JUDGMENT OF THE COURT (Fifth Chamber)
4 December 1997 *

In Case C-207/96,

Commission of the European Communities, represented by Marie Wolfcarius, of its Legal Service, and Enrico Altieri, a national official on secondment to that Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Umberto Leanza, Head of the Department for Legal Affairs in the Ministry of Foreign Affairs, acting as Agent, assisted by Oscar Fiumara, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that, by not adopting within the prescribed period the laws, regulations and administrative provisions necessary in order to comply with Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), and by retaining in national law rules prohibiting nightwork by

* Language of the case: Italian.

women, contrary to Article 5 of that directive, the Italian Republic has failed to fulfil its obligations under Community law,

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the First Chamber, acting for the President of the Fifth Chamber, J. C. Moitinho de Almeida, D. A. O. Edward (Rapporteur), P. Jann and L. Sevón, Judges,

Advocate General: C. O. Lenz,
Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 30 September 1997,

gives the following

Judgment

1 By application lodged at the Court Registry on 19 June 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by not adopting within the prescribed period the laws, regulations and administrative provisions necessary in order to comply with Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40; 'the

Directive'), and by retaining in national law rules prohibiting nightwork by women, contrary to Article 5 of the Directive, the Italian Republic has failed to fulfil its obligations under Community law.

2 Under Article 5 of the Directive, application of the principle of equal treatment with regard to working conditions means that men and women must be guaranteed the same working conditions without discrimination on grounds of sex (paragraph 1). To that end, the Member States are to take the measures necessary to ensure that provisions contrary to the principle of equal treatment are abolished (paragraph 2(a)) or revised when the concern for protection which originally inspired them is no longer well founded (paragraph 2(c)). Nevertheless, Article 2(3) provides that the Directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

3 Under Article 9(1) of the Directive, the Member States were required to put into force the laws, regulations and administrative provisions necessary in order to comply with the Directive within a period of 30 months of its notification and, with respect to Article 5(2)(c), within a period of four years. The latter period expired on 14 February 1980.

4 The Court held in Case C-345/89 *Stoeckel* [1991] ECR I-4047 that Article 5 of the Directive is sufficiently precise to impose on Member States the obligation not to lay down by legislation the principle that nightwork by women is prohibited, even if that is subject to exceptions, where nightwork by men is not prohibited. Furthermore, it has repeatedly held that Article 5 is sufficiently precise and unconditional to be relied upon by an individual before a national court in order to avoid the application of any national provision not conforming to Article 5(1), which lays down the principle of equal treatment with regard to working conditions (*Stoeckel*, cited above, paragraph 12; Case 152/84 *Marshall* v *Southampton and South-West Hampshire Health Authority* [1986] ECR 723, paragraph 55).

5 In Italy, Article 5(1) of Law No 903 of 9 December 1977 on Equal Treatment for Men and Women at Work ('the Italian Law') provides:

'Women shall not be employed in factories or workshops between the hours of midnight and 6.00 a. m. This prohibition shall not apply to women who occupy managerial posts or are employed in the health services of the undertaking.'

6 Under Article 5(2) and (3) of the Italian Law, that prohibition may, in certain circumstances, be relaxed or disapplied by means of a collective or company-level agreement, but no derogation is permitted for women during pregnancy and for a certain period after they have given birth.

7 The Italian Law thus maintains in force the prohibition on nightwork by women laid down by Law No 1305 of 22 October 1952 which ratified Convention No 89 of 9 July 1948 of the International Labour Organization concerning Nightwork of Women Employed in Industry ('the Convention').

8 Article 3 of the Convention provides that women, whatever their age, are not to be employed during the night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed.

9 Having regard to the existence of the Convention, the Court stated in Case C-158/91 *Levy* [1993] ECR I-4287 that the national court is under an obligation to ensure that Article 5 of the Directive is fully complied with by refraining from applying any conflicting provision of national legislation, unless the application of such a provision is necessary in order to ensure the performance by the Member

State concerned of obligations arising under an agreement concluded with non-member countries prior to the entry into force of the EEC Treaty.

10 Following the judgment in *Stoeckel*, cited above, the Italian Republic denounced the Convention in February 1992, with effect from February 1993.

11 In view of the judgments in *Stoeckel* and *Levy* and the Italian Republic's denunciation of the Convention, the Commission took the view that the Italian Government was required to adopt the measures needed to make the Italian Law compatible with Article 5 of the Directive. Consequently, by letter dated 2 March 1994, it gave formal notice to the Italian Government to submit observations within two months pursuant to the first paragraph of Article 169 of the Treaty.

