JUDGMENT OF THE COURT (Fifth Chamber)

22 May 2003 *

In Case C-441/01,

Commission of the European Communities, represented by H. van Vliet and H. Kreppel, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by H.G. Sevenster, acting as Agent,

defendant,

APPLICATION for a declaration that, by authorising employers to choose freely whether to make use of internal or external health and safety services, the Kingdom of the Netherlands has failed to fulfil its obligations under the EC Treaty and Article 7(3) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1),

* Language of the case: Dutch.

THE COURT (Fifth Chamber),

composed of: C.W.A. Timmermans, President of the Fourth Chamber, acting for the President of the Fifth Chamber, A. La Pergola, P. Jann, S. von Bahr and A. Rosas (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 28 November 2002, at which the Commission was represented by H. van Vliet and the Kingdom of the Netherlands by N.A.J. Bel, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 16 January 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 15 November 2001, the Commission of the European Communities brought an action under Article 226

EC for a declaration that, by authorising employers to choose freely whether to make use of internal or external health and safety services, the Kingdom of the Netherlands has failed to fulfil its obligations under the EC Treaty and Article 7(3) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1, 'the Directive').

Legal background

Community legislation

2 The 11th and 12th recitals of the Directive are worded as follows:

'... in order to ensure an improved degree of protection, workers and/or their representatives must be informed of the risks to their safety and health and of the measures required to reduce or eliminate these risks;... they must also be in a position to contribute, by means of balanced participation in accordance with national laws and/or practices, to seeing that the necessary protective measures are taken;

... information, dialogue and balanced participation on safety and health at work must be developed between employers and workers and/or their representatives by means of appropriate procedures and instruments, in accordance with national laws and/or practices'.

3 Article 7 of the Directive, which is entitled 'Protective and preventive services', provides:

'1. Without prejudice to the obligations referred to in Articles 5 and 6, the employer shall designate one or more workers to carry out activities related to the protection [from] and prevention of occupational risks for the undertaking and/or establishment.

2. Designated workers may not be placed at any disadvantage because of their activities related to the protection [from] and prevention of occupational risks.

Designated workers shall be allowed adequate time to enable them to fulfil their obligations arising from this Directive.

3. If such protective and preventive measures cannot be organised for lack of competent personnel in the undertaking and/or establishment, the employer shall enlist competent external services or persons.

4. Where the employer enlists such services or persons, he shall inform them of the factors known to affect, or suspected of affecting, the safety and health of the workers and they must have access to the information referred to in Article 10(2).

5. In all cases:

— the workers designated must have the necessary capabilities and the necessary means,

— the external services or persons consulted must have the necessary aptitudes and the necessary personal and professional means, and

— the workers designated and the external services or persons consulted must be sufficient in number

to deal with the organisation of protective and preventive measures, taking into account the size of the undertaking and/or establishment and/or the hazards to which the workers are exposed and their distribution throughout the entire undertaking and/or establishment.

6. The protection from, and prevention of, the health and safety risks which form the subject of this article shall be the responsibility of one or more workers, of one service or of separate services whether from inside or outside the undertaking and/or establishment.

The worker(s) and/or agency(ies) must work together whenever necessary.

7. Member States may define, in the light of the nature of the activities and size of the undertakings, the categories of undertakings in which the employer, provided he is competent, may himself take responsibility for the measures referred to in paragraph 1.

8. Member States shall define the necessary capabilities and aptitudes referred to in paragraph 5.

They may determine the sufficient number referred to in paragraph 5.'

4 Article 11(2) of the Directive provides:

'Workers or workers' representatives with specific responsibility for the safety and health of workers shall take part in a balanced way, in accordance with national laws and/or practices, or shall be consulted in advance and in good time by the employer with regard to:

...

(b) the designation of workers referred to in Articles 7(1) and 8(2) and the activities referred to in Article 7(1);

...

(d) the enlistment, where appropriate, of the competent services or persons outside the undertaking and/or establishment, as referred to in Article 7 (3);

... .'

National law

5 Article 17 of the Nederlandse Arbeidsomstandighedenwet (Netherlands law on working conditions), amended by the Law of 22 December 1993 (*Staatsblad* 1993, No 757) and by the Law of 9 June 1994 (*Staatsblad* 1994, No 441, 'the *arbowet*'), is worded as follows:

'General obligation

Article 17

1. With respect to their obligations under this law, employers shall seek the assistance of:

(a) one or more expert workers, irrespective of whether they are organised in the form of a service;

(b) one or more other experts;

(c) one or more services composed of other experts; or

(d) a combination of expert workers, other experts or services within the meaning of (a), (b) and (c) above.

2. Employers shall take measures and manage activities in such a way as to ensure that the tasks of expert workers, of other experts or of the services referred to in paragraph 1 are mutually compatible.

3. Employers shall consult the works council or, in the absence of a works council, the workers concerned prior to any decision which they intend to take in accordance with paragraph 1.'

6 Amendments were made to that Law after the pre-litigation procedure had been closed. A new law on working conditions was adopted in 1998 (*Staatsblad* 1999, No 184) and amended on 29 December 2000 (*Staatsblad* 2000, No 595). Article 14 of that Law replaced Article 17 of the previous one but it is undisputed that this does not affect the subject-matter of the proceedings because Article 14 applies the same principles to the use of internal or external services in relation to working conditions.

The pre-litigation procedure

7 Since the pre-litigation procedure is not the subject of dispute, it is appropriate merely to outline the principal stages of that procedure.

8 By letter of 21 February 1994, the Netherlands authorities communicated to the Commission the laws transposing the Directive into Netherlands law, which included the *arbowet*.

9 On 11 July 1997, the Commission addressed to the Kingdom of Netherlands a letter of formal notice, to which the Netherlands authorities responded by letter of 21 November 1997.

10 On 30 December 1998, the Commission delivered a reasoned opinion, to which the Netherlands authorities responded by letter of 29 March 1999.

11 Since it was not satisfied with the Netherlands authorities' response to the reasoned opinion, the Commission decided to bring the present proceedings.

The action

12 The Commission claims that the Kingdom of the Netherlands has failed properly to transpose Article 7(3) of the Directive. In its view, Article 17(1) of the *arbowet* does not provide for an order of precedence between the various options listed under (a) to (d). Employers thus enjoy a wide freedom of choice between internal

and external organisation of activities related to protection against and prevention of occupational risks, whereas the Directive does not provide them with such a choice but rather lays down an order of precedence between the two alternatives by reference to an objective criterion, namely the existence or absence within the undertaking and/or establishment of staff possessing the appropriate competence to carry out those activities.

13 The Netherlands Government challenges the Commission's interpretation of the Directive. It submits arguments based on the wording of Article 7(3) of the Directive, on the scheme of that article and on the aim of, the minimal degree of harmonisation sought by, and the effectiveness of the Directive. Those arguments must be examined in turn.

The wording of Article 7(3) of the Directive

Arguments of the parties

14 First of all, the Netherlands Government submits that the wording of Article 7(3) of the Directive is too vague to serve as a criterion for deciding whether recourse may be had to external services. It merely provides that, where sufficient means are not available to an undertaking, the employer must enlist external experts. The wording of Article 7(3) permits a broad and open interpretation.

15 Next, with respect to the transposition of directives, the Netherlands Government contends that it is left to the Member States to choose the form and the means of implementation and that their obligation is to ensure that the directive is effective, which the Netherlands law does.

16 The Netherlands Government argues that, in any event, it is the employer who decides whether or not there is sufficient competent personnel within the undertaking and, therefore, whether or not recourse must be had to competent external services. The employer may or may not himself create the conditions necessary for setting up an internal service.

