JUDGMENT OF THE COURT
8 June 1994 *

In Case C-382/92,

Commission of the European Communities, represented by Karen Banks, of the Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, also of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented initially by Sue Cochrane and subsequently by John E. Collins, of the Treasury Solicitor's Department, acting as Agent, and Derrick Wyatt QC, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

defendant,

APPLICATION for a declaration that, by failing to transpose correctly into national law various provisions 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), the United Kingdom has failed to fulfil its obligations under the EEC Treaty,

* Language of the case: English.

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida and M. Diez de Velasco (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse (Rapporteur), P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: W. Van Gerven,
Registrar: J.-G. Giraud,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 January 1994,

after hearing the Opinion of the Advocate General at the sitting on 2 March 1994,

gives the following

Judgment

1 By application lodged at the Court Registry on 21 October 1992, the Commission of the European Communities brought proceedings under Article 169 of the EEC Treaty for a declaration that, by failing to transpose correctly into national law various provisions 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, the United Kingdom has failed to fulfil its obligations under the Treaty.

2 The directive, which is based in particular on Article 100 of the Treaty, is intended to 'provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded' (second recital in the preamble). It notes that there are still differences in the Member States as regards the extent of the protection of employees in this respect and that such differences ought to be reduced (third recital). It points out that those differences can have a direct effect on the functioning of the common market (fourth recital) and for that reason regards it as necessary to 'promote the approximation of laws in this field while maintaining the improvement described in Article 117 of the Treaty' (fifth recital).

3 Article 1(1) provides that the directive is to 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'.

4 Article 3 of the directive provides that the rights and obligations arising from a contract of employment or an employment relationship are, by reason of such transfer alone, transferred to the transferee. Under Article 4, the transfer of the undertaking cannot constitute a ground for dismissal by the transferor or the transferee. Article 5 provides protection, under certain conditions, for the status and function of the representatives of the employees affected by the transfer. Finally, Article 6 of the directive imposes on the transferor and the transferee certain duties to inform and consult employees affected by a transfer.

5 Member States were required under Article 8 to comply with the directive within two years of its notification. Since the directive was notified to the United Kingdom on 16 February 1977, that period expired on 16 February 1979.

6 The provisions of the directive were transposed in the United Kingdom by the Transfer of Undertakings (Protection of Employment) Regulations 1981 ('the UK

Regulations'). Those Regulations were amended in certain respects by the Trade Union Reform and Employment Rights Act 1993 after the present proceedings had been instituted.

7 The Commission takes the view that the United Kingdom has failed to fulfil its obligations under the directive and Article 5 of the Treaty for the following reasons. First, the UK Regulations do not ensure that the representatives of employees will be informed and consulted in all the cases envisaged by the directive since neither the UK Regulations nor any other provision of United Kingdom law provide for the designation of employee representatives where an employer refuses to recognize them. Second, the scope of the UK Regulations is limited to situations in which the business transferred is owned by the transferor. Third, the UK Regulations do not apply to non-profit-making undertakings. Fourth, the UK Regulations do not require a transferor or transferee who is contemplating measures in respect of his employees to consult their representatives in good time with a view to seeking agreement. Fifth, the UK Regulations do not provide for effective sanctions against an employer who fails to comply with the obligation to inform and consult employee representatives as required by the directive.

The first complaint

8 The Commission's first complaint relates to the transposition of Article 6 of the directive by United Kingdom law.

9 Article 6 of the directive requires a transferor and transferee to inform the representatives of their respective employees affected by a transfer of the reasons for the transfer, its legal, economic and social implications and the measures envisaged in relation to the employees. The transferor is required to give such information to the representatives of his employees in good time before the transfer is carried out.

The transferee is required to give such information to the representatives of his employees in good time and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment (Article 6(1)). If the transferor or transferee envisages measures in relation to his employees, he is required to consult the representatives of his employees in good time on such measures with a view to seeking agreement (Article 6(2)).

