# OPINION OF ADVOCATE GENERAL
# BOT
## delivered on 5 April 2011 [1]

1. This reference for a preliminary ruling is concerned with the interpretation of 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, [2] and with the interpretation of the principle of effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union. [3]

2. This reference was made in the course of proceedings between Ms Scattolon and the Ministero dell'Istruzione, dell'Università e della Ricerca (Ministry of Education, Universities and Research) concerning non-recognition, when Ms Scattolon was transferred to work for that Ministry, of the length of service that she had completed with the Municipality of Scorzè (Italy), her original employer.

3. This case requires the Court to clarify its case-law concerning, first, the scope of Directive 77/187 in the case of transfers of undertakings between legal persons governed by public law and, secondly, the recognition by the transferee of the length of service completed with the transferor by the transferred employees.

4. It also gives the Court the opportunity to rule on the scope of the right to an effective remedy in relation to a legislative provision which, by going against case-law which supports the taking into account by the transferee of the entire length of service completed by the transferred employees with the transferor, has an immediate effect on a series of pending judicial proceedings, including those brought by Ms Scattolon, in a manner which favours the opposite position, supported by the Italian State.

5. In this Opinion, I shall set out the reasons why, in my view, Directive 77/187 must be interpreted as applying a transfer such as that at issue in the main proceedings, namely the transfer of employees responsible for auxiliary cleaning and maintenance services in State educational establishments from local

1 — Original language: French.
2 — OJ 1977 L 61, p. 26
3 — 'The Charter'.

authorities (municipalities and provinces) to the State.

6. I shall go on to explain that, in my view, in a situation such as that in the main proceedings, where, first, the conditions of remuneration laid down in the collective agreement applicable to the transferor are not based primarily on the criterion of length of service completed with that employer and, secondly, the collective agreement applicable to the transferee succeeds that which applied to the transferor, Article 3(1) and (2) of Directive 77/187 must be interpreted as not requiring the transferee to take into account the length of service completed by the transferred employees with the transferor for the purposes of calculating the remuneration of those employees, even where the collective agreement applicable to the transferee provides that the calculation of remuneration is based primarily on the criterion of length of service.

7. Lastly, I shall propose that the Court should rule that Article 47 of the Charter must be interpreted as not precluding a legislative provision such as that which is contested in the main proceedings, provided that it is established, in particular on the basis of statistical evidence, that the adoption of that provision indeed sought to guarantee the budget neutrality of the transfer of administrative, technical and auxiliary (ATA) employees from local authorities to the State, which it is for the national court to verify.

## I — Legal background

### A — *European Union law*

8. As the transfer at issue in the main proceedings took place on 1 January 2000, that is to say prior to the deadline for transposing Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187, [4] namely 17 July 2001, this case is governed by the original version of Directive 77/187. [5]

9. Article 1(1) of that directive provides:

'This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.'

10. Article 2 of that directive provides:

'For the purposes of this Directive:

(a) "transferor" means any natural or legal person who, by reason of a transfer within

4 — OJ 1998 L 201, p. 88.

5 — See, in particular, by analogy, Case C-340/01 *Abler and Others* [2003] ECR I-14023, paragraph 5, and Case C-499/04 *Werhof* [2006] ECR I-2397, paragraphs 15 and 16.

the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the business;

(b) "transferee" means any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the business;

...'

11. Under Article 3 of Directive 77/187:

'1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

...

2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement. Member States may limit the period for observing such terms and conditions, with the provision that it shall not be less than one year.

...'

12. Article 4 of that directive provides:

'1. The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee....

2. If the contract of employment or the employment relationship is terminated because the transfer within the meaning of Article 1(1) involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.'

13. Article 7 of that directive provides that the directive 'shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees'.

B — *National law*

1. Article 2112 of the Italian Civil Code and Article 34 of Decree-Law No 29/93

14. In Italy, Directive 77/187 and, subsequently, Directive 2001/23/EC[6] were implemented, in particular, by Article 2112 of the Civil Code, which provides that, '[i]n the event of transfers of undertakings, the employment relationship shall continue with the transferee and the employee shall retain all rights under that relationship.... The transferee shall apply the... collective agreements that were in force at the date of the transfer, until their expiry, unless they are replaced by other collective agreements applicable to the transferee's undertaking'.

15. Article 34 of Decree-Law No 29/93 on rationalisation of the organisation of the public administration and revision of the legislation on public employment (Decreto Legislativo No 29 – razionalizzazione della organizzazione delle Amministrazioni pubbliche e revisione della disciplina in materia di pubblico impiego),[7] of 3 February 1993, in the version in force at the material time, provides that, 'in the event of a transfer... of activities operated by the public administration, public entities or establishments or structures thereof to other subjects of public or private law, Article 2112 of the Civil Code is to apply to the employees transferred'.

2. Article 8 of Law No 124/99, the ministerial decrees implementing it and the related case-law

16. Until 1999, the auxiliary services at Italian State schools, such as cleaning, maintenance and caretaking, were operated and funded by the State. The State partially delegated the management of those services to local authorities, such as municipalities. Those services were provided in part by State ATA employees and in part by the local authorities.

17. The local authorities operated the services either by means of their ATA employees ('local authority ATA employees'), or by entering into public contracts with private undertakings. The local authority ATA

6 — Council Directive of 12 March 2001 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 undertakings or businesses (OJ 2001 L 82, p. 16).

7 — Ordinary Supplement to GURI No 30 of 6 February 1993, 'Decree-Law No 29/93'.

employees were paid by the local authorities, in exchange for full reimbursement of all expenses by the State.

18. The local authority ATA employees were paid on the basis of the collective agreement for the regions and local authorities sector (Contratto Collettivo Nazionale di Lavoro – Regioni Autonomie Locali, 'the CCNL for local authority employees'). However, the State ATA employees working in State schools were paid on the basis of the collective agreement for the schools sector (Contratto Collettivo Nazionale di Lavoro della Scuola, 'the CCNL for schools'). Under the provisions of the CCNL for schools, remuneration is based largely on length of service, while the CCNL for local authority employees provided for a different remuneration structure, linked to the functions performed and including additional elements of pay.

19. Law No 124/99 adopting urgent provisions concerning school employees (Legge No 124, disposizioni urgenti in materia di personale scolastico) [8] of 3 May 1999 provided for the transfer, from 1 January 2000, of local authority ATA employees onto the lists of State ATA employees.

20. In that regard, Article 8 of Law No 124/99 provides:

'1. ATA employees in State schools and educational establishments shall, regardless of any classification or grade, be the responsibility of the State. The provisions providing for those employees to be provided by the municipalities and provinces shall be repealed.

2. The employees referred to in Article 8(1), employed by local authorities and working in State educational establishments at the date on which this law enters into force, shall be transferred onto the lists of State ATA employees, and shall be incorporated at the corresponding professional grades and with the corresponding job profiles for the purpose of performing the functions specific to those profiles. Employees for whom there are no corresponding grades and profiles within the State ATA staffing structures shall be permitted to opt for their original local authority, within three months of the entry into force of the present law. The length of service of those employees with the original local authority and the right to retain their place of employment, for an initial period, where a post is available, shall be recognised for legal and financial purposes.

...

8 — GURI No 107 of 10 May 1999, 'Law No 124/99'.

4. The transfer of the employees referred to in Article 8(2) and (3) shall be carried out gradually, within the time-limits and according to the procedures to be laid down by decree of the Minister for Education...

5. From the year during which the provisions of Article 8(2), (3) and (4) produce their effects, the [financial] transfers from the State to the local authorities shall be gradually reduced in line with the expenditure incurred by those authorities during the financial year preceding that in which the actual transfer of the employees took place....'

21. Law No 124/99 was followed by the Ministerial Decree concerning the transfer of local authority ATA employees to the State for the purposes of Article 8 of Law No 124/99 of 3 May 1999 (Decreto – trasferimento del personale ATA dagli enti locali allo Stato, ai sensi dell'art. 8 della legge 3 maggio 1999, No 124) of 23 July 1999.[9] That decree is worded as follows:

'*Article 1*

Local authority ATA employees employed as at 25 May 1999 in State educational establishments to carry out the functions and tasks imposed by law on local authorities shall be transferred onto the lists of State ATA employees.

*Article 2*

The transfer of local authority ATA employees to the State, referred to in Article 1, shall take place in accordance with the time-limits and procedures provided for in the following articles.

*Article 3*

Until the end of the financial year 1999, the local authorities shall pay and apply the [CCNL for local authority employees] to employees transferred to the State under Article 8 of [Law No 124/99].... [T]ransferred employees shall receive, on a provisional basis from 1 January 2000, the remuneration that they received prior to the transfer.

