includes the instances disputed by the Commission: bankruptcy, winding-up and similar procedures, expropriation, fire or other causes of *force majeure*, or where the undertaking has ceased trading on the death of its owner.

37. In view of this interpretation of the concept of redundancy, it is not significant that, as the Portuguese Government objects, the instances disputed by the Commission are defined in Portuguese law not as redundancies but as cases in which an employment contract expires *by operation of law*. Indeed, even though under national legislation the termination occurs by operation of law, the fact remains that the worker does not desire the termination of the employment relationship and that this therefore constitutes a redundancy for the purposes of the Directive.

38. In any event, I would repeat that the construction of concepts of Community law cannot hinge on national law and its attendant concepts. Although the instances criticised by the Commission are defined in Portuguese law not as redundancies but as *cases of expiry*, this has no bearing on the fact that they are defined as redundancies within the meaning of the Directive.

39. Moreover, for this very reason, the Portuguese Government may not invoke national law as a justification for its failure to implement correctly a Community directive. Indeed, according to the Court's settled case-law on this point, Member States may not plead provisions, practices or circumstances existing in their internal legal system in order to justify a failure to comply with obligations and time-limits resulting from Community directives. [11]

40. The Portuguese Government's further argument that it believes it can restrict the definition of redundancy in the Directive by referring to the rules governing redundancy by assimilation in the second subparagraph of Article 1(1) of the Directive also appears to me to be unfounded.

41. That provision states: 'For the purpose of calculating the number of redundancies provided for in the first subparagraph of

11 — See Case 42/80 *Commission* v *Italy* [1980] ECR 3635, paragraph 4.

point (a), terminations of an employment contract *which occur on the employer's initiative* for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies'. [12]

42. The Portuguese Government's first and, what is more, entirely defensible premiss is that this provision should be construed as meaning that so-called redundancies by assimilation are not subject to the Directive but are of significance only for the purpose of calculating the minimum number of redundancies necessary for the Directive to apply.

43. That said, the arguments used by the Portuguese Government in its defence seem to imply — in terms which moreover appear to contradict its definition of redundancy as a voluntary act of the employer (paragraph 28) — an interpretation of the concept of redundancy by assimilation which would lead to the inclusion of any termination of the employment relationship occurring on the employer's initiative.

44. Consequently, the Portuguese Government claims that at least one of the instances disputed by the Commission, that of the termination of the employment relationship arising from a refusal by the owner's heirs to continue trading, would not be subject to the Directive.

45. I note, however, that the employer's initiative cannot be the distinguishing criterion between the two types of redundancy in question. This follows, even if only indirectly, from the eighth recital, according to which 'in order to calculate the number of redundancies provided for in the definition of collective redundancies within the meaning of this Directive, *other* forms of termination of employment contracts on the initiative of the employer should be equated to redundancies'. [13] The interposition of the adjective 'other' between 'redundancies' and 'forms of termination of employment contracts on the initiative of the employer' implies that redundancies in the narrower sense may also be regarded as occurring on the employer's initiative.

46. Above all, if the Portuguese Government's interpretation were well founded, it would follow that the first subparagraph of Article 1(1) would be rendered meaningless by the second subparagraph, given that 'dismissals effected by an employer' as a rule give rise to 'terminations of an employment contract ... on the initiative of the employer'. If the simultaneous existence of the two provisions is to be meaningful, the second subparagraph must therefore be presumed to refer to something else. In my opinion, and

12 — Emphasis added.

13 — Emphasis added.

widely-held expert legal opinion corroborates this, the second subparagraph is intended to refer to instances in which the employment relationship is indeed terminated on the employer's initiative, but with the *agreement of the worker*, in circumstances in which the latter is encouraged to give his agreement (for example, in exchange for financial advantages).

47. If my interpretation is correct, then redundancy by assimilation is to be distinguished from redundancy in the narrower sense not so much because it involves the taking of an initiative on the part of the employer, but because it entails the worker's agreement, which is not the case for actual redundancy. [14]

48. That point having been made, I note that the worker's agreement is clearly absent from the case posited by the Portuguese Government (termination of the relationship on the death of the owner where the heirs do not continue trading). That case cannot therefore be regarded as fulfilling the definition of redundancy by assimilation. If this is so, however, it must be regarded as a redundancy within the meaning of the Directive.

14 — See Case 284/83 *Dansk Metalarbejderforbund* [1985] ECR 553, in which the Court ruled out the possibility that termination of an employment contract by a worker could be regarded as a redundancy under the Directive (paragraph 8).

49. It is possible to state at this point that the Portuguese Government's abovementioned objections, as a whole, cannot be accepted. It must therefore be concluded that the cases disputed by the Commission are indeed included in the concept of redundancy in Article 1(1)(a) of the Directive, and, in more general terms, that the Directive does not allow Member States to restrict the guarantees in question to instances of collective redundancy for structural, economic or cyclical reasons.

50. Against the conclusion that I have advanced, the Portuguese Government, however, maintains the argument that various provisions of the Directive do not lend themselves to application in cases in which the termination of the employment contract is not contingent on the wishes of the employer. It refers in particular to the provisions in the Directive (Articles 2 and 3) concerning the employer's obligation to consult workers' representatives, to communicate the period over which the redundancies are to be effected and to notify the competent public authority of the projected collective redundancy. However, it also refers to Article 4 of the Directive, which states that the redundancy may take effect not earlier than 30 days after the notification of the competent public authority.

51. The Portuguese Government submits that because the provisions of the Directive setting out these procedural obligations cannot be applied to the disputed cases, such cases should be omitted from the scope of the Directive in their totality.

52. Nevertheless, the foregoing procedural obligations also appear to be applicable, with appropriate adaptations, to the cases in respect of which the Commission claims that the Directive has not been correctly implemented. As the Commission in fact observes, the consultations provided for in Article 2 of the Directive are not intended merely to reduce or avoid redundancies, but also to mitigate the consequences by recourse to accompanying social measures designed to facilitate the redeployment or retraining of workers made redundant.

53. Similarly, the obligation in Article 3 of the Directive to notify the competent public authority could also be fulfilled by the employer in the case of an undertaking destroyed by fire and by the heirs of a deceased owner. A contrary interpretation would deprive workers of the protection provided for in Article 4 of the Directive, which establishes a period within which the aforementioned authority is required to seek solutions to the problems raised by the projected collective redundancies.

54. The provision of the 30-day period as the period within which the redundancy may not take effect (Article 4(1) of the Directive) is also applicable to the cases disputed by the Commission. This period at least makes it possible for workers to receive a final salary payment and therefore fully corresponds to the Directive's objective of protecting workers' rights.

55. In conclusion, I submit for the foregoing reasons that Portugal has failed to fulfil its obligations under the Directive and the third paragraph of Article 249 EC by restricting the guarantees provided for in the case of collective redundancies to dismissals arising for structural, technological or cyclical reasons but omitting other forms of redundancy for any reason not related to the individual workers concerned.

V — Costs

56. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay costs if they have been applied for in the successful party's pleadings. Since the Commission has asked that the costs be paid by the Portuguese Republic, which has been unsuccessful, the latter should be ordered to pay the costs.

VI — Conclusion

57. For the abovementioned reasons, I propose that the Court declare:

(1) By restricting the guarantees provided for in the case of collective redundancies to dismissals arising for structural, technological or cyclical reasons, thereby omitting other forms of redundancy for any reason not related to the individual workers concerned, the Portuguese Republic has failed to fulfil its obligations under Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies and the third paragraph of Article 249 EC.

(2) The Portuguese Republic is ordered to pay costs.