10 Member States may limit the obligations laid down in paragraphs 1 and 2 of Article 6 to transfers which give rise to a change in the business likely to entail serious disadvantages for a considerable number of employees if national legislation provides that employee representatives may have recourse to an arbitration board to obtain a decision on the measures to be taken in relation to employees (Article 6(3)). Member States may limit the obligations laid down in paragraphs 1, 2 and 3 to undertakings or businesses which, in respect of the number of employees, fulfil the conditions for the election or designation of a collegiate body representing the employees (Article 6(4)) . Finally, Member States may provide that where there are no representatives of the employees in an undertaking or business the employees concerned must be informed in advance when a transfer is about to take place (Article 6(5)) .

11 Under Article 2(c) of the directive, the term 'representatives of the employees' is to be understood for the purposes of the directive as meaning 'the representatives of the employees provided for by the laws or practice of the Member States, with the exception of members of administrative, governing or supervisory bodies of companies who represent employees on such bodies in certain Member States'.

12 The Commission claims that the United Kingdom has failed to fulfil its obligations under Article 6 of the directive in not providing a mechanism for the designation of employee representatives in an undertaking where the employer refuses to recognize such representatives. According to the Commission, for Article 6 of the directive to be effective, Member States must take all appropriate measures to

ensure, subject to any exceptions, that employee representatives are designated in an undertaking, failing which the obligations to inform and consult laid down in Article 6 of the directive cannot be satisfied. It argues that by preventing the designation of employee representatives in an undertaking where the employer is not in agreement, United Kingdom law fails to satisfy that requirement.

13 The United Kingdom acknowledges that employee representation in undertakings within the United Kingdom has traditionally been based on voluntary recognition of trade unions by employers and for that reason an employer who does not recognize a trade union is not subject to the obligations to inform and consult set out in Article 6 of the directive. However, it contends that the directive was not intended to amend national rules or practices on designating employee representatives. It points out that Article 2(c) of the directive provides that the term 'representatives of the employees' is to be understood as meaning the representatives of the employees 'provided for by the laws or practice of the Member States'. It also argues that the directive is limited to a partial harmonization of the rules relating to employee protection at the time of the transfer of an undertaking, that it does not require Member States to provide for specific representation of employees in order to comply with the obligations which it lays down and that the Community legislature itself envisaged the possibility that national law might not require employee representation within a transferred undertaking, as is clear from Article 6(5) of the directive.

14 The United Kingdom's point of view cannot be accepted.

15 By harmonizing the rules applicable to the safeguarding of employees' rights in the event of transfers of undertakings, the Community legislature intended both to ensure comparable protection for employees' rights in the different Member States and to harmonize the costs which those protective rules entail for Community undertakings.

16 To that end, paragraphs 1 and 2 of Article 6 of the directive lay down the principle of compulsory information and, where appropriate, consultation of employee representatives by both the transferor and the transferee, subject to the exceptions provided for in particular by Article 6(4).

17 Under Article 8(1), Member States had a period of two years from the date of notification of the directive in which to amend, if necessary, their national law in order to bring it into line with the directive on that point.

18 Contrary to the United Kingdom's contention, the wording of Article 2(c) of the directive does not cast any doubt on the interpretation of Article 6. Article 2(c) is not simply a *renvoi* to the rules in force in the Member States on the designation of employee representatives. It leaves to Member States only the task of determining the arrangements for designating the employee representatives who must be informed and consulted under Article 6(1) and (2).

19 The interpretation proposed by the United Kingdom would allow Member States to determine the cases in which employee representatives can be informed and consulted, since they can be informed and consulted only in undertakings where national law provides for the designation of employee representatives. It would thus allow Member States to deprive Article 6 of the directive of its full effect.

20 The Court has already held, in particular in its judgment in Case 61/81 *Commission* v *United Kingdom* [1982] ECR 2601, that national legislation which makes it possible to impede protection unconditionally guaranteed to employees by a directive is contrary to Community law.

21 Against that, the United Kingdom argues that it follows from the very wording of Article 6(5) of the directive that the Community legislature envisaged the possibility that national legislation or practice might not provide for employee representation in circumstances other than the very limited cases contemplated by the Commission since it authorized Member States, without any restriction, to provide that the employees concerned may be directly informed in advance when a transfer is about to take place where there are no employee representatives in an undertaking or business.