12 Since that letter remained unanswered, the Commission issued a reasoned opinion on 19 November 1995 in which it called on the Italian Republic to take the necessary measures to comply with the opinion within two months from receipt thereof.

13 Since the Commission received no reply, it brought this action.

14 The Commission's action, as formulated in the claims set out in its application, is based on two complaints against the Italian Republic: first, it failed to adopt within the prescribed period the laws, regulations and administrative provisions necessary in order to comply with the Directive and, secondly, it infringed Article 5 of the Directive by retaining the Italian Law after the denunciation of the Convention.

The first complaint

15 The Italian Republic does not formally raise a plea of inadmissibility but points out that the first complaint was formulated for the first time in the application where it sets out the form of order sought.

16 It should be noted that this complaint presupposes that the Italian Republic was obliged to comply, as regards nightwork by women, with the Directive even before it denounced the Convention.

17 It is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, effectively to put forward its defence to the complaints made by the Commission. The subject-matter of an action brought under Article 169 of the Treaty is thus delimited by the pre-litigation procedure provided for by that article. Consequently, the action cannot be founded on any complaints other than those formulated in the reasoned opinion (Case C-96/95 *Commission* v *Germany* [1997] ECR I-1653, paragraphs 22 and 23).

18 The Court has also held that the reasoned opinion must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under the Treaty (*Commission* v *Germany*, paragraph 24).

19 In this case, although the Commission pointed out in the letter of formal notice and in the reasoned opinion that the Italian Republic was required to adopt the measures needed in order to bring domestic legislation into line with Community law, it indicated that that obligation did not arise until the Italian Republic was no longer bound by the Convention.

20 The Commission claimed in its application, however, that the Italian Republic had failed to fulfil its obligations under the Directive by not adopting, within the period prescribed by the Directive, the laws, regulations and administrative provisions necessary in order to comply with it.

21 Since there was no cogent and detailed exposition, either in the pre-litigation procedure or in the application, of the considerations which led the Commission to take the view that the Italian Republic should have complied, as regards nightwork by women, with the provisions of the Directive even before it had denounced the Convention, the Italian Republic was unable effectively to put forward its defence to that complaint.

22 Accordingly, the first complaint must be rejected as inadmissible.

The second complaint

23 The Commission submits that the Italian Republic has failed since 1993, when it ceased to be bound by the Convention, to fulfil its obligations under Article 5 of the Directive, by retaining in national law rules prohibiting nightwork by women.

24 In its defence the Italian Republic contends, on the one hand, that the prohibition on nightwork laid down by the Italian Law, which may be relaxed, or even disapplied, in certain circumstances, has been retained in order to ensure compliance with the personal and family requirements whose overriding importance is made clear by Article 2(3) of the Directive and the Italian Constitution and, on the other, that individuals may rely directly on Article 5 of the Directive in Italian courts in order to have the Italian Law disapplied.

25 It must first be noted that, even though the prohibition on nightwork laid down by Article 5 of the Italian Law may be relaxed, or even disapplied, in certain circumstances, the Italian Republic does not deny that, after it denounced the Convention, Community law precluded retention of the prohibition in Italian law. The Italian Republic states, moreover, that that incompatibility will be rectified as soon as possible.

26 Second, it is settled case-law that the incompatibility of national legislation with Community provisions, even provisions which are directly applicable, can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended and also that the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity necessary to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (Case C-197/96 *Commission* v *France* [1997] ECR I-1489, paragraphs 14 and 15).

27 Retention of the Italian Law means that those to whom it is directed are in a position of uncertainty as to their legal situation and exposed to unjustified criminal proceedings. The obligation on national courts to secure the full effect of Article 5 of the Directive by not applying any contrary national provision cannot have the effect of amending a statutory provision.

28 It must therefore be held that, by retaining in national law rules prohibiting nightwork by women, contrary to Article 5 of the Directive, the Italian Republic has failed to fulfil its obligations under Community law.

Costs

29 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Italian Republic has been essentially unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. Declares that, by retaining in national law rules prohibiting nightwork by women, contrary to Article 5 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, the Italian Republic has failed to fulfil its obligations under Community law;

2. Dismisses the remainder of the application as inadmissible;

3. Orders the Italian Republic to pay the costs.

Wathelet Moitinho de Almeida Edward

Jann Sevón

Delivered in open court in Luxembourg on 4 December 1997.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber