

JUDGMENT OF THE COURT (Fifth Chamber)
7 December 1995 *

In Case C-472/93,

REFERENCE to the Court under Article 177 of the EC Treaty by the Pretore di Lecce (Italy) for a preliminary ruling in the proceedings pending before that court between

Luigi Spano and Others

and

(1) Fiat Geotech SpA

(2) Fiat Hitachi Excavators SpA (formerly Fiat Hitachi Construction Equipment SpA)

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 (OJ 1977 L 61, p. 26),

* Language of the case: Italian.

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet (Rapporteur), acting as President of the Chamber, J. C. Moitinho de Almeida, C. Gulmann, P. Jann and L. Sevón, Judges,

Advocate General: G. Cosmas,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mr Spano and others, plaintiffs in the main proceedings, by Francesco Galluccio Mezio and Giuseppe Galluccio, of the Lecce Bar,
- Fiat Geotech and Fiat Hitachi Excavators, defendants in the main proceedings, by Cataldo Motta, of the Lecce Bar, Germano Dondi and Renzo Maria Morresi, of the Bologna Bar, and Alberto Dal Ferro, of the Vicenza Bar,
- the Commission of the European Communities, by Nicola Anecchino, of its Legal Service, and José Juste Ruiz, a national civil servant on secondment to that Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Spano and others, represented by Francesco Galluccio Mezio and Giuseppe Galluccio, Fiat Geotech and Fiat Hitachi Excavators, represented by Germano Dondi, Renzo Maria Morresi and Alberto Dal Ferro, and the Commission, represented by Nicola Anecchino and Horstpeter Kreppel, a national civil servant on secondment to the Commission, at the hearing on 29 June 1995,

after hearing the Opinion of the Advocate General at the sitting on 17 October 1995,

gives the following

Judgment

- 1 By order of 2 December 1993, received at the Court on 17 December 1993, the Pretore di Lecce (Magistrate's Court, Lecce) referred to the Court for a preliminary ruling under Article 177 of the EC 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 (OJ 1977 L 61, p. 26, hereinafter 'the directive').
- 2 Those questions were raised in the course of proceedings between Mr Spano and several other employees against Fiat Geotech and Fiat Hitachi Construction Equipment, now Fiat Hitachi Excavators ('Fiat Hitachi'), concerning the application of the trade-union agreement concluded on 11 November 1992 between Fiat Geotech, on the one hand, and the relevant trade unions belonging to the confederations that were most representative at national level and the various representatives of the employees' association at its Lecce plant, on the other hand ('the agreement').
- 3 The agreement, which was designed to absorb structural surpluses in the workforce brought about by a significant fall in demand for earth-moving equipment produced by the Lecce plant, was concluded within the framework of the trade-union consultation procedure provided for by Article 47 of Law No 428 of 29 December 1990 laying down provisions for the fulfilment of the obligations

arising from Italy's membership of the European Communities — the 1990 Community Law (GURI, 1991 supplement, No 10, hereinafter 'the 1990 Law').

- 4 Article 47 of the 1990 Law amends the legislation transposing the directive into Italian law. Article 47(5) introduces a derogation from Article 2112 of the Italian Civil Code, which provides that, in the event of the transfer of an undertaking, employment relationships are to continue to exist with the new owner and that the employees' rights under those relationships are to be preserved.

- 5 Article 47(5) provides as follows:

'Where the transfer concerns an undertaking or production unit declared by the CIPI, pursuant to Article 2(5)(c) of Law No 675 of 12 August 1977, to be in critical difficulties, or an undertaking which has been declared insolvent or is the subject of an approved composition consisting in the disposal of assets, or an undertaking the compulsory liquidation of which has been published or which has been made subject to the special administration procedure — whether or not provision has been made for the continuation of the business or the consultation referred to in the foregoing paragraphs has resulted in any agreement providing for the continued employment of personnel, even in part —, Article 2112 of the Civil Code shall not, unless the agreement lays down more favourable conditions, apply to employees whose employment relationship continues with the transferee. Such an agreement may additionally provide that surplus personnel are to be excluded from the transfer and that the latter are to continue, wholly or in part, in the service of the transferor.'