22 Article 6(5) of the directive does, admittedly, envisage the possibility of there not being any employee representatives in an undertaking or business. However, that provision cannot be read in isolation and independently of the other provisions of Article 6.

23 As mentioned above, paragraphs 1 and 2 of Article 6 of the directive lay down the obligation to inform and consult employee representatives in the event of the transfer of an undertaking. Paragraphs 3 and 4 of Article 6 specify the cases in which Member States may, under certain conditions, limit that obligation. Paragraph 4, in particular, allows Member States to exempt from that obligation undertakings or businesses which, in respect of the number of their employees, do not fulfil the conditions for the election or designation of a collegiate body representing employees. In order to prevent employees being thereby deprived of all protection, paragraph 5 of Article 6 allows Member States to provide that employees must none the less be informed in advance when a transfer is about to take place.

24 The intention of the Community legislature was not therefore to allow the different national legal systems to accept a situation in which no employee representatives are designated since such designation is necessary to ensure compliance with the obligations laid down in Article 6 of the directive.

25 The United Kingdom also submits that the directive does not require Member States to provide a specific mechanism for employee representation merely in order to comply with the requirements of the directive where an undertaking has no employee representatives by virtue of national law.

26 While it is true that the directive does not contain any provision designed expressly to deal with such a case, that has no bearing on the combined effect of Articles 6 and 8 of the directive, which require Member States to take all measures necessary to ensure that employees are informed and consulted through their representatives in the event of the transfer of an undertaking.

27 Finally, the United Kingdom cannot rely on the fact that the directive only partially harmonizes the rules for the protection of employees and was not designed to amend national rules on employee representation.

28 Admittedly, the directive achieves only partial harmonization of the rules for the protection of employees in the event of a change of employer (see, in particular, the judgments in Case 105/84 *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar* [1985] ECR 2639, paragraph 26, and in Case 324/86 *Foreningen af Arbejdsledere i Danmark* v *Daddy's Dance Hall* [1988] ECR 739, paragraph 16) and is for that reason not designed to bring about full harmonization of national systems for the representation of employees in an undertaking. However, the limited character of such harmonization cannot deprive the provisions of the directive, and especially Article 6, of their effectiveness. In particular, it cannot prevent Member States from being required to take all appropriate measures to ensure that employee representatives are designated with a view to the provision of information and consultations provided for by Article 6.

29 The United Kingdom itself recognizes that, as United Kingdom law now stands, employees affected by the transfer of an undertaking do not enjoy protection

under Article 6 of the directive in cases where an employer objects to employee representation in his undertaking.

30 In those circumstances, United Kingdom law, which allows an employer to frustrate the protection provided for employees by Article 6(1) and (2) of the directive, must be regarded as contrary to Article 6 thereof (see, by way of analogy, the judgment in *Commission* v *United Kingdom*, cited above).

31 The Commission's first complaint must therefore be upheld.

The second complaint

32 In its second complaint, the Commission argues that the UK Regulations, as interpreted by courts and tribunals in the United Kingdom, do not apply to transfers which do not involve the transfer of the property of an undertaking, contrary to Article 1(1) of the directive, as interpreted by the Court. The Commission refers on this point to the judgment in Case 287/86 *Landsorganisationen i Danmark for Tjenerforbundet i Danmark* v *Ny Mølle Kro* [1987] ECR 5465 and to the judgment in *Daddy's Dance Hall*, cited above.

33 The United Kingdom submits that since, according to the case-law of the House of Lords, the UK Regulations must be interpreted in accordance with the directive and the Court's interpretation of it, their scope is the same as that of the directive, even if the Regulations do not expressly state that a transfer thereunder does not necessarily involve the transfer of the property of the undertaking.

34 Regulation 3 provides that the UK Regulations apply to the 'transfer from one person to another of an undertaking situated immediately before the transfer in the United Kingdom or a part of one which is so situated'.

