JUDGMENT OF THE COURT
8 June 1994 *

In Case C-383/92,

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 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1975 L 48, p. 29), 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 75/129/EEC of 17 February 1975 on the

approximation of the laws of the Member States relating to collective redundancies, the United Kingdom has failed to fulfil its obligations under the EEC Treaty.

2 The directive, which is based in particular on Article 100 of the EEC Treaty, is designed to ensure that 'greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community' (first recital in the preamble). It notes that, despite increasing convergence, differences still remain between the provisions in force in the Member States concerning the practical arrangements and procedures for such redundancies and the measures designed to alleviate the consequences of redundancy for workers (second recital). It points out that such differences may have a direct effect on the functioning of the common market (third recital) and for that reason considers it necessary to promote the approximation of the legislation of Member States on collective redundancies 'while the improvement is being maintained within the meaning of Article 117 of the Treaty' (fifth recital).

3 According to Article 1(1)(a), the directive applies to 'dismissals effected by an employer for one or more reasons not related to the individual workers concerned' where the number of redundancies reflects the criterion chosen by the Member State from the two set out in the directive.

4 Article 2 of the directive lays down a procedure for consulting and informing workers' representatives.

5 Articles 3 and 4 of the directive set out the rules governing the procedure for collective redundancies. Article 3 requires employers to notify the competent public authority in writing of any projected collective redundancies. Workers' representatives must be informed of such notification and may send any comments they may have to the competent public authority. Article 4 provides in particular that projected collective redundancies cannot take effect before the expiry of a 30-day

period following their notification to the public authority, which is required to use that period to seek solutions to the problems raised by such redundancies.

6 Member States were required under Article 6(1) of the directive to bring into force the laws, regulations and administrative provisions needed to comply with the directive within two years following its notification. As the directive was notified to the Member States on 19 February 1975, that period expired on 19 February 1977.

7 The directive was transposed in the United Kingdom by some of the provisions of the Employment Protection Act 1975 ('the EPA').

8 The Commission takes the view that the United Kingdom legislation fails to meet the requirements of the directive or to satisfy the obligations under Article 5 of the Treaty on the following grounds. First, the EPA does not ensure that workers' representatives will be informed and consulted in all the cases covered by the directive, since neither that statute nor any other provision of United Kingdom law provides for the designation of workers' representatives where an employer refuses to recognize them. Second, the scope of the EPA, which is limited to cases of 'redundancy', is narrower than that of the directive, which extends to all dismissals not related to the individual workers concerned. Third, the EPA does not ensure that consultation with workers will take place with a view to reaching an agreement and cover ways and means of avoiding redundancies or mitigating the consequences. Fourth, the EPA does not provide for effective sanctions against an employer who fails to comply with the obligation to inform and consult workers' representatives as required by the directive.

The first complaint

9 The Commission's first complaint concerns the transposition of Articles 2 and 3 of the directive by United Kingdom law.

10 Article 2 of the directive requires an employer contemplating collective redundancies to begin consultations with the workers' representatives with a view to reaching an agreement. Such consultations must, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and mitigating the consequences. The employer is required to supply the workers' representatives with all relevant information and must in any event give in writing the reasons for the redundancies, the number of workers to be made redundant, the number of workers normally employed and the period over which the redundancies are to be effected.

11 Article 3 of the directive requires employers to notify the competent public authority in writing of any projected collective redundancies. Such notification must contain all relevant information concerning the projected collective redundancies, the consultations with workers' representatives and the matters specified in Article 2 of the directive (Article 3(1)). A copy of this notification must be forwarded to the workers' representatives, who may send any comments they may have to the competent public authority (Article 3(2)).

12 Article 1(1)(b) of the directive provides that the term'"workers' representatives" means the workers' representatives provided for by the laws or practices of the Member States'.

13 The Commission claims that the United Kingdom has failed to fulfil its obligations under Articles 2 and 3 of the directive in not providing a mechanism for the

designation of workers' representatives in an undertaking where the employer refuses to recognize such representatives. In its view, for Articles 2 and 3 of the directive to be effective, Member States must take all measures to ensure, subject to any exceptions, that workers' representatives are designated in an undertaking, failing which the obligations to inform and consult and the right to send comments to the public authority set out in the directive cannot be satisfied. The Commission argues that by preventing the designation of workers' representatives in an undertaking where the employer is not in agreement, United Kingdom law fails to meet that requirement.

