Opinion of Advocate General Alber delivered on 18 January 2000

Renato Collino and Luisella Chiappero v Telecom Italia SpA

Reference for a preliminary ruling: Pretore di Pinerolo – Italy

Directive 77/187/EEC - Safeguarding employees' rights in the event of transfers of undertakings - Transfer of an entity managed by a public body forming part of the State administration to a private company whose capital is publicly owned - Definition of an employee - Taking into account of remployees' total length of service by the transferee

Case C-343/98

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Opinion of the Advocate-General

A – Introduction

1. The present reference for a preliminary ruling chiefly concerns the question whether Directive 77/187/EEC on the safeguarding of employees' rights in the event of transfers of undertakings may also be applied in the event of privatisation of public entities. The main issue in this regard is the interpretation of Articles 1 and 3 of the directive. Article 1 refers to a legal transfer of a company, whereas the transfer which gave rise to the dispute in the main proceedings took place under statute; Article 3 refers to employees, whereas the plaintiffs in the main proceedings were probably civil servants at the time of the transfer in 1993.

B - The law

1 - Community law

Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses

2. In the passages relevant to this case, the directive reads as follows:

Section I

Scope and definitions

Article 1

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

...

Article 2

For the purposes of this Directive:

(a) "transferor" means any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the business.

...

Section II

Safeguarding employees' rights

Article 3

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

...

2. Following the transfer within the meaning of Article 1 (1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions, with the provision that it shall not be less than one year.

...

Article 4

1. The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organizational reasons entailing changes in the work-force.

...

II - National law

3. Italy transposed the directive into national law by way of an amendment to Article 2112 of the Codice Civile (Civil Code). As the order for reference explains, the substantive scope of Article 2112 of the Codice Civile was subsequently extended to the transfer of activities from public to private bodies, unless there are special provisions specifying otherwise. In the view of the national court, Law No 58/92 of 29.1.1992 laid down in respect of the transfer of ASST's telecommunications service activities [ASST being a state enterprise] to the company then known as Iritel [a private company] special rules derogating from the general rule on transfers of undertakings contained in Article 2112, since the law, unlike Article 2112, does not provide for the employment relationship to continue. Law No 58/92 merely provides that management and labour are responsible for ensuring that former ASST employees receive, through collective bargaining, overall financial terms not less favourable than those previously enjoyed. Law No 58/92 also entitles employees of ASST to claim a length-of-service payment.

4. Law No 58/92, Article 4, provided that Iritel SpA (Iritel) was to continue employing for one year in its activities the staff previously employed by ASST. At the end of that year, those workers who had not requested to remain in the public service (where they would be assigned a new job in the public administration and within the territory of the province) would become employees of Iritel.

C - The facts

5. The plaintiffs in the main proceedings, Renato Collino and Luisella Chiappero (the plaintiffs), were employed from 6 December 1965 and 11 December 1966 respectively until 31 October 1993 by Azienda di Stato per i Servizi Telefonici (ASST), a State institution which undertook the management, installation and running of public telecommunications systems throughout the country. In the course of the privatisation of telecommunications services and the winding-up of ASST, the Minister for Posts and Telecommunications, by a decree of 29 December 1992 and on the basis of Law No 58/92, granted Iritel, a private company, an exclusive concession to take over and continue the activities previously carried on by ASST. Iritel had been founded, also on the basis of Law No 58/92, by the Instituto per la Ricostruzione Industriale (IRI), a State-owned holding company, and its entire capital was owned by the State.

6. The plaintiffs continued to be employed by Iritel with effect from 1 November 1993 in the same jobs as they had held with ASST, having been paid the length-of-service payment which was due to them from ASST. On 16 May 1994 they were transferred to the Società Italiana per le Telecomunicazione p.a. (SIP), which also belonged to IRI, when Iritel was taken over by SIP. SIP was later renamed Telecom Italia SpA, and it continued to employ the plaintiffs until they retired on 30 November 1996.

7. The defendant submits, and the plaintiffs do not dispute, that under Italian law the length-of-service payment following the end of the period of employment with the former employer, ASST, could be paid in to the new employer, Iritel, within 30 days for the purpose of uniform calculation.

8. According to the order for reference from the Pretura Circondariale di Pinerolo (the Pretura), in the action lodged on 16 October 1977 against Telecom Italia SpA (the defendant) the plaintiffs are pursuing two objectives, both in reliance on the identity of their employment relationship with the former and the current employer. They are requesting recalculation of the salary and wage increases since 1 November 1993 which are dependent on their length of service, taking into account their service with the former employer. Secondly, they are applying to be allowed to pay in to the defendant the length-of-service payment which they received after leaving the public service on 31 October 1993, in order to obtain a more favourable length-of-service payment calculated according to their entire period of employment until retirement. In the view of the plaintiffs, the transfer of the functions of ASST, initially to Iritel and then to SIP, was a transfer of an undertaking, so that their entire period of employment from initial recruitment to ASST until retirement from the defendant's service should be defined as an uninterrupted employment relationship.

9. The national court is asking whether a national provision such as that in Law No 58/92 is compatible with the requirements of the directive, and if not, whether the directive should take precedence, as Community law, over the national rules.