- 6 A finding by the Comitato di Ministri per il Coordinamento della Politica Industriale (Ministerial Committee for the Coordination of Industrial Policy, hereinafter 'CIPI') pursuant to Article 2(5)(c) of Law No 675 of 12 August 1977 laying down measures for the coordination of industrial policy, restructuring, conversion and development in the relevant sector ('the 1977 Law') that an undertaking is in critical difficulties enables the remuneration of the employees of the undertaking concerned to be taken over, either wholly or in part, by the Cassa Integrazione

Guadagni — Gestione Straordinaria (Special Department of the Wage Supplement Fund, hereinafter 'CIGS').

7 The agreement concluded by Fiat Geotech provided for:

- (a) the transfer of the Lecce plant to Fiat Hitachi, which was formed in order to take over the plant and to continue production (albeit on a reduced scale) from 1 January 1993;
- (b) the submission by Fiat Geotech to the competent official authorities of an application for a declaration, pursuant to Article 2(5)(c) of the 1977 Law, that the Lecce plant was facing particularly critical difficulties, having regard to the local employment situation and the production situation in the sector;
- (c) the transfer into the service of Fiat Hitachi, under Article 47(5) of the 1990 Law, of 600 of the 1 355 persons employed in the Lecce plant. Those 600 employees were to be chosen in accordance with the technical, organizational and production requirements of the transferee;
- (d) the continuation in the service of Fiat Geotech of the remaining 755 employees, including the plaintiffs in the main action, and their registration with the CIGS.

8 In pursuance of the agreement, the plaintiffs in the main action remained in the employment of Fiat Geotech and were placed under the full responsibility of the CIGS with effect from 1 January 1993.

- 9 Fearing that they would be dismissed at the end of their period of registration with the CIGS, the plaintiffs in the main action applied to the Pretore di Lecce for a declaration that the agreement was void and for an order for the transfer of their employment relationship to Fiat Hitachi, the transferee of the Lecce plant, pursuant to Article 2112 of the Civil Code.

- 10 Fiat Geotech and Fiat Hitachi, the defendants in the main proceedings, maintained that the agreement was valid, since it had been concluded in accordance with Article 47(5) of the 1990 Law.

- 11 The national court proceeded to consider whether, in so far as Article 47(5) departed from the principle of the automatic continuance of employment relationships with the transferee, it was consistent with the directive.

- 12 The national court observed, in particular, that, although this Court had held that the directive did not apply to transfers effected in proceedings for the liquidation of the transferor's assets and the collective payment of creditors, the concept of a transfer of an undertaking in critical difficulties, within the meaning of Article 2(5)(c) of the 1977 Law, covered groups of businesses or individual businesses belonging to undertakings in a state of indebtedness whose financial situation was manifestly less serious than that of an undertaking subject to a creditors' arrangement procedure, and whose operations are taken over by the transferee without any significant hiatus in production — that is to say, undertakings with real prospects of recovery, as evidenced, in particular, by the submission to the CIPI by the undertaking concerned of reorganization plans with a view to obtaining from that organization a declaration recognizing its critical position and applying the scheme for the assumption of responsibility for the employees.

13 The Pretore di Lecce consequently decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(a) Must the provisions of Directive 77/187 (in particular Article 3(1)) be interpreted as applying to transfers of undertakings, businesses or parts of businesses to another concern as a result of a contractual transfer or merger, even where the subject-matter of the transfer is a business or production unit which has been declared, under Article 47(5) of national Law No 428 of 29 December 1990, to be in critical difficulties?
- (b) Alternatively, must the exception to the applicability of Directive 77/187 already established by judgments of the Court of Justice in respect of cases where the transfer involves an undertaking which is the subject of a creditors’ arrangement procedure with a view to its liquidation, and for which no decision has been taken to continue trading, be regarded as extending to cases in which the transfer concerns an undertaking, business or production unit (not subject to a creditors’ arrangement procedure) which has been declared to be in critical difficulties within the meaning of the aforementioned Italian provision (Article 47(5) of Law No 428/1990)?’

Admissibility of the reference for a preliminary ruling

14 Fiat Geotech and Fiat Hitachi maintain that the questions referred by the national court are inadmissible, for three reasons. First of all, they are irrelevant to the submissions and arguments advanced by the parties before the national court, which concern a challenge to the validity of the trade-union agreement from the standpoint of various national provisions falling outside the scope of the directive. Second, the questions were raised by the national court of its own motion, contrary to

the applicable rules of national law. Lastly, the national court may not in any event apply the provisions of the directive to the subject-matter of the main proceedings, which is solely concerned with issues between individuals.