A decree of the Minister for Education... shall lay down the criteria for incorporation, in the schools sector, intended to align the salary of the employees in question with that of that sector, by reference to remuneration, additional elements of pay and the recognition, for legal and financial purposes, as well as the impact on management planning, of the length of service completed with the local authorities, after the entry into a collective agreement which is to be negotiated... between the [Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni (Agency for the representation of the public authorities), "ARAN"], and the trade union organisations representing the "school" and

9 — GURI No 16 of 21 January 2000, 'the Ministerial Decree of 23 July 1999'.

"local authorities" sectors, for the purposes of Article 34 of Decree-Law No 29/93...

...

*Article 5*

From 1 January 2000, local authority ATA employees employed as at 25 May 1999 in State educational establishments who are transferred onto the lists of State employees shall be incorporated at the professional grades and with the job profiles corresponding to the State staffing structures...

...

*Article 7*

Employees transferred from the local authorities to the State under this decree shall continue to be responsible for all the tasks which were assigned to them, provided that they are laid down in the State job profiles.

*Article 8*

Former local authority employees who are transferred to the State shall be granted the right to remain in the place where they worked during the school year 1998-1999. Where that position is not available, they shall be assigned, for the school year 2000-2001, on the basis of the decentralised contracts in force.

*Article 9*

From 24 May 1999, the State shall assume the obligations of the local authorities in the contracts which they have entered into, and may have subsequently renewed, in terms of providing ATA functions for State schools, instead of recruiting employees.... Notwithstanding the pursuit of activities of third parties employed... under the legal provisions in force, the State shall assume the obligations under the contracts entered into by the local authorities with the undertakings... in respect of the ATA functions which, by law, must be carried out by the local authorities in the place of the State.

...'

22. The agreement between ARAN and the trade union organisations provided for in Article 3 of the Ministerial Decree of 23 July 1999 was signed on 20 July 2000 and approved by the Ministerial Decree approving the agreement of 20 July 2000 between ARAN and the representatives of trade union organisations and confederations regarding the criteria for incorporating former local authority employees transferred to the schools sector (decreto interministeriale, recepimento dell'accordo ARAN – Rappresentanti delle organizzazioni e confederazioni sindacali in data 20 luglio 2000, sui criteri di inquadramento

del personale già dipendente degli enti locali e transitato nel comparto scuola) of 5 April 2001.[10]

23. That agreement provides:

'*Article 1*

- Scope

This agreement shall apply as from 1 January 2000 to employees employed by local authorities who are transferred to the "schools" sector under Article 8 of [Law No 124/99] and... the Ministerial Decree... of 23 July 1999..., excluding employees whose functions or tasks continue to fall within the purview of the local authority.

*Article 2*

- Contractual system

1. As from 1 January 2000, the [CCNL for local authority employees] shall no longer apply to the employees covered by this agreement...; from that date, those employees shall be covered by the [CCNL for schools], including with regard to all elements relating to additional pay, unless otherwise provided for in the following articles.

...

*Article 3*

– Grading and remuneration

1. The employees referred to in Article 1 of this agreement shall be classified on the pay scale at the salary level corresponding to the professional grades in the schools sector,... as follows. Those employees shall receive a salary level of an amount equal to or immediately below their annual salary on 31 December 1999, comprising salary and individual length-of-service payments as well as, for those entitled thereto, [payments provided for by the CCNL for local authority employees]. Any difference between the amount of remuneration due on the basis of the grading and the salary received by the employee as at 31 December 1999, as stated above, shall be paid on an individual basis and take effect, subject to the reduction of accrued rights, for the purposes of ascertaining the subsequent salary position. Employees affected by this agreement shall receive the special additional payment of the amount applicable as at 31 December 1999 if that payment is greater than the payment made for a corresponding grade in the schools sector. The final grading of employees covered by this agreement in the job profiles for schools shall be carried out on the basis of the comparative table...

...

10 — GURI No 162 of 14 July 2001, 'the Ministerial Decree of 5 April 2001'.

*Article 9*

– Basic salary and additional pay

1. From 1 January 2000, all the provisions of a financial nature of the [CCNL for schools] shall apply to the employees covered by this agreement, in accordance with the procedures laid down in that CCNL.

2. From 1 January 2000, the employees covered by this agreement shall, on a provisional basis, be paid the additional individual pay consistent with the gross amounts set out in the table... annexed to the [CCNL for schools]....

...'

24. The interpretation of those provisions gave rise to legal actions brought by transferred ATA employees who claimed full recognition of the length of service they had completed with the local authorities, without any account being taken of the criteria for alignment adopted as part of the agreement between ARAN and the trade union organisations and approved by the Ministerial Decree of 5 April 2001. They submitted, in that regard, that the criteria adopted in the context of that agreement had the effect that, after they became State ATA employees, they were graded and paid in the same way as State ATA employees who had a shorter length of service. According to their line of argument, Article 8 of Law No 124/99 requires that, in respect of each transferred ATA employee, the length of service completed with the local authorities must be maintained, so that each of those employees must receive, from 1 January 2000, the remuneration received by a State ATA employee who has the same length of service.

25. This dispute led to several judgments delivered in 2005 by the Corte Suprema di Cassazione (Court of Cassation), in which that court, in essence, upheld that argument.

3. Law No 266/2005 and related case-law

26. By approval of a 'super-amendment' (an amendment emanating from the Government and approved by means of a vote of confidence), the Italian legislature included in Article 1 of Law No 266/2005 laying down provisions relating to the drawing up of the annual and multiannual budget of the State (the 2006 Finance Law) [Legge No 266 – disposizioni per la formazione del bilancio annual e pluriennale delle Stato (legge finanziaria 2006)] [11] of 23 December 2005 a paragraph 218 which includes a rule of interpretation having retroactive effect concerning Article 8 of Law No 124/99.

11 — Ordinary Supplement to GURI No 302 of 29 December 2005, 'Law No 266/2005'.

27. Article 1(218) of Law No 266/2005 provides:

'Article 8(2) of [Law No 124/99] is to be interpreted as meaning that the local authority employees who become State [ATA employees] shall receive the grades and job profiles for the corresponding State posts, on the basis of the full financial remuneration earned at the time of the transfer, with the payment of a salary equal to, or immediately below, the annual salary earned as at 31 December 1999, comprising salary, individual length-of-service allowance and any payments, where appropriate, provided for by the [CCNL for local authority employees] in force at the date of transfer to the State administration. Any difference between the starting salary and the annual salary received by the relevant employees as at 31 December 1999... shall be paid to the individual and regarded as effective, subject to recognition of length of service, for the purposes of moving up the salary scale. This is without prejudice to compliance with judgments handed down as at the date on which the present Law enters into force.'

28. Several courts referred questions to the Corte Costituzionale (Constitutional Court) concerning whether Article 1(218) of Law No 266/2005 complies with the Italian Constitution. According to those courts, that rule of interpretation required them, in the context of cases already pending to which the State is a party, to give an interpretation favourable to the State which, furthermore, is incompatible with the wording of Article 8(2) of Law No 124/99 and contrary to the interpretation of that provision given by the Corte Suprema di Cassazione. In their view, Article 1(218) of Law No 266/2005 reintroduced the system set out in the agreement of 2000 and the Ministerial Decree of 5 April 2001, which the Corte Suprema di Cassazione had ruled to be contrary to Law No 124/99. The legislature therefore interfered in the task of providing a uniform interpretation of the law which, in Italy, is reserved for the Corte Suprema di Cassazione, thus undermining the autonomy of the courts, as well as the principles of legal certainty and protection of legitimate expectations.

29. By judgment No 234 of 18 June 2007 [12] and by subsequent orders, the Corte Costituzionale ruled that Article 1(218) of Law No 266/2005 is not vitiated by the alleged infringements of general principles of law.

30. Following that ruling by the Corte Costituzionale, by judgment No 677 of 16 January 2008 the Corte Suprema di Cassazione reversed its previous case-law and stated that the interpretation of Article 8(2) of Law No 124/99 given by the Italian legislature

12 — GURI of 4 July 2007.

in Article 1(218) of Law No 266/2005 is plausible.

31. Nevertheless, by order No 22260 of 3 June 2008, the Corte Suprema di Cassazione asked the Corte Costituzionale to re-examine its position in the light of the principles laid down in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

32. By judgment No 311 of 26 November 2009,[13] the Corte Costituzionale ruled that Article 1(218) of Law No 266/2005 is compatible with the fundamental rights laid down in Article 6 of the ECHR.