10. The Pretura is therefore referring the following questions to the Court for a preliminary ruling:

(a) Does a transfer for value, authorised by law enacted by the State and implemented by ministerial decree, of an undertaking managed by a public body which is a direct emanation of the State to a private company formed by another public body which holds all its shares, where the activity transferred is assigned to the private company under an administrative concession, fall within the scope of Article 1(1) of Directive 77/187/EEC?

If Question (a) is answered in the affirmative,

(b1) Does Article 3(1) of Directive 77/187 require it to be held that the continuation of the employment relationship with the transferor is mandatory, so that the worker's length of service continues as from the date on which he was taken on by the transferor and he continues to be entitled to receive a single termination payment which treats as a single unit the time spent by him in the transferor and transferee's employment?

(b2) Must Article 3(1) be interpreted in any event as meaning that the worker's rights transferred to the transferee include the advantages acquired by him while employed by the transferor, such as length of service if rights of a financial nature are attached thereto under the collective agreements applicable to the transferee?

11. The plaintiffs, the defendant, the Governments of Finland, Austria and the United Kingdom, and the Commission took part in the proceedings. The Government of the United Kingdom confined its observations to the first of the questions referred for a ruling. The arguments of the parties will be considered in connection with the legal assessment of the case.

D - Legal assessment

I - Questions of admissibility

Arguments of the parties

12. In the defendant's view both the questions put to the Court are inadmissible, because the parties to the initial action were exclusively subjects of private law. For this reason, the rules in the directive could not be relied upon by the national court to decide the case.

13. In the oral procedure the defendant also argued that the questions b1 and b2 were not relevant to the decision. As regards the length-of-service payment, what the plaintiffs were seeking was already available under national law, namely the payment into Iritel of the severance money they had received, in order to obtain a severance payment calculated on the whole period of service. As to why the plaintiffs in the original action had not paid in their severance payment, this was a factual, not a legal question.

14. The Finnish Government has pointed out in this connection that it is for the national court alone to determine whether a question referred for a ruling is material to its decision.

15. Finally, the Commission contends that as well as disapplying national law and inquiring into the direct effect of the directive, there is also the option of interpreting national law in conformity with the directive. It also states, however, that from the language of the order for reference it is clear that the national court has already excluded this option. But this is true of many cases in which the Court ultimately pointed to the possibility of an interpretation in conformity with a directive. In principle, national courts tended not to apply the national law and to opt instead for direct application of the directive.

16. But in the Commission's view, in this case also the national court should be advised of the possibility of an interpretation in conformity with the directive. It refers expressly in this regard to the judgments in the Carbonari and Spano cases. The latter case turned also upon Directive 77/187 and upon the same rule of Italian law, namely Article 2112 of the Codice Civile. In its judgment in that case, the Court rejected a plea of inadmissibility in reference to interpretation in conformity with the directive.

17. In the present case, according to the Commission, the point is that Article 3(1) of the Directive has been properly transposed into national law through Article 2112 of the Codice Civile. The problem here is thus not the transposition of the directive, but the special rule found in Law No 58/92 which derogates from Article 2112. For the national court, this poses the problem of interpreting two national rules and deciding which of them is to be applied to the case before it. But the problem thus does not lie in the direct effect of Article 3 of the directive, but in interpreting the national law in conformity with the directive. The Court has always applied very broadly this principle of interpretation in conformity with a directive.

18. In its two judgments in the Spano and Carbonari cases, the Commission continues, the Court implicitly empowered the Italian court to disapply two national rules which provided for an incorrect form of derogation from the general rule transposing the directive. However, this non-application of the national law was not for the purpose of enabling application of a rule in the directive, but for the purpose of applying other national rules which were fully in conformity with the provisions of the directive. This has nothing to do with the direct effect of directives, and so the problem of direct effect as between private parties does not arise.

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19. Turning to the defendant's arguments concerning the irrelevancy of questions B1 and B2, according to the consistent case-law of the Court it is primarily for the national court to determine whether the questions referred for a preliminary ruling are relevant. Because of its direct knowledge of the facts and of the arguments of the parties, the national court is better placed to judge this than the Court. The Court merely has to satisfy itself that the national court has not manifestly abused the discretion conferred on it by Community law. Thus questions from a national court concerning the interpretation of Community law or the validity of a rule of Community law will be inadmissible if they clearly lack any bearing on the situation or on the subject-matter of the original action, and are not therefore objectively necessary in order to resolve the original dispute. But there is no such abuse in this case. Rather, the link between the order for reference and the original dispute can be inferred from

the order itself. It depends on the interpretation of the directive whether and how a national rule such as Law No 58/92 is to be applied by the national court.

20. On the other hand, the question whether the directive can be applied at all in this case, because the dispute is one between private parties, is not really a problem of admissibility. It is more a question of the effect of directives, and especially the effect in national law of directives which may not have been completely transposed.

21. Since two private law subjects were involved in the initial dispute, the defendant is apparently assuming that direct application of the directive in the present case would result in what is called the direct horizontal effect of directives, which is ruled out by the case-law of the Court and must therefore be disallowed.

22. Before turning to the problem of the effect of directives as between private parties, the question arises whether the defendant, a private law organisation, is also in substance a private party. The Court's case-law on the direct effect of directives proceeds from a broad definition of the State. The definition of a State comprises not only State authorities, State institutions and local authorities but also State undertakings. The Court has explained that the possibility of relying as against a State on a rule contained in a directive exists regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law. The Court has therefore ruled that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.