14 The United Kingdom acknowledges that representation of workers in undertakings within that Member State 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 laid down in the directive. However, it contends that the directive was not intended to amend national rules or practices concerning the designation of workers' representatives. It points out that according to Article 1(1)(b) of the directive, the term 'workers' representatives' is to be understood as meaning the workers' representatives 'provided for by the laws or practices of the Member States'. It also argues that the directive is limited to a partial harmonization of the rules for the protection of workers in the event of collective redundancies and that it does not require Member States to provide for specific representation of workers in order to comply with the obligations which it lays down.

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

16 By harmonizing the rules applicable to collective redundancies, the Community legislature intended both to ensure comparable protection for workers' rights in the different Member States and to harmonize the costs which such protective rules entail for Community undertakings.

17 To this end, Articles 2 and 3(2) of the directive lay down the principle that workers' representatives must be informed and consulted with regard to the details of projected collective redundancies and the possibility of reducing the numbers or effects of such redundancies and that those representatives must be in a position to submit any comments to the competent public authority.

18 Under Article 6(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.

19 Contrary to the United Kingdom's contention, the wording of Article 1(1)(b) of the directive does not cast any doubt on the interpretation of Articles 2 and 3(2). Article 1(1)(b) is not simply a *renvoi* to the rules in force in the Member States on the designation of workers' representatives. It leaves to Member States only the task of determining the arrangements for designating the workers' representatives who, depending on the circumstances, must or may intervene in the collective redundancy procedure under Articles 2 and 3(2).

20 The interpretation proposed by the United Kingdom would allow Member States to determine the cases in which workers' representatives may be informed and consulted and may intervene, since they can be informed and consulted and can intervene with public authorities only in undertakings where national law provides for the designation of workers' representatives. Such an interpretation would thus permit Member States to deprive Articles 2 and 3(2) of the directive of their full effect.

21 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 workers by a directive is contrary to Community law.

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

23 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 2, 3 and 6 of the directive, which require Member States to take all measures necessary to ensure that workers are informed, consulted and in a position to intervene through their representatives in the event of collective redundancies.

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

25 Admittedly, the directive carries out only a partial harmonization of the rules for the protection of workers in the event of collective redundancies (see, in that connection, the judgment in Case 284/83 *Dansk Metalarbejderforbund* v *Nielsen & Søn* [1985] ECR 553) and is for that reason not designed to bring about full harmonization of national systems of worker representation in undertakings. However, the limited character of such harmonization cannot deprive the provisions of the directive, and especially Articles 2 and 3, of their effectiveness. In particular, it cannot prevent Member States from being required to take all appropriate measures to ensure that workers' representatives are designated with a view to complying with the obligations laid down in Articles 2 and 3.

26 The United Kingdom itself recognizes that, as United Kingdom law now stands, workers affected by collective redundancies do not enjoy protection under Articles 2 and 3 of the directive in cases where an employer objects to worker representation in his undertaking.

27 In those circumstances, United Kingdom law, which allows an employer to frustrate the protection provided for workers by Articles 2 and 3 of the directive, must be regarded as contrary to those articles (see, by way of analogy, the judgment in *Commission* v *United Kingdom*, cited above).

28 It follows that the Commission's first complaint must be upheld.

The second complaint

29 The Commission submits that the provisions of the EPA are narrower in scope than the directive. It argues that the EPA applies, according to sections 99 and 100, only to cases of 'redundancy', that is to say, according to the interpretation of that term by the courts and tribunals of the United Kingdom, to cases where there is a cessation or reduction of the business of an undertaking or a decline in demand for work of a particular type, whereas the directive, according to Article 1(1)(a), applies to'collective redundancies', that is to say, dismissals for one or more reasons not related to the individual workers concerned, which covers cases other than 'redundancy'.

30 In its reply to the Commission's letter of formal notice, the United Kingdom conceded that United Kingdom law failed to give full effect to the directive on this point.