17 Lastly, the Netherlands Government sets out the negative consequences for undertakings which an interpretation of Article 7(3) of the Directive such as that advocated by the Commission might have. Thus, employers who have sufficient personnel could never enlist an external service unless they dismiss that personnel. Similarly, if they were to engage staff able to carry out the tasks, even though those tasks are currently carried out by an external service, they would have to amend the agreement concluded with that service or terminate it.

18 The Commission observes that Article 7(3) of the Directive follows two paragraphs which clearly provide for the participation of workers of the undertaking in the activities related to protection against and prevention of occupational risks. Article 7(3) does not leave the choice to the employer. To interpret it to the contrary would deprive the clause 'if such protective and preventive measures cannot be organised for lack of competent personnel in the undertaking and/or establishment' of any practical effect.

19 It submits that, although a Member State is not required to transpose the precise wording of a directive into domestic law, it must ensure that it is fully applicable in a sufficiently clear and precise manner. If the Directive has been properly transposed, the order of precedence actually laid down by Article 7(3) must apply equally in the Netherlands. Similarly, it is not a matter for employers alone to determine whether or not there is sufficient competent personnel within the undertaking but, rather, their decisions may be reviewed by the national authorities.

Findings of the Court

20 Article 7(1) of the Directive imposes on employers a principal obligation to designate one or more workers to carry out activities related to protection against and prevention of occupational risks. Article 7(3) provides for an obligation to enlist competent external persons or services. However, that obligation is merely subsidiary to that laid down in Article 7(1), since it arises only 'if such protective and preventive measures cannot be organised for lack of competent personnel in the undertaking and/or establishment'.

21 Article 7 therefore places the obligations imposed on employers in an order of precedence.

22 That interpretation is supported by the wording of Article 11(2) of the Directive, which refers, under (b), to the designation of workers provided for in Article 7(1) and, under (d), to the enlistment, provided for in Article 7(3), of competent external services while adding, in respect of the latter reference only, the phrase 'where appropriate'.

23 In order to ensure full applicability of the Directive in a clear and precise manner, its transposition into Netherlands national law must reflect the order of precedence laid down in Article 7.

24 The fear of a purely subjective assessment by the employer of whether the condition laid down in Article 7(3) is satisfied does not appear to be well founded. Article 7(8) of the Directive obliges the Member States to define the necessary capabilities and aptitudes which the workers must have and it is open

to those States to lay down further objective criteria to guide employers in their assessment of the competence within their undertaking.

25 The negative consequences described by the Netherlands Government and referred to in paragraph 17 of this judgment cannot be as drastic as it suggests. According to Article 7(2) of the Directive, designated workers may not be placed at any disadvantage on account of their activities related to protection against and prevention of occupational risks. The external services which may have been enlisted by employers are without doubt protected against the sudden termination of agreements. In any event, it must be borne in mind that, as specialist services, they are aware of the Community legislation and are able to take the necessary measures to adapt to it.

26 It follows that the Netherlands Government's argument based on the wording of Article 7(3) of the Directive is unfounded.

The scheme of Article 7 of the Directive

Arguments of the parties

27 The Netherlands Government submits that Article 7(3) of the Directive cannot be read in isolation but that it must be interpreted in the light of the other provisions of that article.

28 It challenges the interpretation that Article 7(4) of the Directive demonstrates the Community legislature's preference for services inside the undertaking. It also submits that Article 7(6) does not refer to any order or hierarchy.

29 The Commission submits that Article 7(6) of the Directive in no way affects the order of precedence laid down in Article 7(1) to (3).

Findings of the Court

30 An examination of the structure of Article 7 of the Directive and the order of its various paragraphs does not permit a different conclusion from that drawn from the examination of the wording of paragraph 3. In particular, paragraphs 4 and 6 of Article 7 by no means call into question the order of precedence laid down in paragraphs 1 to 3 of that article.

31 It follows that the Netherlands Government's argument based on the scheme of Article 7(3) of the Directive is unfounded.

