JUDGMENT OF THE COURT (First Chamber)

9 December 2004 *

In Case C-460/02,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 19 December 2002,

Commission of the European Communities, represented by A. Aresu and M. Huttunen, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, and by O. Fiumara, vice-avvocato generale dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, R. Silva de Lapuerta (Rapporteur), K. Lenaerts, S. von Bahr and K. Schiemann, Judges,

Advocate General: P. Léger,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 March 2004,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2004,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, in so far as Legislative Decree No 18 of 13 January 1999 applying Directive 96/67/EC on access to the groundhandling market at Community airports (ordinary supplement to GURI No 28 of 24 February 1999) ('Legislative Decree No 18/99')

— failed to specify a maximum period of seven years for the selection of suppliers of groundhandling services, in accordance with Article 11(1)(d) of Council Directive 96/67/EC of 15 October 1996 (OJ 1996 L 272, p. 36),

— incorporated, in Article 14, a social measure which is incompatible with Article 18 of that directive, and

— set out, in Article 20, interim provisions which are not authorised under the directive,

the Italian Republic has failed to fulfil its obligations under that directive.

Legal framework

Community legislation

2 Directive 96/67 provides for a system of progressive opening-up of the market for groundhandling services in Community airports.

3 Article 2(e) and (f) of the directive define 'groundhandling' and 'self-handling' as follows:

'(e) "groundhandling" means the services provided to airport users at airports as described in the Annex;

(f) "self-handling" means a situation in which an airport user directly provides for himself one or more categories of groundhandling services and concludes no contract of any description with a third party for the provision of such services; for the purposes of this definition, among themselves airport users shall not be deemed to be third parties where:

— one of them holds a majority holding in the other;

or

— a single body has a majority holding in each.'

4 Articles 6(1) and 7(1) of Directive 96/67 state that Member States are to take the necessary measures to ensure, in general terms, free access to the market for

groundhandling services to third parties and the freedom for third parties to self-handle in Community airports.

5 Article 6(2) of the directive lays down the following exceptions to the freedom of access to the groundhandling market for third parties:

'Member States may limit the number of suppliers authorised to provide the following categories of groundhandling services:

— baggage handling,

— ramp ra rramp handling,

— fuel and oil handling,

— freight and mail handling as regards the physical handling of freight and mail, whether incoming, outgoing or being transferred, between the air terminal and the aircraft.

They may not, however, limit this number to fewer than two for each category of groundhandling service.'

6 Article 9(1) of Directive 96/67 states:

'Where at an airport specific constraints of available space or capacity, arising in particular from congestion and area utilisation rate, make it impossible to open up the market and/or implement self-handling to the degree provided for in this Directive, the Member State in question may decide:

...

(b) to reserve to a single supplier one or more of the categories of groundhandling services referred to in Article 6(2);

...'.

7 Article 14(1) of the directive provides that access to the groundhandling market may be made conditional upon obtaining an 'approval' granted by an independent authority. That provision reads as follows:

'Member States may make the groundhandling activity of a supplier of groundhandling services or a self-handling user at an airport conditional upon obtaining the approval of a public authority independent of the managing body of the airport.

The criteria for such approval must relate to a sound financial situation and sufficient insurance cover, to the security and safety of installations, of aircraft, of equipment and of persons, as well as to environmental protection and compliance with the relevant social legislation.

The criteria must comply with the following principles:

(a) they must be applied in a non-discriminatory manner to the various suppliers of groundhandling services and airport users;

(b) they must relate to the intended objective;

(c) they may not, in practice, reduce market access or the freedom to self-handle to a level below that provided for in this Directive.

These criteria shall be made public and the supplier of groundhandling services or self-handling airport user shall be informed in advance of the procedure for obtaining approval.'

8 Article 18 of Directive 96/67 states:

'Without prejudice to the application of this Directive, and subject to the other provisions of Community law, Member States may take the necessary measures to ensure protection of the rights of workers and respect for the environment.'

National legislation

9 Directive 96/67 was transposed into Italian law by Legislative Decree No 18/99.

10 Article 14 of the legislative decree, which relates to social protection, states:

'1. When guaranteeing free access to the groundhandling market, it is necessary, for 30 months after this decree enters into force, to ensure that existing employment levels are maintained and that labour relations with staff under the previous management arrangements are continued.

2. Except where a branch of an undertaking is transferred, any transfer of activity in one or more categories of groundhandling, as set out in Annexes A and B, shall include the transfer of staff, named by those concerned, and in agreement with trade unions, from the previous supplier to the subsequent supplier, in proportion to the volume of traffic or to the scale of the activities being taken over by the subsequent supplier.'

