

JUDGMENT OF THE COURT

25 July 1991 *

In Case C-362/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Pretore di Milano for a preliminary ruling in the proceedings pending before that court between

Giuseppe d'Urso, Adriana Ventadori and Others

and

**Ercole Marelli Elettromeccanica Generale SpA (under special administration),
Ercole Marelli Nuova Elettromeccanica Generale SpA (now ABB Tecnomasio SpA
and ABB Industria Srl) and Others,**

on 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 (Official Journal 1977 L 61, p. 26),

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Díez de Velasco (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris, R. Joliet, F. A. Schockweiler, F. Grévisse and M. Zuleeg, Judges,

Advocate General: W. Van Gerven,
Registrar: D. Louberman, Principal Administrator,

* Language of the case: Italian.

after considering the written observations submitted on behalf of:

- the plaintiffs in the main proceedings, by Alfonso F. Ognibene, of the Milan Bar,
- the defendants in the main proceedings, by Giacinto Favalli and Salvatore Trifirò, of the Milan Bar,
- the French Government, by Claude Chavance, Principal Attaché of Central Administration at the Ministry for Foreign Affairs, acting as Agent,
- the Italian Government, by Oscar Fiumara, Avvocato dello Stato, acting as Agent,
- the Commission of the European Communities, by Giuliano Marengo, Legal Adviser, assisted by Karen Banks, a member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument at the hearing on 18 April 1991 from the plaintiffs in the main proceedings, represented by Alfonso Ognibene and Sergio Galleano, of the Milan Bar, the defendants in the main proceedings, the Italian Government and the Commission of the European Communities,

after hearing the Opinion of the Advocate General at the sitting on 30 May 1991,

gives the following

Judgment

- 1 By order of 23 October 1989, which was received at the Court on 17 November 1989, the Pretore di Milano (Magistrate's Court, Milan) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on 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 (Official Journal 1977 L 61, p. 26, hereinafter referred to as 'the Directive').
- 2 Those questions were raised in proceedings between, on the one hand, Giuseppe d'Urso, Adriana Ventadori and others and, on the other hand, Ercole Marelli Elettromeccanica Generale SpA (hereinafter referred to as 'EMG'), which is under special administration, and Ercole Marelli Nuova Elettromeccanica Generale SpA (hereinafter referred to as 'Nuova EMG').
- 3 It appears from the information given in the order for reference that EMG was made subject to the 'special administration procedure' by a decree of the Minister for Industry of 26 May 1981 whilst being authorized to continue trading. In September 1985, the entire undertaking was transferred to the company Nuova EMG, which was formed for this purpose. Pursuant to the contract of transfer and in accordance with the trade-union agreements to which that contract referred, 940 employees were transferred into the service of the transferee. 518 other employees remained in the service of the transferring company; however, the employment relationship of the latter employees was suspended and the Cassa Integrazione Guadagni Straordinaria (CIES) assumed responsibility for their pay.
- 4 The plaintiffs in the main proceedings, who are amongst those 518 employees, applied to the Pretore di Milano for a declaration that their employment relationship had continued with the transferor, in application of the first paragraph of Article 2112 of the Italian Civil Code, which provides that: 'Where an undertaking is transferred, contracts of employment shall continue to be valid as against the transferee unless the transferor has given the required notice and employees shall retain the rights flowing from the seniority acquired before the transfer'.

- 5 The defendant companies opposed the application. They relied on a provision of national legislation according to which, in the case of undertakings placed under special administration, the aforementioned provision of the Civil Code did not apply to staff who were not transferred at the same time as the undertaking.
- 6 Considering that the resolution of the dispute required an interpretation of the Directive, the Pretore di Milano decided to stay the proceedings until the Court had given a preliminary ruling on the following questions:
 - ‘1. Does the first subparagraph of Article 3(1) of Directive 77/187/EEC provide for the automatic transfer to the transferee of the employment relationships relating to the transferred undertaking and in existence at the time of its transfer?
 2. Is the aforementioned Directive applicable to transfers of businesses made by undertakings under special administration?’
- 7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case before the national court, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