- 15 As regards the first of those arguments, it should be recalled that the Court has consistently held that it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the particular facts of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. A request from a national court for a preliminary ruling may be rejected if it is plain that the interpretation of Community law or the examination of the validity of a Community rule requested by that court has no bearing on the actual facts or subject-matter of the case before the national court (see, in particular, the judgment in *Joined Cases C-332/92, C-333/92 and C-335/92 Eurico Italia and Others* [1994] ECR I-711, paragraph 17). In the present case, the interpretation of Community law requested by the national court is not manifestly unconnected with the subject-matter of the main proceedings, since it affects the application, in this litigation, of a provision of national law on which the defendants in those proceedings rely.
- 16 As regards the second of those arguments, it is sufficient to recall that the Court has also consistently held (see, in particular, paragraph 13 of the judgment in *Eurico Italia*, cited above) that, in view of the distribution of functions between itself and the national courts, it is not for the Court to determine whether the decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organization and procedure of the courts.
- 17 As regards the third argument, which reflects the doubts expressed by the Commission in its observations on the applicability of the directive to the issues in the main proceedings, it should be noted that, whilst the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual (see, in particular, the judgment in *Case C-91/92 Faccini Dori* [1994] ECR I-3325, paragraph 20), it has also held that, when applying national law, whether adopted before or after the

directive, the national court called upon to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the Treaty (judgment in *Faccini Dori*, paragraph 26).

- 18 In the main proceedings, the national court is seeking to determine the extent to which national law, more particularly Article 2112 of the Civil Code, can be applied in conformity with the directive.
- 19 The questions referred for a preliminary ruling are therefore admissible.

Substance

- 20 It is apparent from the grounds of the order for reference that, by the questions referred for a preliminary ruling, the Pretore di Lecce seeks to ascertain whether the directive is applicable to the transfer of an undertaking which under Article 2(5)(c) of the 1977 Law has been declared to be in critical difficulties.
- 21 The plaintiffs in the main action and the Commission maintain that undertakings in a situation of that kind fall within the scope of the directive. They contend that, according to the case-law of the Court, and particularly the judgment in Case C-362/89 *D'Urso and Others* [1991] ECR I-4105, the decisive factor in determining whether a transfer effected in the context of an administrative or judicial procedure concerning an undertaking falls within the scope of the directive is the purpose of the procedure in question. They submit that, if the object of the procedure is the liquidation of the transferor's assets, the directive does not apply. If, on the other hand, the object of the procedure is the continuation of the transferor's business, the directive does apply. The plaintiffs in the main action and the Commission consequently maintain that undertakings declared to be in critical difficulties,

within the meaning of the 1977 Law, are those whose financial and asset situation is less serious than that of undertakings subject to a creditors' arrangement procedure aimed at the liquidation of their assets, and which may be able to continue trading.

- 22 Fiat Geotech and Fiat Hitachi maintain for their part that, particularly in its judgments in Case 135/83 *Abels* [1985] ECR 469 and *D'Urso*, cited above, the Court has excluded from the scope of the directive undertakings which are subject to procedures for the satisfaction of interests other than those of the transferor or the transferee, such as those of the creditors of the undertaking. They contend that undertakings in critical difficulties, within the meaning of the 1977 Law, fulfil that criterion, since they are not transferred merely pursuant to a voluntary agreement between the transferor and the transferee: an administrative measure and the agreement of the trade unions are also involved.
- 23 Those companies argue in the alternative that Article 47(5) of the 1990 Law constitutes a provision more favourable to employees, within the meaning of Article 7 of the directive. They maintain that Article 47(5) of the 1990 Law encourages the transfer of undertakings and limits dismissals, thereby preserving employees' jobs in accordance with the objectives of the directive.
- 24 The Court has held that, for the purposes of determining whether the transfer of an undertaking subject to an administrative or judicial procedure falls within the scope of the directive, the determining factor to be taken into consideration is the purpose of the procedure in question (judgment in *D'Urso*, paragraph 26).
- 25 As the Commission and the plaintiffs in the main proceedings maintain, it is clear from the case-law of the Court that the directive does not apply to transfers taking place in proceedings for the liquidation of the transferor's assets, such as insolvency proceedings (see the judgment in *Abels*, cited above) or compulsory

administrative liquidation under Italian Law (see the judgment in *D'Urso*), but it does apply to the transfer of an undertaking subject to a procedure aimed at ensuring the continuation of its business, such as the 'surséance van betalen' procedure under Netherlands Law (judgment in *Abels*) or the special administration procedure under Italian Law in respect of large undertakings in critical difficulties, where it has been decided that the undertaking is to continue trading for so long as that decision remains in effect (see the judgment in *D'Urso*).