23. This broad definition of a State is also supported by the fact that the sanction of direct effect vis-a-vis the Member States only exercises its full impact if it affects the State in all instances, regardless of the specific legal form in which the State is acting. Whenever in fact the State, directly or indirectly, stands behind an institution or undertaking and controls it, then it is no longer a private individual. It is according to these criteria that the national court has to determine whether Iritel, whose legal successor is the defendant, is to be regarded as a private person at all.

24. The order for reference shows that although Iritel was organised as a private law body, all its shares belonged to a public institution. Moreover, the activity taken over by Iritel was dependent on the grant of an administrative concession. Both these factors suggest the presumption that Iritel was State-controlled and State-run. Since according to the information supplied by the Commission this is also true of the present defendant, this conclusion would apply to the defendant just as to Iritel.

25. However, in case the national court concludes that Iritel is a genuine private person, we have to consider how far the directive can affect the legal relationship between private persons.

26. In this regard the Commission was correct in citing the judgment in the Spano case, in which the Court ruled 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).

27. On the other hand, the Commission's reference to the judgment in Case C-131/97 is only relevant to the extent that the national court had inquired in that case about the direct effect of a directive, and the Court, in its decision, ultimately referred to the possibility of an interpretation in conformity with the directive. Apart from this, the judgment does not offer any further clues for resolving the present case, as the underlying facts are quite dissimilar.

28. In the present case, however, it is not certain whether the reference to the possibility of such an interpretation is sufficient, if the national court has indicated that it does not consider it possible to interpret national law in conformity with the directive. The Commission admittedly observes that in the past the Court has extended this possibility very broadly, but there are limits in some cases even to an interpretation in conformity with the directive. According to the Court's case-law, there will always be a limit where an obligation in a directive which has not been transposed is invoked against an individual. Further limits on such a duty are the general principles of Community law, especially the principle of legal certainty and non-retroactivity, to which the Court has referred in criminal law cases. In this respect the duty of the courts in the Member States to interpret their law in conformity with the directives is subject to the same limitations as the direct effect of rules contained in a directive. This is because the Court has decided, as regards direct effect as well, that a rule in a directive may not itself give rise to any obligations for individuals. If in the present case the national court were told merely to apply the law in conformity with the directive, this might not be of sufficient assistance in resolving the national dispute, as is intended in Article 177 of the EC Treaty (now Article 234 EC).

29. However, the present case is a singular one in the sense that it does not involve the direct application of a rule in a directive which has not yet been transposed into national law. Rather, the issue in the present dispute is whether a special rule laid down in national law should be disregarded if it is incompatible with the directive, applying instead the general national transposition measure, which complies with Community law.

30. According to the consistent case-law of the Court, all the authorities of a Member State are bound by Community law to take all appropriate steps, within their field of competence, to comply with the obligations arising from the directive. The Court's jurisprudence warrants the conclusion that this results in a duty not to apply national law which is contrary to the directive. Of course, indirect or actual burdens or obligations could arise for the individual if the directive is complied with in this fashion. But from the viewpoint of Community law

this is harmless, as long as the legal effect for the individual which is derived from the directive is mediated through national law.

31. This also means that a national rule such as that in Law No 58/92 must not be applied by the national court if it is incompatible with Community law. It is clear from the Pretura's order for a reference that this would do away with the rule under Law No 58/92, that is, the special rule on Article 2112 of the Codice Civile, and the latter general rule by which the directive was transposed into national law would then apply. The duty to preserve the rights of employees therefore arises from the application of the national civil law which was enacted in order to transpose the directive. This does not involve obligations for the individual being based directly on the directive itself.

II - Question a

32. This question deals with the applicability of the directive to the privatisation of State-owned public entities (in the field of telecommunications services) where the activity previously carried on by a public entity is now exercised by a private company in which the sole shareholder is another public entity.

Material scope

- Arguments of the parties

33. According to the plaintiffs, the directive is applicable in the present case. The transfer to Iritel of the responsibilities discharged by ASST in the field of public telecommunications services is a transfer of a business within the meaning of Article 1 of the directive, since the transfer took place for value and the identity of the economic entity transferred was preserved. All the business assets and rights passed to Iritel on the basis of Law No 58/92. Likewise, virtually all the employees of ASST were taken over by Iritel and performed the same functions, on the same premises, as they had done previously for ASST. The plaintiffs rely in this respect on the Court's judgment of 18 March 1986 in Case 24/85 Spijkers.

34. In the view of the plaintiffs, as far as the applicability of the directive is concerned it is irrelevant that the transfer took place as a consequence of the grant of a concession, rather than through a contract between the transferor and the transferee. As the Court found in its judgment of 10 February 1988 in Case 324/86 Daddy's Dance Hall, the directive also applies where, upon the termination of a non-transferable lease, the owner of an undertaking leases it to a new lessee who carries on the business without interruption with the same staff. Moreover, it does not matter whether the transferor is an entity under public or private law. According to Article 2 of the directive, the transferor may be any natural or legal person.