- 8 By this question the national court seeks to determine whether Article 3(1) of the Directive is to be interpreted as meaning that all the contracts or relationships of employment existing at the time of the transfer of an undertaking between the transferor and the employees of that undertaking are automatically transferred to the transferee by the mere fact of the transfer.
- 9 As this Court held in its judgment in Joined Cases 144/87 and 145/87 *Harry Berg and Another v Ivo Marten Besselsen* [1988] ECR 2559, paragraphs 12 and 13, the Directive is intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the new employer

on the same conditions as those agreed with the transferor. The rules applicable in the event of a transfer of an undertaking or a business to another employer are thus intended to safeguard, in the interests of the employees, the existing employment relationships which form part of the economic entity transferred.

- 10 It also follows from the Court's case-law (judgment in Case 186/83 *Arie Botzen and Others v Rotterdamsche Droogdok Maatschappij BV* [1985] ECR 519, paragraph 16) that Article 3(1) of the Directive covers the transferor's rights and obligations arising from a contract of employment or an employment relationship existing on the date of the transfer and entered into with employees who, in order to carry out their duties, were assigned to the part of the undertaking or business transferred.
- 11 The Court also held, in Case 324/86 *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* [1988] ECR 739, at paragraph 14, that the rules of the Directive had to be considered to be mandatory, so that it was not possible to derogate from them in a manner unfavourable to employees. The implementation of the rights conferred on employees by the Directive may not therefore be made subject to the consent of either the transferor or the transferee nor the consent of the employees' representatives or the employees themselves, with the sole reservation, as regards the workers themselves, that, following a decision freely taken by them, they are at liberty, after the transfer, not to continue the employment relationship with the new employer (judgment in Case 105/84 *Foreningen af Arbejdsledere i Danmark v Danmols Inventar A/S, in liquidation* [1985] ECR 2639, paragraph 16).
- 12 It follows that in the event of the transfer of an undertaking, the contract of employment or employment relationship between the staff employed by the undertaking transferred may not be maintained with the transferor and is automatically continued with the transferee: the question whether or not a contract or relationship of employment exists at the date of the transfer must, however, be assessed on the basis of national law (judgment in Case 101/87 *P. Bork International A/S, in liquidation, and Others v Foreningen af Arbejdsledere i Danmark* [1988] ECR 3057, paragraph 17).
- 13 In opposition to such an interpretation of the Directive, the defendants in the main proceedings and the Italian Government put forward three arguments.
- 14 First, they argue that if the Directive were interpreted in that way it would curtail freedom to carry on business.

- 15 In reply to that argument it must be observed that such a restrictive effect is inherent in the very purpose of the Directive which is to ensure that in the interests of employees the obligations arising under contracts or relationships of employment are transferred to the transferee.
- 16 In the second place, the defendants in the main proceedings and the Italian Government argue that in a case such as that now before the national court such an interpretation of the Directive would call in question agreements made with trade-union organizations concerning the detailed transfer arrangements and the number of employees to be transferred.
- 17 That argument may not be entertained since, as was indicated above, the rules of the Directive apply to all parties, including the employees' trade-union representatives, who may not derogate from them by means of agreements concluded with the transferee or the transferor.
- 18 Thirdly, it is argued that an interpretation of the Directive having the effect of preventing surplus employees of the undertaking from being maintained in the transferor's service could be less favourable to those employees either because a potential transferee might be dissuaded from acquiring the undertaking if he must retain the surplus personnel of the undertaking transferred or because the surplus personnel are dismissed and thus lose the advantages which they might have derived from the continuance of their employment relationships with the transferor.
- 19 In reply to that argument it must be pointed out that, although Article 4(1) of the Directive does state that the transfer is not in itself to constitute grounds for dismissal by the transferor or the transferee, it goes on to provide that this provision is not to 'stand in the way of dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce'. It must be added that if, in order as far as possible to prevent dismissals, national legislation lays down in favour of the transferor provisions allowing the burdens connected with the employment of surplus employees to be alleviated or removed, the Directive likewise does not stand in the way of the application of those provisions to the transferee's advantage after the transfer.