35 That provision does not in itself exclude from the scope of the UK Regulations changes of employers which do not involve a transfer of the property of the undertaking.

36 Moreover, the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (see the judgment in Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others* v *Konstantinidis and Others* [1992] ECR I-6577, paragraph 39).

37 The decisions of United Kingdom courts and tribunals relied on by the Commission in support of its second complaint predate the judgment of the House of Lords cited by the United Kingdom, which was delivered on 16 March 1989 and which, as the Commission concedes, holds that the UK Regulations must, as far as possible, be interpreted in accordance with the wording and objectives of the directive and with the Court's interpretation thereof. The Commission does not cite any judicial decision which is later than that judgment and incompatible with Article 1(1) of the directive, as interpreted by the Court.

38 In those circumstances, the Commission has failed to establish that on 26 May 1991, the date on which the period set in the reasoned opinion expired, Regulation 3 had the scope attributed to it by the Commission.

39 The Commission's second complaint must therefore be rejected.

The third complaint

40 The Commission argues in its third complaint that the UK Regulations, as interpreted by courts and tribunals in the United Kingdom, do not apply to non-profit-making undertakings, contrary to Article 1(1) of the directive, as interpreted by the Court. The Commission refers in this connection to the judgment in Case C-29/91 *Dr Sophie Redmond Stichting* v *Bartol and Others* [1992] ECR I-3189.

41 Regulation 2(1) defines an 'undertaking' as including 'any trade or business' but expressly excludes 'any undertaking or part of an undertaking which is not in the nature of a commercial venture'. According to the Commission, whose contentions have not been seriously challenged by the United Kingdom, the UK Regulations must be interpreted as not applying to transfers of non-profit-making undertakings.

42 The United Kingdom submits that the directive cannot apply, as the Commission claims, to transfers of non-profit-making undertakings on the ground that such undertakings, which are not engaged in 'economic activities' within the meaning of the Treaty, do not come within its scope.

43 That argument must be rejected.

44 The Court has already accepted, at least implicitly, in the context of competition law (judgment in Case C-41/90 *Höfner and Elser* v *Macrotron* [1991] ECR I-1979) or social law (see, in fact, for the application of the directive, the judgment in *Red-*

mond Stichting, cited above), that a body might be engaged in economic activities and be regarded as an 'undertaking' for the purposes of Community law even though it did not operate with a view to profit.

45 It follows from those judgments that the fact that an undertaking is engaged in non-profit-making activities is not in itself sufficient to deprive such activities of their economic character or to remove the undertaking from the scope of the directive.

46 Accordingly, the scope of the directive cannot, as the United Kingdom contends, be limited to undertakings which operate with a view to profit.

47 It follows that by restricting the application of the national rules transposing the directive to transfers of profit-making undertakings, the United Kingdom has failed to fulfil its obligations under Article 1(1) of the directive. The Commission's third complaint is therefore well founded.

The fourth complaint

48 The Commission submits that the UK Regulations fail to transpose Article 6(2) of the directive fully, since they merely require a transferor or transferee envisaging measures in relation to employees affected by a transfer to consult the representatives of trade unions recognized by him, to take into consideration any representations made by them, to reply to those representations and, if he rejects them, to

provide reasons, whereas Article 6(2) of the directive imposes an obligation to consult representatives of the employees 'with a view to seeking agreement'.

49 The United Kingdom concedes that its legislation is at variance with the directive on this point.

50 Suffice it to note that the UK Regulations do not require a transferor or transferee who envisages measures in relation to employees affected by a transfer to consult their representatives 'with a view to seeking agreement', as required by Article 6(2) of the directive.

51 The Commission's fourth complaint must therefore be upheld.

The fifth complaint

52 The Commission submits that the sanctions provided for in Regulation 11 for failure on the part of a transferor or transferee to comply with their obligation to consult and inform employee representatives are not a sufficient deterrent for employers. It points out that any compensation which an employer may, in appropriate cases, be ordered to pay to employees under Regulation 11, which is in any event limited to a maximum amount, may be set off against a 'protective award' which the employer may also be ordered to make to employees if he fails to comply with section 99 of the Employment Protection Act 1975 ('the EPA'), which requires the employer to inform and consult employee representatives in the event of redundancies.

53 The complaint thus relates to the case where an employer transfers an undertaking or business and then dismisses employees on grounds of redundancy.

54 The United Kingdom contends that its legislation is consistent with the directive in so far as it places a ceiling on the amounts which an employer may be ordered to pay to his employees, although it accepts that it is contrary to the directive in that it provides that any compensation paid to employees may be set off in full or in part against any amounts which the employer may otherwise be required to pay to them. The United Kingdom also points out that a Bill before Parliament was designed to amend existing legislation on these two points.

55 Where a Community directive does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, while the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive (see, with regard to Community regulations, the judgments in Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraphs 23 and 24, and in Case C-7/90 *Vandevenne and Others* [1991] ECR I-4371, paragraph 11).

56 Regulation 11(4) provides that an employer who fails to consult employee representatives at the time of the transfer of an undertaking may be ordered to pay appropriate compensation to employees affected by the transfer. Under Regulation 11(11), the amount of compensation may not exceed a maximum amount which was increased from two weeks' pay for the employee in question to four weeks' pay by the Trade Union Reform and Employment Rights Act 1993.

However, according to Regulation 11(7), where an employer also dismisses employees on grounds of redundancy and fails to consult employee representatives, contrary to section 99 of the EPA, any compensation may be set off against a 'protective award' which the employer may later be ordered to make to the employee under the EPA and, conversely, a 'protective award' may be set off against any compensation which the employer may subsequently be ordered to pay to the employee.

57 Thus, when employees in a transferred undertaking are made redundant and the employer is ordered to make a 'protective award' to them for failure to comply with the obligations to consult and inform employee representatives in accordance with section 99 of the EPA, the employer will be penalized financially pursuant to the UK Regulations only to the extent that the amount of the penalty exceeds the amount of the 'protective award'. The financial penalty is accordingly weakened, if not entirely removed. In addition, the imposition of a ceiling on the amount which an employer may be ordered to pay by way of compensation under the UK Regulations, particularly at the level at which it was fixed prior to the coming into force of the Trade Union Reform and Employment Rights Act 1993, places a limit on the number of cases in which the 'protective award' may be exceeded.

58 It follows that if an employer is also found to be at fault on the basis of the EPA, the penalty is not truly deterrent. Accordingly, the United Kingdom legislation does not comply on this point with the requirements of Article 5 of the Treaty.

59 The Commission's fifth complaint must therefore be upheld.

60 It follows from all the foregoing considerations that, by failing to provide for the designation of employee representatives where an employer does not agree to it, by excluding non-profit-making undertakings from the scope of the UK Regulations, by not requiring a transferor or transferee who envisages measures in relation to his employees to consult their representatives in good time on such measures with a view to seeking agreement, and by failing to provide for effective sanctions in the event of the employer's failure to inform and consult employee representatives, the United Kingdom has failed to fulfil its obligations under the directive and under Article 5 of the EEC Treaty.

Costs

61 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, the first subparagraph of Article 69(3) provides that the Court may order that the costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads.

62 As the United Kingdom has been unsuccessful on the majority of its pleas, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by failing to provide for the designation of employee representatives where an employer does not agree to it, by excluding non-profit-**

making undertakings from the scope of the United Kingdom Regulations designed to implement 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, by not requiring a transferor or transferee who envisages measures in relation to his employees to consult their representatives in good time on such measures with a view to seeking agreement, and by failing to provide for effective sanctions in the event of the employer's failure to inform and consult employee representatives, the United Kingdom has failed to fulfil its obligations under the directive and under Article 5 of the EEC Treaty;

2. Dismisses the remainder of the application;

3. Orders the United Kingdom to pay the costs.

Due Mancini Moitinho de Almeida

Diez de Velasco Kakouris Joliet

Schockweiler Rodríguez Iglesias Grévisse

Kapteyn Murray

Delivered in open court in Luxembourg on 8 June 1994.

R. Grass

Registrar

O. Due

President