**II — The dispute in the main proceedings and the questions referred**

33. Ms Scattolon, employed by the municipality of Scorzè since 16 May 1980 as a cleaner in State schools, worked as a local authority ATA employee until 31 December 1999. Such employees provide cleaning, maintenance and caretaking services in Italian State schools.

13 — GURI of 2 December 2009.

34. After 1 January 2000, pursuant to Article 8 of Law No 124/99, she was transferred onto the list of State ATA employees.

35. In accordance with the Ministerial Decree of 5 April 2001, Ms Scattolon was placed on a salary scale corresponding, on that list, to nine years of service.

36. As the nearly 20 years of service completed with the municipality of Scorzè were not recognised and the additional elements of pay provided for by the CCNL for local authority employees were lost, she considers that her salary was reduced by EUR 790.

37. On 27 April 2005, Ms Scattolon lodged an application before the Tribunale Ordinario di Venezia in order to have her entire length of service completed with the municipality of Scorzè recognised and therefore to be placed on the scale at a level corresponding to 15 to 20 years of service. Accordingly, she claimed the right to be placed in the same pay category as ATA employees employed from the outset by the State and who had the same length of service as her. In support of that action, she relied, in particular, on Article 2112 of the Civil Code, Article 8 of Law No 124/99 and the judgments of the Corte Suprema di Cassazione of 2005 recognising the right of transferred ATA employees to maintain the length of their service.

38. Following the adoption of Article 1(218) of Law No 266/2005, the Tribunale Ordinario di Venezia stayed the proceedings brought by Ms Scattolon and referred to the Corte Costituzionale the question of the compatibility of that provision with the principles of legal certainty, the protection of legitimate expectations, procedural equity and the right to effective judicial protection, to an independent tribunal and to a fair hearing. In its view, by adopting that provision for the purpose of interpreting a law adopted more than five years earlier and already interpreted by the Corte Suprema di Cassazione, the Italian legislature had sought to establish a different result, this time one which was favourable to the State, in the many cases which are still pending.

39. By order No 212 of 9 June 2008, [14] referring to its judgment No 234 of 18 June 2007, cited above, the Corte Costituzionale ruled that Article 1(218) of Law No 266/2005 is not vitiated by the alleged infringements of general principles of law.

40. Once proceedings had been resumed, Ms Scattolon pointed out that Article 8(2) of Law No 124/99, as interpreted in accordance with Article 1(218) of Law No 266/2005, is incompatible with the rule laid down in Article 3 of Directive 77/187 and with the general principles of EU law on legal certainty, the protection of legitimate expectations and effective legal protection.

41. The Tribunale Ordinario di Venezia considers that, in the light of Directive 77/187, the entire length of service of the transferred employees must be taken into account. Article 1(218) of Law No 266/2005 conflicts with that rule and, furthermore, constitutes an innovative and non-interpretative retroactive rule which undermines the principles enshrined in Article 6 TEU, read in conjunction with Article 6 of the ECHR and Articles 47 and 52(3) of the Charter. Article 1(218) of Law No 266/2005 is, at the same time, contrary to the principles of legal certainty and the protection of legitimate expectations.

42. In those circumstances, the Tribunale Ordinario di Venezia decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Directive 77/187... and/or Directive 2001/23... or the various rules of [EU] law considered relevant be interpreted as meaning that the latter are applicable to a situation in which staff providing auxiliary cleaning and maintenance services in State educational establishments are transferred from local authorities (municipalities and provinces) to the employment of the State, where the transfer has led to the assumption of obligations not only in respect of the activities in question and the legal relationships with all

14 — GURI of 18 June 2008.

the (cleaning) staff concerned, but also in respect of the contracts entered into with private companies for the provision of those services?

(2) Must the continuation of the employment relationship, pursuant to the first subparagraph of Article 3(1) of Directive 77/187 (incorporated, together with Directive 98/50... in Directive 2001/23...), be interpreted as meaning that the transferee's pecuniary payments linked to length of service must take into account all the years worked by the staff transferred, including those in the employment of the transferor?

(3) Must Article 3 of Directive 77/187 and/or... Directives 98/50... and 2001/23... be interpreted as meaning that the employee's rights transferred to the transferee also include the advantages acquired by that employee while employed by the transferor, such as those relating to length of service, if rights of a financial nature are attached thereto under the collective agreement applicable to the transferee?

(4) Must the general [EU]-law principles of legal certainty, the protection of legitimate expectations, procedural equity, effective judicial protection, and the right to an independent tribunal and, more generally, to a fair hearing, guaranteed by Article 6(2) [TEU]... in conjunction with Article 6 [of the ECHR] and with Articles 46, 47 and 52(3) of the [Charter], be interpreted as precluding the adoption by [the Italian Republic], after a significant period of time (5 years), of a specific interpretative provision which is at variance with the wording to be interpreted and in conflict with the consistent and settled interpretation of the institution responsible for ensuring uniform interpretation of the law, a provision which, moreover, is relevant for the purpose of resolving disputes to which [the Italian Republic] is a party?'

## III — Analysis

### A — *The first question*

43. By its first question, the national court seeks, in essence, to ascertain whether Directive 77/187 is applicable to a situation in which employees providing auxiliary cleaning and maintenance services in State educational establishments are transferred from local authorities (municipalities and provinces) to the State.

44. In other words, is the fact that a transfer takes place between two entities which are legal persons governed by public law capable or incapable of leading to the exclusion of such a transfer from the scope of Directive 77/187?

45. The Italian Government submits that, in such a transfer of employees as part of the reorganisation of a public sector, there is no 'transfer of an undertaking' within the meaning of that directive. Ms Scattolon and the European Commission take the opposite view.

46. *Henke* [15] is an interesting precedent for the purposes of answering this question.

47. In order properly to understand the meaning of that judgment, it is necessary to recall the facts. Ms Henke had been taken on as secretary to the mayor's office of the municipality of Schierke (Germany). That municipality had then decided to form, pursuant to the Local Government Law for the Land of Saxony-Anhalt, the 'Brocken' administrative collectivity (Verwaltungsgemeinschaft), to which it transferred administrative functions. Subsequently, the municipality of Schierke terminated its contract of employment with Ms Henke. In the course of the dispute which followed between the municipality and Ms Henke, the Arbeitsgericht Halberstadt decided to refer a question to the Court for a preliminary ruling on whether Directive 77/187 was applicable in the event of the transfer of administrative functions from a municipality to an administrative collectivity such as the one in question in the main proceedings.

48. The Court interpreted Article 1(1) of Directive 77/187 as meaning that the reorganisation of structures of the public administration or the transfer of administrative functions between public administrative authorities does not constitute a 'transfer of an undertaking' within the meaning of the directive. [16]

49. In addition to taking into account the purpose and the wording of that directive, [17] the Court pointed out that the case concerned the grouping together of a number of municipalities in the Land of Saxony-Anhalt, including the municipality of Schierke, the purpose of which was, in particular, to improve the performance of those municipalities' administrative tasks. It stated that that grouping together resulted, inter alia, in the reorganisation of administrative structures and the transfer of administration functions of the municipality of Schierke to a public entity specially set up for that purpose, namely the 'Brocken' administrative collectivity (Verwaltungsgemeinschaft). [18]

50. It then noted that, in the circumstances to which that case relates, the transfer carried out between the municipality and the administrative collectivity related only to activities

15 — Case C-298/94 [1996] ECR I-4989.

16 — Paragraph 14.

17 — Paragraphs 13 and 15, respectively.

18 — Paragraph 16.

involving the exercise of public authority and that, even if it is assumed that those activities had aspects of an economic nature, they could only be ancillary. [19]

51. I conclude from those considerations that such exclusion from the scope of Directive 77/187 is justified not by the public-law nature of the entities at issue, but rather, on the basis of a functional approach, by the fact that a transfer relates to activities involving the exercise of public authority. However, where a transfer relates to an economic activity, it falls within the scope of that directive. The public-law or private-law nature of the transferor and the transferee is of little importance, in that regard. Subsequent judgments demonstrate that the Court upheld that functional approach, placing the emphasis on the existence or otherwise of an activity involving the exercise of public authority. [20]

52. If we now seek to classify the activities at issue in the main proceedings, it follows from the case-law, as was confirmed again recently, that the auxiliary services provided at State schools, such as cleaning and caretaking services, do not constitute activities involving the exercise of public authority.

53. In two recent cases, the Court was called on to interpret Directive 2001/23 in situations in which activities that were previously performed by private undertakings had been taken over by a municipality. *UGT-FSP* [21] involves caretaking and cleaning in public schools, street cleaning and maintenance of parks and gardens. [22] Furthermore, the activity at issue in *CLECE* [23] concerns the cleaning of schools and premises belonging to the council. [24]

54. In both those judgments, the Court held that such activities have an economic nature and therefore fall within the scope of Community rules relating to the safeguarding of employees' rights in the event of transfers of undertakings. Once again, it pointed out that the mere fact that the person to whom the activity is transferred is a public-law body, in

19 — Paragraph 17. As pointed out by Advocate General Alber in point 49 of his Opinion in Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, '[i]n its reasoning the Court focused on the fact that the restructuring did not affect any economic activities. It may be concluded that the scope of … [D]irective [77/187] is not determined by the transferor and its status under public or private law, as long as the transferor is exercising an economic activity. It is not therefore the nature of the transferor which is decisive, but the nature of the activity carried on. The exercise of public authority cannot be the subject of a business transfer within the meaning of [that] directive'.

20 — See, in particular, Joined Cases C-173/96 and C-247/96 *Hidalgo and Others* [1998] ECR I-8237, paragraph 24, for a home-help service to persons in need and the activity of providing surveillance; *Collino and Chiappero*, paragraphs 31 and 32, and Case C-175/99 *Mayeur* [2000] ECR I-7755, paragraphs 28 to 40.

21 — C-151/09 [2010] ECR I-7591.

22 — Paragraph 12.

23 — C-463/09 [2011] ECR I-95.

24 — Paragraph 11.

that case a municipal authority, cannot be a ground for excluding the existence of a transfer within the scope of those rules. [25]

55. I conclude from those considerations that Directive 77/187 is, subject to verification of the other criteria for the application of that directive, applicable where employees providing auxiliary cleaning and maintenance services in State educational establishments are transferred from local authorities (municipalities and provinces) to the State.

56. It remains for me to verify whether the other criteria laid down by the Court for the purposes of assessing whether a transfer constitutes 'the transfer of an undertaking' within the meaning of Directive 77/187 are met in the present case.

57. Under Article 1(1) of Directive 77/187, that directive 'shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger'.

58. In that regard, it is clear from the settled case-law that the concept of legal transfer must be understood in a way which is sufficiently flexible so as to be in keeping with the objective of Directive 77/187, which is, as stated in Recital 2 in the preamble thereto, the protection of employees in the event of a change of employer. [26] The Court has therefore held that that directive is applicable wherever, in the context of contractual relations, there is a change in the legal or moral person who is responsible for carrying on the undertaking and who incurs the obligations of an employer towards employees of the undertaking. [27]

59. That case-law is applicable even in the event of a transfer required by law. Ms Scattolon rightly draws attention to the case-law according to which Directive 77/187 also covers transfers arising from unilateral decisions by public authorities, given that the decisive criterion is not the existence of a contractual agreement between the transferor and the transferee, but rather the change in the person responsible for operating the business. [28]

60. In order for Directive 77/187 to be applicable, it is also necessary to establish whether the transfer relates to an economic entity which retains its identity after the change of employer.

61. In order to determine whether such an entity retains its identity, it is necessary to consider all the facts characterising the transaction in question, including in particular the type of undertaking or business concerned, whether or not its tangible assets, such as

25 — *UGT-FSP*, paragraph 23 and case-law cited, and *CLECE*, paragraph 26 and case-law cited.

26 — *CLECE*, paragraph 29 and case-law cited.

27 — *Ibid.*, paragraph 30 and case-law cited.

28 — See, in that regard, *Collino and Chiappero*, paragraph 34 and case-law cited.

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. [29]

62. The Court has previously stated that an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, and therefore the maintenance of the identity of such an entity following the transaction affecting it cannot, logically, depend on the transfer of such assets. [30] It has accordingly held that inasmuch as, in certain labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task. In those circumstances, the new employer takes over a body of assets enabling him to carry on the activities or certain activities of the transferor undertaking on a regular basis. [31]

63. According to the Court's case-law, cleaning and maintenance services in educational establishments, such as those at issue in the dispute in the main proceedings, can be regarded as an activity essentially based on manpower and, consequently, a group of employees who are permanently assigned to the common task of cleaning and maintenance may, in the absence of other factors of production, amount to an economic entity. [32]

64. I conclude from those considerations that, in the main proceedings, the identity of the economic entity is maintained because the State took over the employees previously assigned to those activities by the municipalities. [33]

65. As noted by the Commission, the ATA employees affected by Law No 124/99 were transferred en bloc; their cleaning,

29 — *CLECE*, paragraph 34 and case-law cited.

30 — *Ibid.*, paragraph 35 and case-law cited.

31 — *Ibid.*, paragraph 36 and case-law cited.

32 — *Ibid.*, paragraph 39 and case-law cited.

33 — By contrary inference, the identity of an economic entity which is essentially based on manpower cannot be retained if the majority of its employees are not taken on by the transferee (see *CLECE*, paragraph 41).

maintenance and caretaking activities remained essentially unchanged both in terms of their purpose and the way in which they were organised, and were carried on in the same places without any interruption. The only change was the identity of the employer.

66. I would add that the continuity of that body of assets which enables the cleaning, maintenance and caretaking activities within schools to be carried on also took the form of the taking over by the State of the contracts by which the local authorities had, in some cases, entrusted private undertakings with the task of carrying on those activities.

67. Lastly, it is necessary to point out that Directive 77/187 does not apply to persons who are not protected as employees under national law. That directive is intended to achieve only partial harmonisation; it is not intended to establish a uniform level of protection throughout the European Community on the basis of common criteria. [34] It is clear from the order for reference, however, that the ATA employees at issue are subject to the ordinary rules of law governing employment relationships, as provided for by the Italian Civil Code. [35]

34 — See Case 105/84 *Foreningen af Arbejdsledere i Danmark* [1985] ECR 2639, paragraphs 26 and 27.

35 — See p. 13 of the French version of the order for reference.

68. It follows from all those considerations that the transfer of ATA employees resulting from Law No 124/99 does indeed fall within the scope of Directive 77/187.

B — *The second and third questions*

69. By its second and third questions, which I propose should be examined together by the Court, the national court seeks, in essence, a ruling from the Court as to whether Article 3(1) of Directive 77/187, which provides that the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer are transferred to the transferee, means that the transferee must take into account the entire length of service completed with the transferor when calculating the remuneration of transferred employees.

70. I would point out that that question from the national court arises as a result of the apparent discrepancy between Law No 124/99, the agreement between ARAN and the trade union organisations set out in the Ministerial Decree of 5 April 2001 and, lastly, Law No 266/2005. Although Law No 124/99 appears to provide for the entire length of service completed by ATA employees with local authorities to be taken into account, the trade union agreement and Law No 266/2005 provide, on the contrary, that the conditions of

remuneration for those employees after the transfer must be determined on the basis of what those employees received at the end of the employment relationship with the transferor. Two methods for determining the remuneration of transferred employees therefore conflict with each other: that is, either a new calculation taking into account, in the context of the transferee's salary scale based principally on the length of service, the entire length of service completed with the transferor by the transferred employees or the continuation of the remuneration previously received on the basis of the economic gain immediately before the transfer.

71. In the light of the information provided by Law No 266/2005, stating that the original intention of the Italian legislature was indeed to ensure the continuity of pay and not the taking over of the entire length of service previously completed with the transferor, the national court seeks to ascertain whether Directive 77/187 requires, on the contrary, such recognition of the length of service.

72. I would point out that, under Article 3(1) of Directive 77/187, the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer of an undertaking are, by reason of such transfer, to be transferred to the transferee.

73. In so far as the conditions of remuneration for ATA employees are laid down by collective agreements, that provision should be interpreted not in isolation, but in conjunction with Article 3(2) of that directive, which, as stated by the Court, 'contains limitations to the principle that the collective agreement to which the contract of employment refers is applicable'. [36]

74. I would point out that, under the latter provision, '[f]ollowing the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement'.

75. The case in the main proceedings corresponds to the last situation referred to in Article 3(2) of Directive 77/187, namely that in which the transfer is followed by the application of another collective agreement. In the present case, the ATA employees who were previously employed by the local authorities under the latter's collective agreement were, after the transfer, governed by a new collective agreement, that applicable to State employees. [37]

36 — *Werhof*, paragraph 28.

37 — See, in that regard, N. Moizard, 'Droit social de l'Union européenne', *Jurisclasseur Europe*, 2010, fascicule 607, for whom the fact that Article 3(2) of Directive 77/187 refers to 'the application of another collective agreement' means that, 'where another collective agreement applies to the transferee, that immediately replaces the agreement of the same level which originally governed the transferred entity' (paragraph 33).

76. Those two collective agreements contain very different methods for calculating the remuneration of the employees covered by them. Under the provisions of the CCNL for schools, remuneration is based, to a large extent, on length of service, while the CCNL for local authority employees provided for a different salary structure, linked to the functions performed and including additional elements of pay.

77. It is clear from the wording of Article 3(2) of Directive 77/187, as interpreted by the Court, that transferred employees may rely on the terms and conditions provided for by a collective agreement, by definition those which they enjoyed with the transferor and which may have provided for more favourable terms and conditions, only for as long as such a collective agreement continues to apply to them under national law. [38]

78. As stated by the Court with regard to the date of expiry of a collective agreement, Article 3(2) of that directive '[t]hus... aims to ensure that, despite the transfer of the undertaking, all the working conditions continue to be observed in accordance with the intention of the contracting parties to the collective agreement. However, that provision cannot derogate from the intention of those parties as expressed in the collective agreement. Accordingly, if the contracting parties have agreed not to guarantee certain working conditions beyond a particular date, [Article 3(2) of Directive 77/187] cannot impose on the transferee the obligation to observe those working conditions after the agreed date of expiry of the collective agreement, as after that date the agreement is no longer in force'. [39] According to the Court, '[i]t follows that [that provision] does not require the transferee to ensure that the working conditions agreed with the transferor are observed after the date of expiry of the collective agreement'. [40]

79. In my view, that case-law applies, by analogy, to a situation in which, after the transfer, the collective agreement applicable to the transferor is replaced by that applicable to the transferee. In such a situation, Article 3(2) of Directive 77/187 does not require the transferee to observe the working conditions provided for by the collective agreement applicable to the transferor.

80. It is therefore completely consistent with that provision that, from 1 January 2000, the date of the transfer, the transferred ATA employees were governed by the provisions of the CCNL for schools, and were therefore subject to the terms and conditions and methods for calculating remuneration

38 — See, in that regard, Case C-4/01 *Martin and Others* [2003] ECR I-12859, paragraph 47.

39 — Case C-396/07 *Juuri* [2008] ECR I-8883, paragraph 33.

40 — *Ibid.*, paragraph 34.

applicable to State employees. Transferred employees could therefore no longer rely on the benefits granted to them under the CCNL for local authority employees and, in particular, the rights of a financial nature granted by that agreement.

81. By way of example, in a situation such as this where there is a changeover of collective agreements, the transferred employees may no longer claim from the transferee a bonus which was provided for under the collective agreement previously applicable to the transferor. After the transfer, the components of and methods for calculating pay are governed solely by the collective agreement newly applicable to the transferee. [41]

82. The main problem is therefore whether, in order to determine the remuneration of the transferred employees on the basis of the criteria laid down in the collective agreement applicable to the transferee, which gives a predominant place to the length-of-service criterion, Directive 77/187 requires, even where there is a changeover of collective agreements, that the entire length of service previously completed by those employees with the transferor should be taken into account.

83. The case-law of the Court contains some answers with regard to the general issue of recognition of length of service.

84. Thus, in *Collino and Chiappero*, the Court ruled that 'the transferred employees' length of service with their former employer does not as such constitute a right which they may assert against the new employer'. [42] On the other hand, in its view, the 'length of service is used to determine certain rights of employees of a financial nature, and it is those rights which will have to be maintained by the transferee in the same way as by the transferor'. [43]

85. The Court concluded that, 'in calculating rights of a financial nature such as a termination payment or salary increases, the transferee must take into account the entire length of service of the employees transferred, in so far as his obligation to do so derives from the employment relationship between those employees and the transferor, and in accordance with the terms agreed in that relationship'. [44]

86. In that judgment, the Court deals with the issue of taking into account the length of service on the basis of an approach which emphasises the parallels between successive employment relationships and based on the need for equivalent protection of the rights

41 — Although certain elements of remuneration provided for in the CCNL for local authority employees were retained by the Italian legislature, that was therefore in accordance not with an obligation imposed by Directive 77/187, but solely with the intention of that legislature (those elements are the individual length-of-service allowance and three other payments).

42 — Paragraph 50.

43 — Ibid.

44 — Paragraph 51.

granted to employees in the context of those relationships.

87. It is also on the basis of that approach that the Court immediately qualifies the principle of recognition by the transferee of rights of a financial nature arising from length of service which were enjoyed by the transferred employees with the transferor by stating that, 'where national law allows the employment relationship to be altered in a manner unfavourable to employees in situations other than the transfer of an undertaking, in particular as regards their protection against dismissal and conditions of remuneration, such an alteration is not precluded merely because the undertaking has been transferred in the meantime and the agreement has therefore been made with the new employer. Since by virtue of Article 3(1) of Directive [77/187] the transferee is subrogated to the transferor's rights and obligations under the employment relationship, that relationship may be altered with regard to the transferee to the same extent as it could have been with regard to the transferor, provided that the transfer of the undertaking itself may never constitute the reason for that amendment.' [45] That is one of the consequences of the subrogation mechanism. The employment relationship may be altered with regard to the transferee to the same extent as it could have been with regard to the transferor.

88. In summary, it is clear from *Collino and Chiappero* that the transferred employees may rely, in their employment relationship with the transferee, on the same financial rights arising from length of service as those which they enjoyed in their employment relationship with the transferor. However, it is still possible for the transferee to alter the terms of the employment relationship, and in particular the conditions of remuneration, in the same way as the transferor was able to do under national law and in situations other than a transfer.

89. The purpose of Directive 77/187 is to prevent the transfer as such from being treated as a pretext to worsen the employee's existing position, by reducing or ceasing to grant entitlements already acquired. The rights which matter are those which could be claimed from the transferor. Accordingly, there is no entitlement to comparability with new colleagues (who may be better off), nor is there any entitlement to retrospective extension of more favourable arrangements made by the transferee in respect of the years of service accrued with the transferor. [46]

90. The content of the rights and obligations which are transferred depends on the

45 — Paragraph 52.

46 — See point 94 of Advocate General Alber's Opinion in *Collino and Chiappero*.

applicable national law and will therefore vary. As the Court has reiterated, Directive 77/187 does not seek to establish a uniform level of protection on the basis of common criteria. That is why, as the Court stated in *Foreningen af Arbejdsledere i Danmark*, [47] that directive can be relied on only to ensure that the employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the Member State concerned. [48]

91. It follows that the transferred employees are entitled to have their entire length of service with the transferor taken into account for the purposes of calculating their remuneration only where the contract of employment concluded with the transferor granted such a right and where that right has not been legitimately altered by the transferee, irrespective of the transfer of an undertaking.

92. We have seen that, under the CCNL for local authority employees, remuneration was calculated mainly on the basis of the type of function performed and by including additional elements of pay, and therefore not primarily on the basis of length of service. In accordance with the equivalence approach, transferred employees may not, therefore, on the basis of Article 3(1) of Directive 77/187, require the transferee to take into account the entire length of service completed with the transferor.

93. In any event, in view of my previous comments on the scope of Article 3(2) of that directive as interpreted by the Court, I doubt that, in a situation where there is a changeover of collective agreements such as that in the main proceedings, that provision allows employees to claim from the transferee any financial rights arising from length of service to which they were entitled under the collective agreement applicable to the transferor.

94. It is also necessary to point out that the existence of inequalities in pay in relation to employees who were already employed by the State is not, in itself, contrary to Directive 77/187. That directive does not go so far as to require that, through a legal fiction, the employees of the first employer should, retrospectively, be treated in the same way as the employees of the second employer and granted exactly the same rights as the latter. That directive introduces the principle of the continuation of the employment relationship and the safeguarding of working conditions, rather than that of altering those conditions for the purpose of bringing them into line with the working conditions of employees who have always been employed by the new employer.

95. However, *Delahaye* [49] casts doubt on the scope of Directive 77/187 with regard to the

47 — Case 324/86 [1988] ECR 739.

48 — Paragraph 16.

49 — Case C-425/02 [2004] ECR I-10823.

recognition of the length of service of transferred employees in so far as the Court appears to be concerned with equal treatment between transferred employees and employees already working for the transferee.

96. The facts of the case giving rise to that judgment are as follows. Ms Delahaye was an employee of an association whose activity was transferred to the Luxembourg State. Accordingly, she was taken on as an employee of the Luxembourg State. By virtue of the Grand-Ducal regulation on the remuneration of State employees, Ms Delahaye was then allocated a lower remuneration than that she had received under the contract concluded with her original employer. [50]

97. In that case, the question referred by the Luxembourg Administrative Court sought, in essence, to know whether Directive 77/187 precluded, in the event of a transfer of an undertaking from a legal person governed by private law to the State, the latter, as new employer, from reducing the amount of the remuneration of the employees concerned for the purpose of complying with the national rules in force for public employees

98. According to the Court of Justice, which relies on its case-law and, in particular, on *Mayeur* (C-175/99 [2000] ECR I-7755) '[s]ince Directive 77/187 is intended to achieve only partial harmonisation of the field in question... it does not preclude, in the event of a transfer of an activity to a legal person governed by public law, the application of national law which prescribes the termination of contracts of employment governed by private law'. [51] The Court states, however, that 'such a termination constitutes, in accordance with Article 4(2) of Directive 77/187, a substantial change in working conditions to the detriment of the employee resulting directly from the transfer, so that the termination of those contracts of employment must, in such circumstances, be regarded as resulting from the action of the employer'. [52]

99. Transposing that reasoning to the case at issue, the Court holds that '[t]he same must apply where... application of the national rules governing the position of State employees entails a reduction in the remuneration of the employees concerned by the transfer. Such a reduction must, if it is substantial, be regarded as a substantial change in working conditions to the detriment of the employees in question, within the meaning of Article 4(2) of Directive [77/187]'. [53]

100. The Court's acknowledgment of such a possibility on the part of the public authorities

50 — She stated that she had been classified, with no allowance for length of service, in the first grade, last step, of the salary scale, which meant that she lost 37 % of her monthly salary (paragraph 17 of the judgment).

51 — *Delahaye*, paragraph 32.

52 — *Ibid.*

53 — *Ibid.*, paragraph 33.

is, however, then qualified where it states that 'the competent authorities responsible for applying and interpreting the national law relating to public employees are obliged to do so as far as possible in the light of the purpose of Directive 77/187'. From that perspective, the Court notes that '[i]t would be contrary to the spirit of that directive to treat an employee taken over from the transferor without taking length of service into account, in so far as the national rules governing the position of State employees take a State employee's length of service into consideration for calculating his remuneration.'

101. *Collino and Chiappero* and *Delahaye* may therefore appear to be difficult to reconcile as they adopt two different approaches. While the first is based on the idea of equivalent protection for employees in the event of transfers of undertakings, the second emphasises equal treatment between the transferred employees and the employees already working for the transferee.

102. Although equal treatment of the transferred employees and the employees already working for the transferee is desirable in the event of transfers of undertakings, it is not, in my view, required by Directive 77/187. It seems to me to be more consistent with the spirit of that directive to adopt the approach based on equivalent protection inherent in the subrogation mechanism which was adopted by the Court in *Collino and Chiappero*.

103. I conclude from all of those considerations that, in a situation such as that in the main proceedings, where, first, the conditions of remuneration provided for by the collective agreement applicable to the transferor are not based primarily on the criterion of length of service completed with that employer and, secondly, the collective agreement applicable to the transferee replaces that which was applicable to the transferor, Article 3(1) and (2) of Directive 77/187 must be interpreted as not requiring the transferee to take into account the length of service completed with the transferor by the transferred employees for the purposes of calculating the remuneration of those employees, even though the collective agreement applicable to the transferee provides that remuneration should be calculated primarily on the basis of the length-of-service criterion.

C — *The fourth question*

104. By its fourth question, the national court seeks to ascertain whether several general principles of EU law preclude the adoption by a Member State of a national provision such as Article 1(218) of Law No 266/2005.

105. It is necessary to recall the context in which that question arises. By adopting Article 1(218) of Law No 266/2005, the Italian legislature sought to clarify the scope it intended

to give to Law No 124/99 as regards the issue of whether the transfer of ATA employees was to be accompanied by the State's taking into account the entire length of service completed by those employees with the local authorities. Taking the opposite view to the case-law of the Corte Suprema di Cassazione, that legislature considered that the remuneration of transferred employees should be established 'on the basis of the full financial remuneration earned at the time of the transfer, with the payment of a salary equal to, or immediately below, the annual salary earned as at 31 December 1999, comprising salary, individual length-of-service allowance and any payments where appropriate, provided for by the [CCNL for local authority employees] in force at the date of transfer.' The Italian legislature thus stated that, despite the prevailing interpretation adopted by the national courts, Law No 124/99 should not be interpreted as basing the calculation of the remuneration of the transferred employees on the criterion of length of service completed with the local authorities.

106. We have seen that that position taken by the Italian legislature may not, in my view, be regarded as being contrary to Directive 77/187 as that directive does not, in a situation such as that at issue in the main proceedings, require the entire length of service previously completed by the transferred employees with the local authorities to be taken into account.

107. In so far as the interpretation of Law No 124/99 given in Article 1(218) of Law No 266/2005 has an immediate effect on a whole series of pending judicial proceedings, including those brought by Ms Scattolon, and this favours the position taken by the Italian State, the national court also seeks to ascertain whether or not such intervention by the Italian legislature complies with the general principles of EU law. It is clear from both the order for reference and the written and oral observations submitted to the Court that that question relates, in the first place, to the interpretation of the principle of effective legal protection and, in particular, the right to a fair trial. [54]

54 — It should be pointed out that, at the same time, three applications dealing with a similar problem were brought before the European Court of Human Rights, on the basis of Article 6(1) of the ECHR. They are Application Nos 43549/08 *Agrati and Others* v. *Italy*, 5087/09 *Carlucci* v. *Italy*, and 6107/09 *Cioffi and Others* v. *Italy*, On 5 November 2009, the Second Section of the European Court of Human Rights addressed the following questions to the parties:
'1. Does the application of Article 1 of [Law No 266/2005] to proceedings already pending before the courts undermine the rule of law or the fairness of the proceedings as guaranteed by Article 6 of the [ECHR]?
2. If so, is that interference justified by overriding reasons in the public interest and was it sufficiently proportionate to the objective(s) pursued by the legislature?
3. In view of the adoption of Article 1 of [Law No 266/2005] and its application by the national courts in proceedings which are already pending, was there an infringement of the right of the applicants to peaceful enjoyment of their possessions, within the meaning of Article 1 of Protocol No 1 [to the ECHR]?'

108. In accordance with settled case-law, the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member states and enshrined in Articles 6 and 13 of the ECHR. [55] That principle was reaffirmed by Article 47 of the Charter, which has acquired, since the entry into force of the Treaty of Lisbon, 'the same legal value as the Treaties'. [56] Since the Charter now occupies a central place in the system of protection of fundamental rights in the Union, it must, in my opinion, constitute the reference legislation each time the Court is called upon to rule on the compliance with an EU measure or a national provision with the fundamental rights protected by the Charter. [57]

109. Before providing, where appropriate, the national court with the interpretative guidance enabling it to determine whether Article 1(218) of Law No 266/2005 complies with Article 47 of the Charter, it is necessary to ascertain whether the Court does indeed have jurisdiction to do so.

55 — See, in particular, Case C-279/09 *DEB Deutsche Energiehandels-und Beratungsgesellschaft* [2010] ECR I-3849, paragraph 29 and cited case-law.

56 — See the first paragraph of Article 6(1) TEU.

57 — See, to that effect, concerning assessment of the validity of an EU measure, Joined Cases C-92/09 and C-93/09 *Volker and Markus Schecke and Eifert* [2010] ECR I-11063, paragraphs 45 and 46.

1. The jurisdiction of the Court to answer the fourth question

110. According to the type of situation brought before it, [58] the Court requires the Member States to comply with the fundamental rights protected in the Community legal order, first, where those States implement EU law and, secondly, where national law falls within the scope of EU law.

111. Thus, according to the case-law of the Court, the requirements flowing from the protection of general principles recognised in the Community legal order, including fundamental rights, are also binding on Member States when they implement Community rules, and consequently they are bound, as far as possible, to apply the rules in accordance with those requirements. [59]

58 — According to whether a Member State acts as a 'servant of the Union' by adopting the national measures required by Community rules, whether it adopts national legislation that derogates from a freedom of movement recognised by the Treaty or, more broadly, whether it seeks to obtain the objective sought by Community regulations in adopting the national provisions which it considers necessary for that purpose. For an example of those three situations, see, in particular and respectively, Case 5/88 *Wachauf* [1989] ECR 2609; Case C-260/89 *ERT* [1991] ECR I-2925 and Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411.

59 — See, in particular, Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 105 and case-law cited.