The aim of the Directive

Arguments of the parties

32 The Netherlands Government denies that the aim of the Directive is to achieve maximum participation of workers in activities related to protection against and

prevention of occupational risks. Such an aim is not clear from the wording of Article 1 of the Directive, the recitals in the preamble, the comments on the directive initially proposed or the structure of the Directive.

33 According to the Netherlands Government, the Directive is intended to ensure that working conditions and occupational risks within the undertaking are the subject of systematic and preventive scrutiny. In that connection, it refers to Article 1(1) and (2) of the Directive. The method of organisation of activities related to protection against and prevention of occupational risks is not an end in itself but merely a means of achieving that end.

34 The Netherlands Government submits further that, if the aim of the Directive were that which the Commission claims, the Community legislature would have placed restrictions on the enlistment of external experts, for example by imposing a minimum of protective and preventive activities to be organised within the undertaking or more requirements with regard to the competence and skills of those experts, in order to prevent employers from enlisting their services too readily.

35 In any event, the Netherlands legislation does not neglect participation of workers, which is mandatory under Articles 10 and 11 of the Directive.

36 The Commission does not deny that the aim of the Directive is to improve the safety and health of workers at work. However, it submits that several recitals in the preamble to the Directive indicate the intention of the Community legislature to have a 'balanced participation' of workers introduced with a view to achieving that aim.

37 Moreover, it is wrong to claim that, if the Commission's interpretation were correct, the Community legislature would have imposed a minimum of protective and preventive activities to be organised within the undertaking. According to the Commission, the Directive is based on the principle that each of the undertakings at which it is aimed is capable of organising such a minimum of activities.

Findings of the Court

38 As the title itself shows, the Directive is intended to introduce measures to encourage improvements in the safety and health of workers at work. Contrary to what the Netherlands Government claims, the aim of the Directive is not solely to improve the protection of workers against accidents at work and the prevention of occupational risks; it is also intended to introduce specific measures to organise that protection and prevention. It thus states a number of means regarded by the Community legislature as being suitable to facilitate achievement of the set purpose.

39 The 11th and 12th recitals of the Directive show that its aims include a dialogue and balanced participation between employers and workers with a view to adopting the measures necessary for the protection of workers against accidents at work and occupational diseases.

40 The decision, given expression in Article 7 of the Directive, to favour, where there is sufficient competent personnel within the undertaking, participation of the workers in the activities related to protection against and prevention of occupational risks over the enlistment of external competent persons or services

is an organisational measure consistent with the aim of participation of workers in their own safety.

41 It follows that the Netherlands Government's argument based on the aim of the Directive is unfounded.

The minimum degree of harmonisation sought by the Directive

Arguments of the parties

42 The Netherlands Government claims that the Directive achieves only a minimum degree of harmonisation. In that connection, it observes that it was adopted on the basis of Article 118 A of the EEC Treaty, now Article 138 EC (Articles 117 to 120 of the EC Treaty were replaced by Articles 136 EC to 143 EC), which is a basis for minimum harmonisation, and that Article 1(3) of the Directive provides that it is without prejudice to provisions which are more favourable to protection of workers. According to the Netherlands Government, the Member States may therefore adopt stricter national provisions to protect workers.

43 The Netherlands Government takes the view that, in some respects, the *arbowet* offers a greater degree of protection than the Directive, in particular by establishing a system of high quality services covering the whole territory, with preventive tasks going beyond the requirements of the Directive. It claims that Article 7(3) of the Directive must be interpreted to that effect. The greater protection which the Kingdom of the Netherlands is authorised to provide under the Directive means that employers must be able to choose freely the service which, in their case, will guarantee them that high level of protection. Any interpretation of Article 7(3) which, as a matter of law, gives precedence to the

internal organisation of activities related to protection against and prevention of occupational risks could prejudice Article 1(3) of the Directive.

44 The Commission contests the argument that workers' safety is better ensured by the enlistment of external competent services. It cites a report drawn up at its request by a research centre, which makes clear that the enlistment of external experts does not necessarily contribute to improving safety at work, and refers to the example of a company providing a risk assessment on the internet without having visited the undertaking.