35. Finally, the plaintiffs argue that there is no special rule in Law No 58/92 which takes priority by way of derogation from Article 2112 of the Codice Civile; the Law merely reproduces the generally applicable rules on the transfer of businesses to be found in that article. Consequently, Article 2112 of the Codice Civile applies to the privatisation of ASST and the transfer of its functions to Iritel.

36. The defendant denies that the directive applies to the case in issue. It argues that Article 1(1) of the directive poses, as an unconditional requirement for its application, a transfer by means of a contractual takeover or merger. Since the transfer of ASST's functions to Iritel took place on the basis of Law No 58/92 and the ministerial grant of a concession, hence on the basis of State measures, this condition was not fulfilled. Admittedly, the Court has always made a broad interpretation of the concept of a legal transfer. However, in the defendant's view the act of transfer must be traceable to the joint intention of the transferor and the transferee, and this requirement cannot be dispensed with.

37. The defendant further argues that a transfer of a business can only exist where the subject of the transfer is an economic entity. However, the functions transferred from ASST to Iritel were not of an economic kind. The operation and installation of the telephone network was a function in the public interest, serving a public purpose. Hence ASST did not pursue any economic aim in performing its activities.

38. The Commission, the Austrian and Finnish Governments and the Government of the United Kingdom consider the directive applicable to a case such as that in the main proceedings.

39. The Austrian and Finnish Governments emphasise that the decisive criterion in determining that a business has been transferred is the preservation of an economic entity which existed before the transfer. The statements of the national court show that this condition was fulfilled.

40. In the view of all three participating Governments and the Commission, the fact that ASST was part of the public administration makes no difference when deciding whether the directive is applicable. The Court's judgment of 15 October 1996 in Case C-298/94 Henke shows that where the transfer of sovereign administrative functions of a municipality to an administrative collectivity is concerned, the applicability of the directive will not depend on the form of organisation of the transferor, but only on the nature and kind of the activity transferred. This means that only the transfer of sovereign functions is excluded from the purview of the directive. The Court confirmed this view in a recent judgment of 10 December 1998.

41. Moreover, to differentiate between the transfer of jobs from the public to the private sector and transfers from one private undertaking to another would not satisfy the protective purpose of the directive, which seeks to guarantee the rights of employees when there is a change of ownership of the undertaking. For the same reason, it is also irrelevant that the sole owner of Iritel, a private law foundation, is a public entity.

42. In this connection the Austrian Government also points out that Directive 98/50 amending Directive 77/187/EEC merely took over the case-law of the Court. The fifth recital in its preamble states that in the light of the case-law of the Court of Justice legal certainty and transparency require an express provision. The nature of

the activities transferred also does not result in the directive becoming inapplicable, because the services provided in the field of telecommunications are not in any case administrative functions of a sovereign character.

43. The Commission and the United Kingdom Government take the view that the functions transferred from ASST to Iritel in the field of telecommunications services and the operation of the public telephone network are definitely economic activities. This is also reflected in the fact that the transfer was for value. Hence there is no reason why the directive should not be applied.

44. The Finnish Government and the Commission point out, moreover, citing the judgment of 8 June 1994 in Case C-382/92 Commission v United Kingdom, that the directive applies to all public and private undertakings exercising an economic activity, whether for profit or otherwise. It follows that even if the exercise of the function transferred to Iritel enabled services in the field of telecommunications to be provided in the public interest and for a public purpose, this alone would not limit in any way the scope of the directive. Nor does the need for a concession to be granted detract from the economic nature of the activity; it merely facilitates supervision in the interest of consumer protection.

45. Finally, the absence of a contractual agreement between the transferor and the transferee is no bar to the application of the directive. The element of a legal transfer in Article 1 of the directive is not to be interpreted literally, because of the differences between the various language versions and the different concepts of the term in the Member States, but rather in the light of its purpose and intent. The Austrian Government, the Finnish Government and the Government of the United Kingdom rely particularly on the judgments of 7 February 1985 in Case 135/85 Abels, 10 February 1988 in Case 324/86 Daddy's Dance Hall, 19 May 1992 in Case C-29/91 Redmond Stichting and 11 March 1997 in Case C-13/95 Süzen. These cases show that the requirement of a contractual agreement between the transferor and the transferee can be dispensed with, so that a statutory transfer and subsequent grant of a concession would fall within the scope of the directive.

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46. To begin with, I must briefly mention that the question raised by the plaintiffs of the relationship between Article 2112 of the Codice Civile and Law No 58/92 is to be answered according to national law. The question whether Law No 58/92 does in fact contain a special priority rule derogating from Article 2112 of the Codice Civile must therefore be decided not by the Court, but by the national court which made the order for reference.

(a) On the question of a transfer of a business

47. Here I begin by recalling that according to the case-law of the Court there is a transfer of an undertaking when an economic entity continues to exist and retains its identity following a change of ownership. In determining whether this condition is met, the Court considers in an overall assessment all the facts characterising the transaction in question. The points to consider are, in particular, how far tangible or intangible business assets have been transferred, to what extent the majority of the workforce have continued in employment with the new employer, and how far the activity of the new owner resembles the previous activity. The reference from the national court indicates that in the light of these criteria the transfer of ASST to Iritel is to be defined as the transfer of an undertaking.