11 Article 20 of the legislative decree contains the following interim provision:

'Contractual arrangements for groundhandling staff in force as of 19 November 1998, which include various organisational and contractual schemes, shall remain in force until the expiry of the relevant contracts, which shall not be renewed, and in any event for a period not greater than six years.'

Pre-litigation procedure

12 Following a complaint, the Commission held that the Italian legislation failed to comply with Community law in several respects. It therefore sent the Italian Government a letter of formal notice of 3 May 2000. The Italian Government replied to it by a note of 18 July 2000.

13 As it considered that that reply was unsatisfactory, the Commission sent a reasoned opinion to the Italian Republic on 24 July 2001. The Italian Government's reply was

given by a note of 31 October 2001. That note was followed by another communication of 5 December 2001.

14 Several meetings then took place between the representatives of the Commission services responsible for the matter and experts from the Italian Ministry of Infrastructure and Transport, during which the Italian Government produced proposals to amend Legislative Decree No 18/99. As no further information was provided to the Commission, it decided to bring this action.

The action

The first complaint

15 By letter of 19 January 2004, the Italian Government informed the Court that Article 11(1) of Legislative Decree No 18/99 had been amended by Law No 306 of 31 October 2003 (GURI of 15 November 2003). In those circumstances, the Commission withdrew its first complaint by letter of 23 March 2004, while maintaining its application for costs against the defendant.

The second complaint

Arguments of the parties

16 The Commission considers that Article 14 of Legislative Decree No 18/99 is incompatible with Article 18 of Directive 96/67, since it obliges the suppliers of groundhandling services to ensure that, on each occasion of a 'transfer of activity' in one or more of the categories of groundhandling referred to in the annexes to the decree, the staff of the previous supplier are transferred to the subsequent supplier in proportion to the volume of traffic or the scale of the activities being taken over by the latter.

17 The Commission points out that measures to protect the rights of workers are permitted under Article 18 of Directive 96/67, provided they do not prejudice the effective application of the directive as regards groundhandling services. Article 14 (1) of Legislative Decree No 18/99 plainly goes beyond the protection guaranteed by 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), as amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88) and codified by Council Directive 2001/23/EC of 12 March 2001 (OJ 2001 L 82, p. 16).

18 The Commission considers that a national provision such as that impugned in the present case could only be justified on the basis of Article 18 of Directive 96/67 if it applied to the transfer of an undertaking within the meaning of Directive 2001/23. For that directive to apply, the transfer must relate to an economic entity, that is to

say an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective. However, in order to be in a position to judge whether the transfer of an entity is involved, it is necessary to take into account all the actual circumstances which apply to the transaction in question.

19 According to the Commission, the mere fact that the services provided by the previous supplier and those provided by the subsequent supplier are similar does not mean that there is a transfer of an economic entity between the two undertakings. An entity cannot consist only of the activity which is entrusted to it, and its identity is made up of other factors, such as its staff, its management, the manner in which its work is organised, and its methods and style of management.

20 The Commission states there can be no transfer of an undertaking in the present case, as the key element for the disposal of the undertaking is missing, namely a negotiated agreement, whether express or implied, or an act of a public authority. The new supplier in fact gains access to the airport structures on the basis of a separate title, independently of any relationship or contact, howsoever constituted, with the previous supplier. The source of that title is a contract entered into with the operator of the airport concerned.

21 The Commission argues that the measure adopted by the Italian Government truly entails the transfer of social costs borne by the State to the new undertakings providing the services, to the detriment of those undertakings. Should the national authorities wish to adopt social measures as part of the process of liberalisation of groundhandling services, Article 18 of Directive 96/67 could represent an adequate legal basis, but only if the measures in question were to comply with the spirit of that directive and the general principles of Community law.

22 According to the Commission, Article 14 of Legislative Decree No 18/99 prevents suppliers wishing to enter the market from selecting their own staff and, accordingly, the way in which the services they seek to provide are organised so that they can carry out their activities on the market. The objective of Directive 96/67 is precisely to encourage competition in markets that were previously closed and monopolistic, by reducing the operating costs of airlines and improving the quality of the services provided to airport users.

23 The Italian Government maintains that Directive 96/67 provides the Member States with a degree of discretion as regards the manner and timing of the adoption of the measures required for the implementation of the new system, in light of the specific circumstances in each State. With that in mind, the national legislature adopted the legislation concerned, aware of the fact that free access to the market may be compatible with the proper working of Community airports and put into place progressively and in a manner adapted to the requirements of the sector. The social protection measures laid down in Article 14 of Legislative Decree No 18/99 do not impede the liberalisation of the groundhandling sector and represent the practical embodiment of a power given to the State by Article 18 of Directive 96/67.

24 The Italian Government considers that compliance with that directive and other provisions of Community law, particularly those relating to the safeguarding of employees' rights in the event of transfers of undertakings, does not mean that the level of protection the Member States may provide can only be set within the limits permitted by legislative harmonisation at the Community level. If that were so, Article 18 of Directive 96/67 would lose all purpose, since that provision would give the Member States no freedom to offer employees a safeguard which was not already available under Community law.

25 According to the Italian Government, the last-mentioned provision should be interpreted as meaning that by its very nature such an 'additional' safeguard must not represent a breach of the Community law set out specifically in Directive 96/67 or, more generally, in other Community acts. In so far as the effective protection of the workforce can only be given effect by the imposition of a financial constraint and an obligation on the employer, its validity must be judged by a comparative and reasonable analysis of the interests involved.

26 The Italian Government also argues that, in so far as the service remains the same as, or at least similar to, that provided by the previous supplier, the critical element of the definition of the transfer of an undertaking is not necessarily the taking over of tangible or intangible assets. The organisation of an activity in such a way that, seen from an economic perspective, there is in substance a taking over of activities also falls within the scope of the concept of a 'transfer'.

27 In the light of the specific characteristics of the sector concerned and the organisation of the undertakings in question, the Italian Government maintains that the transfer of airport 'activities' may be covered by the wider concept of the 'transfer of an undertaking'. In fact, it is precisely the continuity of the activity, which moves from one supplier to another, which makes that situation wholly comparable with the transfer of an undertaking.

28 The Italian Government states that, while Article 14 of Legislative Decree No 18/99 refers specifically to any 'transfer of activity in one or more categories of groundhandling', it is clear that in practice such a transfer will be accompanied by the transfer of a number of tangible assets and structures necessary to enable the activity to be carried out by the new supplier. In those circumstances, there is a transfer of part of an undertaking or, at the very least, the carrying on of a business by one party as successor to another which has, in substance, the characteristics of a transfer. It was accordingly lawful for the national legislature to be concerned to ensure the protection of the workforce by adopting a reasonable compromise between opposing interests.

29 As regards the argument that the transposition of Directive 96/67 into national law was liable to distort competition on the market for airport services in favour of established undertakings and to the detriment of potential competitors, the Italian Government observes that the principle of freedom of competition means that the undertakings concerned should enjoy true equality of opportunity under the rules laid down by the social legislation which applies, even if those rules are restrictive in their nature.

Findings of the Court

30 By its arguments, the Italian Government is essentially maintaining that Article 14 of Legislative Decree No 18/99 has its legal basis in Article 18 of Directive 96/67 and that the disputed provision falls within the scope of Directive 2001/23.

31 As to the compatibility of Article 14 of the decree with Directive 96/67, in the light of Article 18 of that directive, it is clear from the 24th recital in the preamble to the directive that Member States retain the power to ensure an adequate level of social protection for the staff of undertakings providing groundhandling services.

32 As regards the definition of 'adequate level', it must be pointed out, as the Advocate General rightly observes at point 33 of his Opinion, that that power does not confer an unlimited jurisdiction and must be exercised in a manner that does not prejudice the effectiveness of Directive 96/67 and the objectives it pursues. As the Court noted

in Case C-363/01 *Flughafen Hannover-Langenhagen* [2003] ECR I-11893, paragraph 43, the aim of the directive is to ensure the opening-up of the groundhandling market which, according to the fifth recital in the preamble to the directive, must help, in particular, to reduce the operating costs of airlines.

33 By contrast, the interpretation of Article 18 of Directive 96/67 provided by the Italian Government, particularly as regards the taking into account of social considerations, would make the entry of new suppliers of services in the groundhandling market unduly difficult, as they would be obliged to take over the staff employed by the previous supplier. As a result, the rational use of airport infrastructures and the reduction of the costs of the services charged to users would be impaired.

34 The obligation imposed by Article 14 of Legislative Decree No 18/99 on the undertakings concerned to take over the staff of the previous supplier puts potential new competitors at a disadvantage in relation to established undertakings and jeopardises the opening-up of the groundhandling markets, thereby undermining the effectiveness of Directive 96/67.

35 It follows that the disputed legislation prejudices the aim of that directive, namely the opening-up of the markets concerned and the creation of appropriate conditions for intra-Community competition in the sector.

36 Since the disputed legislation is not compatible with Directive 96/67, it is not relevant to argue, as the Italian Government does, that Article 14 of Legislative Decree No 18/99 does not contravene Directive 2001/23.

37 In any event, the Italian Government cannot maintain that Article 14 of the legislative decree is based on the notion of the 'transfer of an activity' which is within the scope of Directive 2001/23.

38 Article 1(1) of that directive provides that it applies to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger. The Court's case-law makes it clear that the decisive criterion for establishing the existence of a transfer within the meaning of the directive is whether the entity in question retains its identity, as indicated inter alia by the fact that its operation is actually continued or resumed (see, inter alia, Case 24/85 *Spijkers* [1986] ECR 1119, paragraphs 11 and 12, and Case C-13/95 *Süzen* [1997] ECR I-1259, paragraph 10).