- 20 The answer to be given to the first question referred to the Court must therefore be that Article 3(1) of Council Directive 77/187/EEC of 14 February 1977 is to be interpreted as meaning that all contracts of employment or employment relationships existing on the date of the transfer of an undertaking between the transferor and the workers employed in the undertaking transferred are automatically transferred to the transferee by the mere fact of the transfer.

The second question

- 21 It is apparent from the tenor and grounds of the order for reference that, by this question, the Pretore di Milano seeks to ascertain whether the Directive is applicable to, in the words of Article 1(1) thereof, 'the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger', when the undertaking concerned is governed by provisions of the kind laid down in Decree-Law No 26 of 30 January 1979 on urgent measures for the special administration of large undertakings in critical difficulties (GURI No 36 of 6 February 1979) converted, with amendments, into Law No 95 of 3 April 1979 (GURI No 94 of 4 April 1979).
- 22 In order to answer that question it is necessary to recall the distinctions made by the Court, in particular in its judgment in Case 135/83 *H. B. M. Abels v Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 469, which are also summarized by the Pretore di Milano.
- 23 The Court held that the Directive did not apply to transfers effected in bankruptcy proceedings designed to liquidate the transferor's assets under the supervision of the competent judicial authority. It based that conclusion on the fact that the Directive contains no express provision dealing with such liquidation proceedings (paragraph 17), on the purpose of the Directive, which was to prevent the restructuring of undertakings within the common market from adversely affecting the workers in the undertakings concerned (paragraph 18) and on the existence of a serious risk of a general deterioration in working and living conditions, contrary to the social objectives of the Treaty (paragraph 23) if the Directive were to apply to transfers effected in such liquidation proceedings.
- 24 In the same judgment, the Court held, however, that the Directive was applicable to a procedure like a 'surséance van betaling' (suspension of payments), although

that procedure did have some features in common with liquidation proceedings. The Court considered that the reasons which justified not applying the Directive in the case of liquidation proceedings were not valid when the procedure in question involved court supervision more limited than in liquidation proceedings and when its purpose was primarily to safeguard the assets and, where possible, to continue the business of the undertaking by means of a collective suspension of the payment of debts with a view to reaching a settlement which would ensure that the undertaking was able to continue operating in the future (paragraph 28).

- 25 Although in paragraph 28 of its judgment in the *Abels* case the Court mentions the extent of court supervision of the procedure, that reference, which is explained by the difficulty, mentioned in paragraph 12 of that judgment, of defining the concept of contractual transfer used in Article 1(1) of the Directive in view of the differences between the legal systems of the Member States, does not enable the scope of the Directive to be ascertained solely on the basis of a textual interpretation of the concept of contractual transfer, as paragraph 13 of the judgment indicates, or, consequently, its scope to be determined according to the kind of supervision exercised by the administrative or judicial authority over transfers of undertakings in the course of a specific creditors' arrangement procedure.
- 26 Given all the considerations set out in the judgment in the *Abels* case, the decisive test is therefore the purpose of the procedure in question.
- 27 The Italian Law of 3 April 1979 provides for the application by decree of the special administration procedure to undertakings which it defines. Under that Law, the decree has, or may have, two kinds of effects.
- 28 On the one hand, for the application 'in all its effects' of the Law on Insolvency, it must be assimilated to the decree ordering compulsory administrative liquidation as provided for by Article 195 et seq. and Article 237 of the Law on Insolvency. It is apparent from those latter provisions taken together that, save for the particular features specific to it, compulsory administrative liquidation has effects which in substance are identical to those of bankruptcy proceedings.