48. I must also agree with the view expressed by all parties except the defendant that in defining a transfer of an undertaking within the meaning of the directive it does not matter whether the transferor is a legal person under public or under private law. This follows from the wording of the definition of a transferor in Article 2(a) of the directive. Under this provision, all legal persons, not only private law bodies, may be transferors within the meaning of the directive. This conclusion is borne out by the protective purpose of the directive. The aim of the directive is to protect the rights of employees in all cases in which they are exposed to the typical risks regularly resulting from a change of ownership and management. The Court has repeatedly made reference, in its case-law on transfers of undertakings, to this protective purpose. In view of this protective purpose, it cannot matter whether the transferor is part of the State or part of the private sector.

49. This is not affected in any way by the fact, pointed out by the defendant, that ASST itself had no legal personality. Admittedly, according to the definition in Article 2(a) of the directive, only a natural or legal person can be a transferor. This precondition is however met in the case of the State, by which ASST was run and controlled as a public entity. Moreover, this conclusion is in line with the Court's judgment in Case C-298/94. In that case the Court decided that restructuring processes within the public administration, such as the transfer of administrative functions between different parts of the administration, are not covered by the directive. In its reasoning the Court focused on the fact that the restructuring did not affect any economic activities. It may be concluded that the scope of the directive is not determined by the transferor and its status under public or private law, as long as the transferor is exercising an economic activity. It is not therefore the nature of the transferor which is decisive, but the nature of the activity carried on. The exercise of public authority cannot be the subject of a business transfer within the meaning of the directive.

50. This distinction was confirmed in the judgment in Sánchez Hidalgo and Others. This case dealt, first, with the question whether there is a transfer of an undertaking when a public law entity transfers a contract for home help services for persons in need, following its expiry with a private company, to another private company. Second, it dealt with the award of a contract by the German Federal Army to various security companies. The Court, referring to the Henke judgment, ruled that the fact that the service or contract in question has been contracted out or awarded by a public body cannot exclude application of Directive 77/187 if neither the activity of providing a home-help service to persons in need nor the activity of providing surveillance involves the exercise of public authority.

51. If we now consider the nature of the transferred activity in the main proceedings, the conclusion is clear. As most of the parties have correctly argued, the telecommunications services taken over by Iritel from ASST are not functions of public authority, but economic activities. Iritel, and subsequently the defendant, carried on the same activities as ASST, for an economic purpose. This is precisely the aim pursued in privatisation. To draw the conclusion that in the case of ASST there had been a privatisation of functions of public authority would be very strange. Moreover, Commission Directive 90/388/EEC of 28 June 1990 on competition on the market for telecommunications services, which is the basis of the privatisation measures in the telecommunications sector, presumes that the activity is economic in character. In summary, it may be concluded that the nature of the transferred activity in the main proceedings is not such as to exclude application of the directive.

(b) On the question of a legal transfer

52. As regards the additional requirement of a legal transfer, reference should be made to the Redmond Stichting judgment. The question in that case was whether there is a transfer of an undertaking where a local authority stops paying subsidies to a foundation, and simultaneously begins paying the subsidies to another foundation which is active in the same field. The cessation of support had the result that the former foundation, which was chiefly engaged in providing support for drug addicts, brought its activities to a complete halt. But both the foundations, which were legal persons, and the subsidising body, the local authority, had not only intended and agreed that the clients/patients of the first legal person should be "switched" to the second legal person but also that, thereupon, a lease should be granted to the second legal person of the immovable property leased by the first legal person from the subsidising body and that, so far as is possible ... use should be made of the "knowledge and the resources (e.g. staff)" of the first legal person. The employees working for the first foundation on the basis of contracts of employment, who were not taken over by the second foundation and against whom proceedings were brought to end their employment contracts, relied on the rules in Netherlands law for the transposition of the directive.

53. In this judgment the Court gave a detailed explanation of the concept of a legal transfer. It began by recalling its finding in the Abels case that the scope of the provision at issue could not be appraised solely on the basis of a textual interpretation on account of the differences between the language versions of the provision and the divergences between the laws of the Member States with regard to the concept of legal transfer. It has therefore given that concept a sufficiently flexible interpretation in keeping with the objective of the directive, which is to safeguard employees in the event of a transfer of their undertaking, and has held that the directive is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the undertaking. The directive does not become inapplicable merely because the transfer is effected in two stages, inasmuch as the undertaking is first re-transferred from the lessee to the owner and the latter then transfers it to the new owner. On the basis of these considerations, the Court came to the view in the Redmond Stichting case that the expression legal transfer is to be interpreted so that the expression covers a situation in which a public authority decides to terminate the subsidy paid to one legal person, as a result of which the activities of that legal person are fully and definitively terminated, and to transfer it to another legal person with a similar aim.

54. From the foregoing it may be concluded that in the present case likewise, application of the directive will not fail because the transfer was effected by the State through the grant of a concession. Moreover, its application seems to be necessary in order to meet the protective aim of the directive.

Personal scope - the concept of an employee

55. The order for reference gives no further details about the exact nature of the employment relationship between the plaintiffs and the original employer. It is not clear whether they were public officials or civil servants of some other kind. This distinction notwithstanding, the question thus arises in the present case of the applicability of the directive in respect of the concept of an employee since it is not certain whether persons who have been working for a State enterprise may be regarded as employees for the purpose of the directive.