Findings of the Court

45 As the Netherlands Government submits, it is clear from Article 1(3) that the Directive is without prejudice to existing or future national and Community provisions which are more favourable to protection of the safety and health of workers at work.

46 However, as the Advocate General noted in point 24 of his Opinion, the question in this case is not whether the Netherlands legislation guarantees greater protection for workers than that offered by the Directive but rather whether or not that legislation runs counter to the requirements of that Directive, including the order of priority given to the two alternatives provided for in Article 7.

47 It follows that the Netherlands Government's argument based on the minimum degree of harmonisation sought by the Directive is unfounded.

The effectiveness of the Directive

Arguments of the parties

48 The Netherlands Government takes the view that it has ensured the effectiveness of the Directive. In its opinion, the Netherlands legislation provides for sufficient means of achieving the aim of the Directive, which is intended to ensure a preventive and systematic health and safety policy in undertakings, based on sufficiently skilled and competent personnel.

49 The Netherlands Government submits, first, that the persons responsible for activities related to protection against and prevention of occupational risks must observe stringent quality requirements. It is therefore the kind and the size of the undertaking which determine whether the necessary resources are available internally or whether it is appropriate to enlist external services, which often have the advantage of being able to display a greater objectivity than internal services.

50 It claims, second, that the Netherlands legislation provides for a variety of measures designed to ensure the participation of workers in the policy adopted in relation to working conditions (provision of information to the works council, consultation, annual report on the protective measures adopted, etc.). It submits, in particular, that, under the law on works councils, decisions of employers relating to the organisation of such protective and preventive activities are subject to the consent of the workers' representatives.

51 The Netherlands Government declares that it is convinced that a flexible system which imposes requirements as to expertise and grants significant rights to workers' representatives best guarantees compliance with the aims of the Directive.

52 The Commission takes the view that the effectiveness of the Directive can be assured only by giving preference to internal organisation of the activities related to protection against and prevention of occupational risks. First of all, the workers are more motivated than external experts to guarantee a high level of protection for themselves and their colleagues. In addition, they are better informed of the risks to which they are exposed. Finally, the fact that they are familiar with the other workers and that they cannot be placed at a disadvantage on account of their activities enables them to speak in the name of the other workers and to make demands on the employer as regards safety.

Findings of the Court

53 First, it should be observed that Article 7(1) and (3) of the Directive clearly lays down an order of precedence with regard to the organisation of activities related to protection against and prevention of occupational risks within the undertaking. It is only where there is a lack of competent personnel within the undertaking that the employer must enlist external competent services.

54 Second, as was explained in paragraphs 38 and 39 of the present judgment, the aim of the Directive is to promote balanced participation of employers and workers in activities related to protection against and prevention of occupational

risks. It is therefore by giving precedence to the internal organisation of such activities that the best possible effectiveness of the Directive can be ensured.

55 In the light of those findings, allowing employers to choose between internal organisation of such activities or the enlistment of external competent services does not contribute to ensuring the effectiveness of the Directive but constitutes a failure to fulfil the obligation to ensure full applicability of that directive.

56 It follows that the argument of the Netherlands Government based on the effectiveness of the Directive is unfounded.

57 Consequently, the Court finds that, by not reflecting, in its national legislation, the subsidiary nature of the enlistment by undertakings of external competent services to carry out activities related to protection against and prevention of occupational risks within those undertakings, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 7(3) of the Directive.

Costs

58 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 Commission has applied for costs and the Kingdom of the Netherlands has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by not reflecting, in its national legislation the subsidiary nature of the enlistment by undertakings of external competent services to carry out activities related to protection against and prevention of occupational risks within those undertakings, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 7(3) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work;

2. Orders the Kingdom of the Netherlands to pay the costs.

Timmermans La Pergola Jann

von Bahr Rosas

Delivered in open court in Luxembourg on 22 May 2003.

R. Grass M. Wathelet

Registrar President of the Fifth Chamber