- 26 It appears from the order for reference and the written replies to the Court's questions that the purpose of a declaration that an undertaking is in critical difficulties is to enable the undertaking to retrieve its economic and financial situation, but above all to preserve jobs. A declaration by the CIPI that an undertaking is in critical difficulties, which is based on assessments of both an economic and financial nature and a social nature, is thus conditional on the submission of a recovery plan, which must include measures to resolve the employment problems. Such a declaration allows the undertaking to have the CIGS temporarily assume responsibility for the remuneration of all or some of its employees.
- 27 The national court states that the undertakings declared by the CIPI to be in critical difficulties are undertakings whose economic situation is such as to permit the continuation, without any significant hiatus, of their production activities, and who have real prospects of recovery.
- 28 Consequently, an undertaking found to be in critical difficulties is subject to a procedure which, far from being aimed at the liquidation of the undertaking, is designed on the contrary to promote the continuation of its business with a view to its subsequent recovery.

- 29 In particular, by contrast with insolvency proceedings, the procedure whereby an undertaking is declared to be in critical difficulties does not involve any judicial supervision or any measure whereby the assets of the undertaking are put under administration, and does not provide for any suspension of payments.
- 30 The economic and social objective pursued by that procedure cannot explain or 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 (see, by analogy, the judgment in *D'Urso*, paragraph 32).
- 31 Nor does the fact, relied on in their observations by the defendants in the main action, that the application of Article 47(5) of the 1990 Law is conditional on the employees' representatives agreeing to the preservation, even in part, of jobs cause the transfer of the undertaking to fall outside the rules laid down by the directive.
- 32 The Court has previously held, in paragraph 11 of its judgment in *D'Urso*, that those rules had to be regarded as mandatory, so that it was not possible to derogate from them in a manner unfavourable to employees, and that 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 employees themselves, that, following a decision freely taken by them, they are at liberty, after the transfer, not to continue in the employment relationship with the new employer. As the Court stated in paragraph 17 of that judgment, 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 transferor or the transferee.
- 33 Lastly, a provision such as Article 47(5) of the 1990 Law, the effect of which is to deprive the employees of an undertaking of the guarantees afforded to them by the

directive, cannot be regarded as a provision which is more favourable to employees, within the meaning of Article 7 of that directive.

34 Indeed, the Court has previously rejected a similar argument in paragraphs 18 and 19 of its judgment in *D'Urso*. In that case it was 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 had to retain the surplus personnel of the undertaking transferred or because the surplus personnel would be dismissed and thus lose the advantages which they might have derived from the continuance of their employment relationships with the transferor.

35 The Court pointed out, in reply to that argument, that, although Article 4(1) of the directive did state that the transfer was not in itself to constitute grounds for dismissal by the transferor or the transferee, it went on to provide that this provision was not to 'stand in the way of dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce'. It added that if, in order as far as possible to prevent dismissals, national legislation laid 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 did not stand in the way of the application of those provisions to the transferee's advantage after the transfer.

36 The answer to be given to the questions referred for a preliminary ruling must therefore be that the directive is applicable to the transfer of an undertaking which under Article 2(5)(c) of the 1977 Law has been declared to be in critical difficulties.

Costs

- 37 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Pretore di Lecce by order of 2 December 1993, hereby rules:

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 applicable to the transfer of an undertaking which under Article 2(5)(c) of Italian Law No 675 of 12 August 1977 has been declared to be in critical difficulties.

Puissochet

Moitinho de Almeida

Gulmann

Jann

Sevón

Delivered in open court in Luxembourg on 7 December 1995.

R. Grass

Registrar

J.-P. Puissochet

acting as President of the Fifth Chamber