56. According to the consistent case-law of the Court, the harmonisation achieved by the directive is only partial, because it essentially extends the protection already secured for employees through the legal rules of the individual Member States to cases in which undertakings have been taken over. It is not an attempt to create a uniform level of protection for the whole Community on the basis of common criteria, and it follows that Directive No 77/187 may be relied upon only by persons who are, in one way or another, protected as employees under the law of the Member State concerned. If they are so protected, the directive ensures that their rights arising from a contract of employment or an employment relationship are not diminished as a result of the transfer.

- Arguments of the parties

57. The Finnish Government and the Commission take the view that the plaintiffs in the main proceedings are covered by the personal scope of the directive. The Finnish Government relies primarily on the Court's case-law, under which the directive applies to all workers or employees who are protected from dismissal under national law. It argues that even if the concept of an employee is to be defined according to national rules, neither the wording of the directive nor the case-law of the Court indicates that employment relationships in the public service are automatically to be excluded from the scope of the directive on the basis of purely formal considerations. What matters here is the nature of the activity performed. If it is an economic activity, the fact that the employer is the State or a public entity is irrelevant. One cannot exclude all State employees from the scope of the directive on the basis of considerations of form.

58. The Commission too, having stated that the plaintiffs in the main proceedings had probably been in a public law employment relationship, so that under Italian law they would not have been employees, focuses initially on the nature of the activity. It argues that since the plaintiffs in the main proceedings were carrying on the same activity as that exercised subsequently by the employees of the private undertaking, they cannot be excluded from the scope of the directive.

59. The Commission also refers to the preparatory work for the directive, the two drafts of 1974 and 1975, which in Article 3(1) referred merely to an employment relationship and thus would have governed the rights and duties arising from an existing employment relationship. During consultations the French delegation had suggested adding the term contract of employment in Article 3(1). These two terms contract of employment and employment relationship were then also transferred to Article 4(2). No reasons are given in the records for this addition of another term. It is however indisputable that both France and Italy, during the 1970s, ran many State enterprises and that the employment relationships in them were governed by administrative law.

60. In the Commission's opinion, the terms contract of employment and employment relationship are not equivalent in meaning. The concept of an employment relationship, by contradistinction to a contract of employment, should be interpreted to bring within the scope of the directive all employees whose employment relationship is governed not by a contract but by administrative provisions. This concept could play an important inclusive role, by ensuring that the directive will also apply in the event of State enterprises being transferred. On the basis of this broad interpretation and by analogy with the concept of the employment relationship, this would fulfil the aims of the directive by affording protection to employees in a State enterprise whose duties are similar to those of employees of private companies to which the undertakings have been transferred.

- Opinion

61. It is questionable whether the focus on the nature of the activity - economic activity as distinct from functions of public authority - is sufficient in itself to define the personal scope of the directive. Reference should be made here to the Sánchez Hidalgo judgment, in which the Court held that the directive was applicable because the main proceedings did not concern the exercise of public authority. If that was all that mattered, all employees - civil servants as well as ordinary employees - who do not perform functions of public authority would automatically be covered by the directive. But in the Sánchez Hidalgo judgment the Court went on, referring to the judgment in Danmols Inventar, to consider further whether the employees were each protected as an employee under national labour law.

62. This would mean that only employees of a public entity or State undertaking who are protected as workers under national law are covered by the directive. All others would be excluded, even if they were only performing an economic function. But this would very frequently be the case when a State enterprise is privatised.

63. Even the distinction argued by the Commission between the terms contract of employment and employment relationship does not necessarily result in the scope of the directive being extended to State employees. The distinction between the two terms could also be that the concept of an employment relationship embraces, for example, actual employment relationships without a contractual basis. In any event, it would not necessarily mean that employment relationships in the public service are covered.

64. But a strict interpretation of the concept of an employee would result in a distinction being drawn between the individual employees of a public entity, so that some would be covered by the directive and others not. It is doubtful whether such a distinction would be sensible.

65. One reason for this difference of treatment could be the special position occupied by civil servants vis-a-vis their employer, the State. This relationship could be described as a special relationship of trust, possibly involving special privileges for the employees. In that light, State employees could not be regarded as being in need of protection. Moreover, as a general rule they are not affected by takeovers and mergers. It could therefore be assumed that the directive does not apply to the employees of the former State telephone company.

66. It cannot however be assumed in principle that a civil servant is adequately protected by national law because of his or her special position, even in the event of privatisation. The present case is thus a special case, precisely with respect to the concept of employee. Here people working in the public service are affected by a transfer, with the result that they switch over from their possibly privileged position, derived from their special relationship of trust to the employer, to an ordinary private law employment relationship. This means that once the privatisation has taken place, they are indisputably employees within the meaning of the directive. Against this background it seems questionable whether the strict formal delimitation in line with the previous concept of an employee should apply in this case too. If it did, the directive would not be applicable in the event of privatisation, whereas in the reverse situation - where employees switch over from a private employment relationship to a employment relationship in the public service - this would probably fall at least within the personal scope of the directive. In this case the question arises whether State employees who are taken over by private industry are not just as deserving of protection as private sector workers who switch to a specially protected relationship as State employees.

67. In this connection one has to bear in mind what the directive is seeking to achieve. According to the consistent case-law of the Court, the directive is intended to safeguard the rights of employees when there is a change of ownership of the undertaking, by making it possible for them to continue to work for the new employer under the same conditions as agreed with the transferor. The contracts of employment or employment relationships are thereby continued, ipso jure, with the transferee.

68. Where the case-law indicates that the directive gives workers the option of continuing their employment relationship with the new owner under the same terms as had been agreed with the transferor, this means that there should be no change in salary conditions and no change in the composition of the salary. Moreover, the

employees should not suffer any disadvantages, even if these are offset by gains elsewhere. This means that there cannot be any change in the conditions of employment as a result of the transfer.

69. In the present instance of privatisation of a State undertaking, this would mean that on application of the directive all the benefits granted to the employees in the public service are transferred without alteration to the private sector.

70. Otherwise, on a strict interpretation of the concept of an employee, no protection would be afforded to State employees in the event of privatisation, although they are losing their special position vis-a-vis the State.

71. The fact that the directive does not expressly mention privatisation, such as has occurred in this case, does not warrant the conclusion that the employees in such a case are to be excluded from the protection of the directive. The directive dates from 1977, namely from a time when privatisation of State enterprises was not yet the norm. It might therefore be assumed that this development was not contemplated when the directive was adopted.

72. It must of course be borne in mind that there is no more extensive concept of an employee in the new directive of 1998. Admittedly, the new directive is not yet applicable to the case at issue in the main proceedings, since it only came into force subsequently. However, it is clear from the recitals in its preamble that it is intended to clarify the concept of an employee in the light of the case-law adopted by the Court in the meantime. The difficulty of achieving a uniform definition of an employee was no doubt already evident when Directive 77/187 was in preparation. It is uncertain, however, how far it was intended, on that occasion and in the drafting of Directive 98/50, to extend the protection of the directive to employees in the public service, especially in the event of privatisation. In any case, the legislature omitted to regulate this point clearly. Three possible conclusions could be drawn from this. First, it could be concluded that State employees, or civil servants, were deliberately left out of the protection under the directive. It is equally conceivable that it was found impossible to agree on whether, and how, State employees were to be covered by the directive. A third explanation could be that because of the different national formulations it was not possible to harmonise the concept of a worker.

73. While no attempt at all was made by the Community legislature to define the concept of an employee in the original directive, which is the one relevant to the solution of the present dispute, the new directive confines itself to codifying a definition of the concept which was developed in the case-law for a particular type of case. Since, however, the Court has not yet had to deal with questions of privatisation, such a case cannot be embraced by the concept of a worker as it derives from the case-law.

74. Moreover, in Case 105/84, in which the Court defined its previous understanding of what an employee is, the facts were quite different. In that case it was a question of clarifying whether a person holding a 50% share in the company concerned is to be regarded as an employee when the undertaking is transferred. The definition of an employee was not therefore made with a view to the distinction between the private and the public sectors, but only with a view to distinguishing employees from employers.

75. The language of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time could, admittedly, be said to stand in the way of an extension of the existing concept of an employee. Article 1(3) of this directive defines its scope as extending to all private and public sectors of activity. It refers, in this connection, to Article 2 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work. Here too, both private and public activities are mentioned. It is also provided that Directive 89/391 will not apply where there are compelling reasons derived from the particular features of certain specific public service activities. Since, therefore, Directive 93/104 specifically mentions the public service, and thus covers all employees of private and public sector activities, the fact that the public service is not mentioned in Directive 77/187 could prompt the conclusion that in the latter directive there is no intention to extend the concept of an employee to the public service.

76. As regards the special rights enjoyed by State employees, such as protection from dismissal, it is conceivable that they are not intended to fall within the directive on safeguarding the rights of employees of workers when undertakings are transferred. However, this is a benefit which is not confined to the public service. It is quite conceivable that in the private sector also, there is a form of protection virtually equivalent to protection from dismissal available under collective agreements to those with long records of service. This too shows that it cannot be simply assumed that State employees are invariably in a privileged position and therefore enjoy special protection if an undertaking is taken over.

77. On the other hand, it is the aim of the directive to afford special protection to those affected by the transfer of an undertaking. In this connection, it should also be pointed out that according to the case-law of the Court the affected workers, because of this protective purpose, cannot even themselves waive their rights under the directive, and that it is not permissible to curtail these rights, even with their consent. On the other hand, the Court points out that the directive effects only a partial harmonisation, because what it essentially does is to extend the protection already afforded to workers under the law of the individual Member States to the case of takeovers of undertakings. Thus the directive can be relied on only to ensure that the employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the Member State concerned ¼ Consequently, in so far as national law allows the employment relationship to be altered in a manner unfavourable to employees in situations other than the transfer of an undertaking, in particular as regards their protection against dismissal, such an alternative is not precluded merely because the undertaking has been transferred in the meantime and the agreement has therefore been made with the new employer. Since by virtue of Article 3(1) of the directive the transferee is subrogated to the transferor's rights and obligations under the employment relationship, that relationship may be altered with

regard to the transferee to the same extent as it could have been with regard to the transferor, provided that the transfer of the undertaking itself may never constitute the reason for that amendment.