31 According to Article 1(1)(a) of the directive, the term'"collective redundancies" means dismissals effected by an employer for one or more reasons not related to the individual workers concerned' where the number of redundancies reflects the criterion chosen by the Member State from the two set out in the directive.

32 The concept of 'redundancy', which determines the scope of the EPA and the Commission's interpretation of which has not been disputed by the United Kingdom, does not cover all the cases of'collective redundancy' covered by the directive. In particular, as the Commission points out, it does not cover cases where workers have been dismissed as a result of new working arrangements within an undertaking unconnected with its volume of business.

33 The Commission's second complaint must therefore be upheld.

The third complaint

34 The Commission submits that the EPA does not fully transpose the provisions of Article 2(1) and (2) of the directive since it merely requires an employer to consult trade union representatives about proposed dismissals, to 'consider' representations made by such representatives and, if he rejects them, to 'state his reasons', whereas Article 2(1) of the directive requires the workers' representatives to be consulted 'with a view to reaching an agreement' and Article 2(2) lays down that such consultations must 'at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and mitigating the consequences'.

35 The United Kingdom concedes that its legislation does not comply with the directive on those points.

36 Suffice it to note that the provisions of the EPA do not require an employer to consult workers' representatives 'with a view to reaching an agreement', as required by Article 2(1) of the directive, nor do they specify that such consultations must, at least, 'cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and mitigating the consequences', as required by Article 2(2).

37 The Commission's third complaint must therefore be upheld.

The fourth complaint

38 The Commission submits that the United Kingdom has failed to fulfil its obligations under Article 5 of the Treaty in so far as the sanctions provided for by the EPA for failure on the part of an employer to comply with his obligations to consult and inform the workers' representatives are not a sufficient deterrent. It points out that any compensation which an employer may, in appropriate cases, be ordered to pay to employees if he fails to consult or inform their representatives may be set off in full or in part against any amounts which he is required to pay to his employees.

39 The United Kingdom concedes that its legislation was at variance with Treaty requirements in that respect, merely pointing out that a Bill designed to remedy the situation was subsequently put before Parliament.

40 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).

41 In this case, it follows from section 102(3) of the EPA that a 'protective award' which an employer may, in an appropriate case, be ordered to make to a dismissed employee if he has failed to comply with the obligation to consult and inform the workers' representatives provided for in that statute may be set off against any amounts which he may otherwise be required to pay to that employee under the latter's contract of employment or in respect of breach of that contract, and, conversely, that any amounts so payable to the employee may be set off against a 'protective award' if the amount of that award is greater.

42 By providing that a 'protective award' may be set off in full or in part against any amounts otherwise payable by an employer to an employee under the latter's contract of employment or in respect of breach of that contract, the United Kingdom legislation largely deprives that sanction of its practical effect and its deterrent value. Moreover, an employer will not be penalized even moderately or lightly by the sanction except and only to the extent to which the amount of the 'protective award' which he is ordered to make exceeds the sums which he is otherwise required to pay to the person concerned.

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

44 It follows from all the foregoing considerations that, by failing to provide for the designation of workers' representatives where an employer does not agree to it, by laying down statutory provisions designed to implement the directive that are narrower in scope than the directive, by not requiring an employer contemplating collective redundancies to consult the workers' representatives with a view to reaching an agreement and in relation to the matters specified in the directive, and by failing to provide for effective sanctions in the event of failure to consult the workers' representatives as required by the directive, the United Kingdom has failed to fulfil its obligations under the directive and under Article 5 of the EEC Treaty.

Costs

45 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs.

46 Since the United Kingdom has been unsuccessful, 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 workers' representatives where an employer does not agree to it, by laying down statutory provisions designed to implement Council Directive 75/129/EEC of 17 Feb-**

ruary 1975 on the approximation of the laws of the Member States relating to collective redundancies that are narrower in scope than the directive, by not requiring an employer contemplating collective redundancies to consult the workers' representatives with a view to reaching an agreement and in relation to the matters specified in the directive, andby failing to provide for effective sanctions in the event of failure to consult the workers' representatives as required by the directive, the United Kingdom has failed to fulfil its obligations under the directive and under Article 5 of the EEC Treaty;

2. 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