112. Furthermore, the Court has consistently held that, where national legislation falls within the field of application of Community law, the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights – as laid down, in particular, in the ECHR – whose observance the Court ensures. [60] However, the Court has no such jurisdiction with regard to legislation which does not fall within the framework of Community law and where the subject-matter of the case has no connection with Community law. [61]

113. In view of the answer which I propose the Court should give to the first question, that is to say that the transfer at issue in the main proceedings constitutes a transfer of an undertaking within the meaning of Directive 77/187 and must therefore take place in accordance with the rules laid down in that directive (as transposed by Article 2112 of the Italian Civil Code and Article 34 of Decree-Law No 29/93), the present case clearly differs from the situations which gave rise to the decisions in which the Court declared that it did not have jurisdiction to interpret general principles and fundamental rights on the grounds that the case did not have a sufficient connection with EU law. [62]

114. The purpose of Law No 124/99, as made clear by the Italian legislature in 2005, is to define one of the conditions for the transfer of local authority ATA employees to the State, namely the method for calculating their remuneration following the transfer. In so far as it concerns a transfer that falls within the scope of Directive 77/187, such legislation must be regarded as having a sufficient connection with EU law. Since the contested national legislation indeed falls within the framework of EU law, the Court has jurisdiction to provide the national court with the guidance necessary to determine whether that legislation complies with the principle of effective legal protection. [63]

115. The same must be true, in my view, in respect of Article 47 of the Charter.

60 — See, in particular, Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 70 and case-law cited.

61 — See, in particular, order of 27 November 2009 in Case C-333/09 *Noël*, paragraph 11 and case-law cited.

62 — See, in particular, Case C-144/95 *Maurin* [1996] ECR I-2909 and Case C-309/96 *Annibaldi* [1997] ECR I-7493, as well as the orders in Case C-328/04 *Vajnai* [2005] ECR I-8577, of 25 January 2007 in Case C-302/06 *Kovaľský* and Case C-339/10 *Asparuhov Estov and Others* [2010] ECR I-11465.

63 — Of course, the existence of a sufficient connection with EU law must be clear from the order for reference. Where no such connection is shown, the Court will declare that it manifestly does not have jurisdiction, as was the case with the order in Case C-287/08 *Savia and Others* [2008], a case similar to that under consideration.

116. We know that, in order to define the scope of the Charter, its authors adopted the wording used in *Wachauf*.[64] Article 51(1) of the Charter thus provides that the provisions of the Charter apply to the Member States 'only when they are implementing Union law'.

117. In the light of that wording, the issue of whether the scope of the Charter, as laid down in Article 51(1) therein, coincides with that of general principles of EU law is disputed, and as yet the case-law of the Court provides no clear answer.[65] While those who favour a restrictive interpretation of the concept of implementation of EU law submit that that concept refers only to a situation in which a Member State acts as a servant of the Union, those who favour a broader view consider that that concept refers more widely to a situation in which national legislation falls within the scope of EU law.

118. In my view, the wording adopted by the authors of the Charter does not mean that they sought to restrict the scope of that Charter in relation to the case-law definition of the scope of general principles of EU law. That is demonstrated by the explanations relating to Article 51(1) of the Charter, which, in accordance with the last paragraph of Article 6(1) TEU and Article 52 of the Charter, must be taken into account for the purpose of interpreting the Charter.

119. I would note, in that regard, that those explanations indicate that, as regards the Member States, 'it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'. Furthermore, those explanations concern the case-law relating to the various cases where there is a connection between national legislation and EU law, to which I referred above. In my view, those two elements allow the Court to adopt a broad interpretation of Article 51(1) of the Charter without distorting the intention of

64 — Paragraph 19 of the judgment.

65 — See, in particular, on that issue, Lenaerts, K., and Gutiérrez-Fons, J. A., 'The constitutional allocation of powers and general principles of EU law', *Common Market Law Review*, 2010, No 47, p. 1629, in particular p. 1657 to 1660; Tridimas, T., 'The General Principles of EU Law', 2nd edition, Oxford University Press, 2006, p. 363; Egger, A., 'EU-Fundamental Rights in the National Legal Order: The Obligations of Member States Revisited', *Yearbook of European Law*, Vol. 25, 2006, p. 515, in particular p. 547 to 550 and Jacqué, J. P., 'La Charte des droits fondamentaux de l'Union européenne: aspects juridiques généraux' *REDP*, Vol. 14, No 1, 2002, p. 107, in particular p. 111.

the Charter's authors.[66] It could thus be accepted that that article, read in the light of the explanations relating to it, must be interpreted as meaning that the provisions of the Charter apply to the Member States where they act within the scope of EU law. Furthermore, when referring to the specific case of directives, the concept of implementation of EU law should not be restricted merely to measures transposing that law. Such a concept should, in my view, be understood as referring to subsequent and specific applications of rules laid down by a directive,[67] as well as, more generally, to all situations in which national legislation 'concerns' or 'affects' a matter governed by a directive the period prescribed for the transposition of which has expired.[68]

120. Besides the fact that a restriction of the scope of the Charter in relation to the scope of the fundamental rights recognised as general principles of EU law was not, in my view, the intention of the authors of the Charter, a strict interpretation of Article 51(1) of the Charter does not appear desirable. Indeed, it would lead to the creation of two separate systems of protection of fundamental rights within the Union, according to whether they stem from the Charter or from general principles of law. That would weaken the level of protection of those rights, which could be regarded as being contrary to the wording of Article 53 of the Charter, which provides, in particular, that '[n]othing in [the] Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law …'

121. Since the Court's jurisdiction to answer the fourth question seems to me to be established, the national court should now be provided with the information which will enable it to assess whether Article 1(218) of Law No 266/2005 is consistent with Article 47 of the Charter.

66 — See Rosas, A., and Kaila, H., 'L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice – un premier bilan'. *Il Diritto dell'Unione European,* 1/2011. Those authors consider, referring to the explanations relating to the Charter, that the expression 'when they are implementing Union law', used in Article 51(1) of the Charter, 'call for quite a broad interpretation'. In their view, '[w]hat matters, in the light of the case-law of the Court, is the existence of a connection with that law'. I would also note that, in its order in *Asparuhov Estov and Others*, the Court states that its jurisdiction to interpret the Charter is not established, in so far as the order for reference contains nothing showing that the national decision at issue 'constitutes a measure implementing EU law or contains other connections with the latter' (paragraph 14). That reference to 'other connections' with EU law rather supports a broader understanding by the Court of its jurisdiction to interpret the Charter.

67 — Case C-145/09 *Tsakouridis* [2010] ECR I-11979, paragraphs 50 to 52.

68 — Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paragraphs 22 to 26.

2. The interpretation of Article 47 of the Charter

122. As confirmed by Article 47 of the Charter, the fundamental right to effective legal protection includes the right to an effective remedy, which guarantees, in particular, a fair hearing for the applicant. In so far as Article 1(218) of Law No 266/2005 has an influence on the legal proceedings brought by Ms Scattolon, which is favourable to the Italian State, her right to an effective remedy is likely to be affected.

123. It is necessary, nonetheless, to point out that Article 52(1) of the Charter accepts that limitations may be made on the exercise of the rights and freedoms recognised by the Charter, as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

124. Furthermore, Article 52(3) of the Charter states that, in so far as it contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights is to be the same as those laid down by that Convention.[69] According to the explanation given by that provision, the meaning and scope of the guaranteed rights are determined not only by the wording of the ECHR, but also, in particular, by the case-law of the European Court of Human Rights.

125. For the purposes of providing the national court with the information necessary to enable it to assess whether Article 1(218) of Law No 266/2005 is consistent with the principle of effective legal protection, I shall follow the analytical approach of the European Court of Human Rights in similar cases of alleged infringement of Article 6(1) of the ECHR as a result of the impact on pending legal proceedings of a law having retroactive effect.

126. I shall therefore examine, first of all, whether there is interference by the legislature with the administration of justice. If that is the case, I shall then need to assess whether there is an overriding reason in the public interest justifying that interference.

69 — However, that provision does not prevent Union law providing more extensive protection (see the second sentence of Article 52(3) of the Charter).

(a) The existence of interference by the legislature with the administration of justice

127. As the European Court of Human Rights held in *Zielinski and Pradal & Gonzalez and Others* v. *France*, judgment of 28 October 1999,[70] 'while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 [of the ECHR] preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute'.[71]

128. It is clear from that judgment that the first stage of assessing whether a law having retroactive effect is consistent with Article 6(1) of the ECHR involves determining whether there is any impact on cases pending before a court.

129. In *Lilly France* v. *France*, judgment of 25 November 2010, the European Court of Human Rights points out that it confines itself to finding that the contested law prevented a court from reaching a decision on the case at issue.[72] In *Zielinski and Pradal & Gonzalez and Others* v. *France*, it emphasises that the contested law settled once and for all the terms of the dispute before the ordinary courts and did so retrospectively.[73] The jurisdiction of the court called upon to give judgment in the case is therefore rejected in favour of the interpretation given by the national legislature. Even if the legislature has sought to preclude applying the law having retroactive effect to final decisions, interference by the legislature with the administration of justice is proven where the court is bound by the wording of the legislation.