39 In order to determine whether the conditions for the transfer of an entity are met, the Court has held that it is necessary to consider all the facts characterising the transaction in question, including in particular the type of undertaking or business, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (see, in particular, *Spijkers*, paragraph 13, and *Süzen*, paragraph 14).

40 It follows from that case-law that the importance to be given to the different criteria which may establish the existence of the transfer of an undertaking, establishment or parts of undertakings or establishments within the meaning of Directive 2001/23 will vary in accordance with a large number of factors.

41 It must accordingly be held that it is only by having regard to the specific characteristics of each transfer of activity concerning one or more categories of groundhandling services that it is possible to determine whether the transaction concerned constitutes a transfer for the purposes of Directive 2001/23.

42 It should be noted that Article 14 of Legislative Decree No 18/99 applies, irrespective of the nature of the transaction concerned, to 'any transfer of activity' in the sector in question and that, in light of the case-law mentioned above, such a definition of a transfer clearly goes beyond the definition laid down in Directive 2001/23, as interpreted by the Court.

43 It must accordingly be held that the second complaint is well founded, as the social protection arrangements provided for in Legislative Decree No 18/99 are incompatible with Directive 96/67.

The third complaint

44 The Commission considers that Article 20 of Legislative Decree No 18/99 is incompatible with Directive 96/67, as the article permits undertakings with particular organisational arrangements to operate in the self-handling field at the

same time as suppliers selected and/or licensed in accordance with the provisions of the directive.

45 The Commission notes that Article 20 of the legislative decree refers to contracts of employment in force on 19 November 1998, which include various organisational and contractual schemes. Those contracts of employment involve the staff of self-handling users other than those covered by Directive 96/67. They are to remain in force in their current form until their expiry and, in any event, for a period not greater than six years. In practice, those undertakings are licensed to provide services at the same time as other undertakings in the self-handling field and suppliers of groundhandling services to third parties.

46 According to the Commission, Directive 96/67 clearly specifies the categories of undertakings providing groundhandling services which may regard themselves as being suppliers of groundhandling services to third parties and as being self-handling users. Entities which fail to satisfy the criteria for self-handling laid down in Article 2(f) of Directive 96/67 may only operate as suppliers of services to third parties. Furthermore, Articles 6 and 7 of that directive impose a duty to follow specific procedures for the selection of self-handling users and of suppliers of groundhandling services to third parties.

47 The Commission adds that Directive 96/67 does not lay down any interim measures for undertakings having different organisational arrangements. The validity of the contractual relations must be judged having regard to the applicable legislation and in particular to the provisions of Directive 96/67. The national legislature may not impose rules as to the maximum period of the validity of contractual relations, thereby treating those relations as if they fell outside the obligations laid down under those provisions.

48 The Italian Government considers that the disputed rule is not only an interim measure, but also very limited in its scope. It should be understood as seeking to safeguard acquired rights, and as doing so for a relatively brief period, namely until the expiry of the contracts in question and, in any event, for a period not greater than six years. Furthermore, it is intended that it will be repealed under the next annual law implementing Community provisions.

Findings of the Court

49 Directive 96/67 clearly specifies the categories of undertakings which may provide groundhandling services to third parties and self-handling users. It follows that entities which do not satisfy the criteria for self-handling set by that directive may operate only as suppliers of services to third parties. Furthermore, as the Advocate General rightly notes at point 49 of his Opinion, the directive does not allow Member States to adopt interim measures in that regard.

50 In putting such interim measures in place, Article 20 of Legislative Decree No 18/99 adopts a regime which is incompatible with Directive 96/67.

51 The Commission's complaint is accordingly well founded.

52 In the light of all of the above, it must be held that, in so far as Legislative Decree No 18/99 incorporates, at Article 14, a social measure which is incompatible with Article 18 of Council Directive 96/67 and sets out, at Article 20, interim provisions which are not authorised under the directive, the Italian Republic has failed to fulfil its obligations under the directive.

Costs

53 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. As the Commission has asked that costs be awarded against the Italian Republic and the latter has been unsuccessful, the Italian Republic must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that in so far as Legislative Decree No 18 of 13 January 1999 applying Directive 96/67/EC on access to the groundhandling market at Community airports incorporates, at Article 14, a social measure which is incompatible with Article 18 of Council Directive 96/67/EC of 15 October 1996 and sets out, at Article 20, interim provisions which are not authorised under the directive, the Italian Republic has failed to fulfil its obligations under the directive;**

2. **Orders the Italian Republic to pay the costs.**

Signatures.