- 29 Secondly, the decree ordering the special administration procedure to be applied may also authorize the undertaking to continue trading under the supervision of an auditor for a period to be determined according to the detailed provisions of the Law. According to Article 2 of the Law of 3 April 1979, the powers of that auditor include the power to draw up a programme whose implementation must be authorized by the supervisory authority and which must comprise, as far as is possible and taking account of creditors' interests, 'a restructuring plan compatible with the trends of industrial policy, and specify the plants to be brought back into operation and those to be expanded as well as the plants or business units to be transferred'.
- 30 It is apparent from the foregoing that legislation like the Italian Law on the special administration of large undertakings in critical difficulties has different characteristics depending on whether or not the decree ordering compulsory administrative liquidation authorizes the undertaking to continue trading.
- 31 If no decision is taken on that last matter or if the period of validity of a decision authorizing the undertaking to continue trading has expired, the aim, consequences and risks of a procedure such as the compulsory administrative liquidation procedure are comparable to those which led this Court to conclude, in its judgment in the *Abels* case, that Article 1(1) of the Directive did not apply to transfers of an undertaking, business or part of a business in a situation in which the transferor had been adjudged insolvent. Like insolvency proceedings, that procedure is designed to liquidate the debtor's assets in order to satisfy the body of creditors, and transfers effected under this legal framework are consequently excluded from the scope of the Directive. As the Court pointed out in its judgment in *Abels*, without that exclusion, a serious risk of a general deterioration in the living and working conditions of workers, contrary to the social objectives of the Treaty, could not be ruled out.
- 32 On the other hand, it is apparent from the provisions of the Italian Law that when the decree ordering the application of the special administration procedure also authorizes the undertaking to continue trading under the supervision of an auditor, the primary purpose of that procedure is to give the undertaking some stability allowing its future activity to be safeguarded. The social and economic objectives thus pursued cannot explain nor justify the circumstance that, when all

or part of the undertaking concerned is transferred, its employees lose the rights which the Directive confers on them under the conditions which it lays down.

- 33 In this regard, the national court points out in particular in its order for reference that the report on Decree-Law No 26/1979 states that the purpose of the procedure is to rescue the parts of an undertaking which are basically sound, that an undertaking under special administration may, for the purpose of resuming operations and supplementing plant, land and industrial equipment, obtain loans whose repayment is guaranteed by the State and, finally, that under the special administration procedure the protection of creditors' interests is less extensive than in other liquidation procedures and that, in particular, creditors are not involved in decisions concerning the continued operation of the undertaking.
- 34 The answer to the second question must therefore be that Article 1(1) of Council Directive 77/187/EEC of 14 February 1977 does not apply to transfers of undertakings made as part of a creditors' arrangement procedure of the kind provided for in the Italian legislation on compulsory administrative liquidation to which the Law of 3 April 1979 on special administration for large undertakings in critical difficulties refers. However, that provision of that directive does apply when, in accordance with a body of legislation such as that governing special administration for large undertakings in critical difficulties, it has been decided that the undertaking is to continue trading for as long as that decision remains in effect.

Costs

- 35 The costs incurred by the French Government, the Italian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Pretore di Milano, by order of 23 October 1989, hereby rules:

1. Article 3(1) 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 is to be interpreted as meaning that all contracts of employment or employment relationships existing on the date of the transfer of an undertaking between the transferor and the workers employed in the undertaking transferred are automatically transferred to the transferee by the mere fact of the transfer.
2. Article 1(1) of Council Directive 77/187/EEC of 14 February 1977 does not apply to transfers of undertakings made as part of a creditors' arrangement procedure of the kind provided for in the Italian legislation on compulsory administrative liquidation to which the Law of 3 April 1979 on special administration for large undertakings in critical difficulties refers. However, that provision of that directive does apply when, in accordance with a body of legislation such as that governing special administration for large undertakings in critical difficulties, it has been decided that the undertaking is to continue trading for as long as that decision remains in force.

Due	Mancini	Moitinho de Almeida	Rodríguez Iglesias
	Díez de Velasco	Slynn	Kakouris
Joliet	Schockweiler	Grévisse	Zuleeg

Delivered in open court in Luxembourg on 25 July 1991.

J.-G. Giraud
Registrar

O. Due
President