130. In the context of the main proceedings, Article 1(218) of Law No 266/2005 provides an interpretation of Article 8(2) of Law No 124/99 whose effects are retroactive 'subject to the enforcement of judicial decisions delivered as at the date of entry into force of the present law'.

131. The condition of interference by the legislature with the administration of justice appears to be met. It is common ground that the new legislative interpretation has a direct impact on the proceedings between Ms Scattolon and the State in a manner unfavourable to the applicant, since the interpreting law rejects the interpretation favourable to the transferred employees which had previously been upheld by the Corte Suprema di Cassazione and most of the courts adjudicating

70 — *Reports of Judgments and Decisions* 1999-VII.

71 — § 57.

72 — § 49.

73 — § 58.

on the substance. It is of little importance, in that regard, whether Article 1(218) of Law No 266/2005 is understood as being a genuine rule of interpretation or rather as a rule with innovative content.

132. It is now necessary to assess whether such interference may be regarded as being justified by an overriding reason in the public interest.

(b) The existence of an overriding reason in the public interest justifying interference

133. In general, the case-law of the European Court of Human Rights seeks to preclude financial grounds from being capable, per se, of justifying interference by the legislature with the administration of justice. [74] However, in *National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society* v. *the United Kingdom*, judgment of 23 October 1997, [75] the European Court of Human Rights ruled that the State's concern for maintaining the level of tax revenues constitutes a reason in the public interest. [76] It is interesting to note that, in that case, the retroactive law sought to restore the original intention of the legislature and remedy technical deficiencies in the drafting of the legislation. [77] Furthermore, *OGIS-Institut Stanislas, OGEC St. Pie X and Blanche de Castille and Others* v. *France*, judgment of 27 May 2004, concerns the issue of closing a gap in the law. [78]

134. It is clear from that case-law that the European Court of Human Rights tends to accept the existence of a reason in the public interest where it is a question of securing sound legislation (including, in particular, the remedying of technical deficiencies and the closing of a gap in the law) or of favouring the attainment of a project which is beneficial to the majority. [79] Financial reasons are not sufficient, per se, but may succeed where they are accompanied by another objective in the public interest.

135. In the main proceedings, the Italian Government justifies the intervention of Law No 266/2005 by the fact that the wording of Article 8(2) of Law No 124/99 was vague and had given rise to a number of disputes. That justification may be likened to that of seeking

74 — See, in particular, Eur. Court HR *Lecarpentier and Other* v. *France*, judgment of 14 February 2006 (§ 47), and *Cabourdin* v. *France*, judgment of 11 April 2006 (§ 37).

75 — *Reports of Judgments and Decisions*, 1997-VII.

76 — § 80 to 83.

77 — § 81.

78 — § 71.

79 — See Sudre, F., Marguénaud, J.-P., Andriantsimbazovina, J., Gouttenoire, A., and Levinet, M., *Les grands arrêts de la Cour européenne des droits de l'homme*, 5th edition, PUF, Paris, 2009, p. 307.

to secure sound legislation, that is to say legislation whose scope is made clear.

136. With regard, however, to the argument that it was necessary to put a stop to differences in case-law, in addition to the fact that such differences must be established, it should be noted that the European Court of Human Rights is reluctant to accept that argument. Indeed, in *Zielinski and Pradal & Gonzalez and Others* v. *France*, that court ruled that differences in case-law are inherent in any legal system. In the view of that court, therefore, that argument is not, in itself, relevant.

137. If it is established that the Italian legislature sought, in 1999, to leave it to the social partners and the legislature to implement specific conditions for the incorporation of transferred employees, in particular as regards the remuneration of those employees after the transfer, it might be possible to accept subsequent intervention by that legislature aimed at putting a stop to case-law which is in line neither with the original intention of that legislature nor with the conditions for application defined by the social partners and later validated by the legislature. I would point out, in that regard, that the clarifications provided by the legislature in 2005 confirm the interpretation adopted by the social partners following Law No 124/99, which drew up, as requested by the Ministerial Decree of 23 July 1999, criteria for the incorporation of transferred employees. Accordingly, it could be accepted, as the Corte Suprema di Cassazione itself recognised in a judgment of 16 January 2008, [80] that the clarifications provided by the Italian legislature in 2005 relating to the basis for calculating the annual salary of transferred employees were in line with one of the possible conditions for the legal and financial recognition of the length of service completed. The Italian legislature therefore opted for a partial recognition of the length of service based, for the purpose of the classification of the transferred employees, on the remuneration received by them as at 31 December 1999.

138. The Italian Government puts forward a ground based on the need to guarantee the budget neutrality of the transfer operation for the purposes of justifying that choice.

139. It may seem reasonable that the Italian State sought to group together into one body ATA employees who were working together but who were subject to two different schemes and, in particular, that it wished to harmonise the conditions of remuneration of those employees by ensuring, at the same time, that that operation was budget neutral,

80 — Judgment No 677 of the Chamber of Employment.

that is to say, that it was carried out at the same cost.

140. It is important, however, for the Italian Government to show that the requirement of budget neutrality was actually at the heart of the original reform and that the intervention by the legislature in 2005 indeed sought to safeguard that objective. In particular, it is for it to show that solely the interpretation based on the length of service being only partially taken into account was capable of guaranteeing the budget neutrality of the reform.

141. I would note that the Italian Government claimed before the Court that the original reform in 1999, together with the fact that the length of service of the transferred employees was only partially taken into account, did not adversely affect the financial situation of those employees. Faced with that claim, Ms Scattolon did not, in my view, succeed in rigorously and clearly demonstrating that the transferred employees' financial situation worsened after the transfer. [81] The information available to me does not therefore convince me that the legislature's intervention in 2005 had any aim other than that of guaranteeing the budget neutrality of the reform.

142. It is ultimately for the national court to verify, in particular on the basis of statistical evidence relating to the comparative costs of the two interpretations put forward, [82] that the interpretation adopted by the Italian legislature in 2005 is indeed capable of satisfying the legitimate objective of budget neutrality of an administrative reform such as that at issue in the main proceedings and that it has not disproportionately prejudiced the right protected by Article 47 of the Charter.

143. I conclude from those considerations that Article 47 of the Charter must be interpreted as not precluding a legislative provision such as that contained in Article 1(218) of Law No 266/2005, provided that it is established, in particular on the basis of statistical evidence, that the adoption of that provision indeed sought to guarantee the budget neutrality of the transfer of local authority ATA employees to the State, which it is for the national court to verify.

81 — It is clear from the hearing held before the Court on 1 February 2011 that the few hundred Euros which Ms Scattolon stated that she had lost following the transfer should instead be regarded as an economic loss in relation to the salary increase to which she could have been entitled if her total length of service had been recognised. Furthermore, with regard to any loss of payments provided for by the CCNL for local authority employees, other than those which were renewed under Article 1(218) of Law No 266/2005, there is nothing to indicate that the CCNL for schools does not, in general, contain their equivalents.

82 — The need for such statistical evidence arises, in particular, from *Lilly France* v. *France*, (§ 51).

## IV — Conclusion

144. In the light of the above considerations, I propose that the Court should answer the questions referred by the Tribunale Ordinario di Venezia as follows:

(1) 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 must be interpreted as applying to a transfer such as that at issue in the main proceedings, namely the transfer of employees providing auxiliary cleaning, maintenance and caretaking services in State educational establishments from local authorities (municipalities and provinces) to the State.

(2) In a situation such as that in the main proceedings where, first, the conditions of remuneration provided for by the collective agreement applicable to the transferor are not based primarily on the criterion of the length of service completed with that employer and, secondly, the collective agreement applicable to the transferee replaces that which was applicable to the transferor, Article 3(1) and (2) of Directive 77/187 must be interpreted as not requiring the transferee to take into account the length of service completed with the transferor by the transferred employees for the purposes of calculating the remuneration of those employees, even where the collective agreement applicable to the transferee provides that remuneration is to be calculated primarily on the basis of the length-of-service criterion.

(3) Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding a legislative provision such as that contained in Article 1(218) of Law No 266/2005 laying down provisions relating to the drawing up of the annual and multiannual budget of the State (the 2006 Finance Law)

[Legge no. 266/2005 – disposizioni par la formazione del bilancio annuale a pluriennale dello Stato (legge finanziaria 2006)] of 23 December 2005, provided that it is established, in particular on the basis of statistical evidence, that the adoption of that provision indeed sought to guarantee the budget neutrality of the transfer of ATA (administrative, technical and auxiliary) employees from local authorities to the State, which it is for the national court to verify.