78. Indeed the directive itself provides that the terms of employment may be altered for other reasons, independent of the transfer. For instance, under Article 4(1), a dismissal is not possible solely because of the transfer. However, dismissals for economic, technical or organisational reasons are not prohibited by the directive. Moreover, according to Article 3(2) the terms and conditions agreed in a collective agreement must be continued until its termination or expiry, to the same extent as provided in the collective agreement for the transferor. According to Article 3(2), second sentence, the Member States may however limit the period for observing them, provided it continues for at least one year.

79. Accordingly, application of the directive to State employees who are transferred along with the undertaking to the private sector would not result in expanding unduly the protection granted by the directive. Since, as already discussed, on a narrow interpretation of the concept of an employee the protective aim of the directive cannot be fulfilled in this case, it should be assumed that at least the rights concerned in the present case are covered, by virtue of the general purpose of the directive.

80. These various considerations also show that it would be appropriate, where directives are intended to protect workers, to adopt a (broad) uniform concept of an employee.

81. Finally, I must add that the application of the directive cannot be excluded on the ground that under Italian law, the plaintiffs would have had the option of remaining in the public service. As in this case the plaintiffs would have taken over a new function in the administration, remaining in the public service would necessarily have involved a change of workplace and activity, and possibly also a change of location. If the plaintiffs wanted to remain in their previous occupation with minimum alteration of the outward circumstances of their employment, they had no choice other than to leave the public service and continue their previous occupation with Iritel in a form of employment governed by private law. In that situation, a worker should be protected by the directive. It would be illogical to deny him or her such protection merely because he did not accept an offer of further employment from the transferor and former employer in another occupation. This conclusion is also borne out by the case-law of the Court, according to which the legal consequences of the transfer of an undertaking are independent of the will of the employee. The only exception will be a case in which the employee voluntarily declines to continue the employment relationship with the new employer. But the complete opposite is true in the present case. The persons affected by the transfer of the undertaking are not objecting to further employment with the transferee; they did not take up an offer to remain with the transferor. This does not affect their legal position under the directive.

82. In the light of the foregoing considerations it seems appropriate here to bring the State employees who are switching over to private sector employment because of the privatisation within the protection of the directive.

83. The answer to Question a) should therefore be that a transfer for value, authorised by law promulgated by the State and implemented by ministerial decree, of an undertaking which is transferred from a public entity owned directly by the State to a private company belonging to another public entity which holds all its shares falls within the scope of Article 1 of Directive 77/187 if the private company is entrusted under an administrative concession with the activity which is the subject of the transfer.

III - Question b1

84. In the context of Question b the problem arises of determining the nature of the individual claims which are transferred, i.e., ascertaining which terms of employment are maintained. Question b1 relates to the plaintiffs' right to a certain payment for length of service, and the manner in which it is calculated.

Arguments of the parties

85. The plaintiffs here rely on the binding character of Article 3(1) of the directive, from which they argue that the employees transferred from ASST to Iritel can rely on their length of service to obtain a single payment. Admittedly, in the oral procedure the plaintiffs conceded that a single calculation of the length-of-service payment would have been possible under Italian law. However, for this to take place it would have been necessary to pay in to the new employer the length-of-service payment paid by ASST within 30 days of the transfer of the undertaking. But this time limit was far too short, and this was the reason why the plaintiffs were not able to act in time.

86. The defendant points out that under Italian law the plaintiffs could have received a uniform length-of-service payment if they had paid in the payment received from ASST. On the other hand, as far as the obligations under the directive are concerned, according to Article 3(1) the transferee must accord the employees the rights which existed with the transferor immediately before the transfer. It is not, however, the purpose of the directive to grant retrospectively to an employee who retains his rights from the previous employment relationship benefits from his new employer for the period of employment prior to the transfer. The length-of-service payment for the years prior to the transfer may therefore only be calculated according to the criteria of ASST, and for the period following the transfer according to the rules which applied at Iritel and subsequently to the defendant.

87. In the view of the Austrian and Finnish Governments, as well as of the plaintiffs, the effect of Article 3 is that all rights and advantages attached to length of service are transferred or maintained. In this connection, the Austrian Government recalls, however, that the directive does not prevent subsequent variation of the employment contract by the transferee, if national law permits the variation independently of the transfer of the undertaking.

88. The Commission contends that the transferee is bound, under Article 3 of the directive, by all the obligations of the transferor arising from the employment relationship as it was at the time of the transfer. However, it takes the view that Law No 58/92 does not provide very clear rules on this point.

89. The Commission adds that according to the case-law, however, all obligations arising from the contract pass to the transferee, and under Article 3(2) this has also been extended to collective agreements. This prompts the conclusion that length of service is maintained for the purpose of the length-of-service payment. This would give the employees the right to payment of a single payment, covering the years of service with both the old and the new employer.

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90. In this context I recall again the Court's case law mentioned in points 67 and 68, stating that the continuation of the employment relationship in its original form is to be secured and there should be the possibility of continuing the employment under the same terms. It is, after all, the meaning and purpose of Article 3 of the directive to protect employees from the specific risks resulting from the situation in which an undertaking is transferred. The rule is therefore intended to guarantee the continuance of the employment relationship in every respect, and to exclude any change to the rights of the employees solely on the basis of the transfer.

91. In itself, however, length of service does not constitute a right or entitlement which could be transferred with the undertaking and be claimed from the transferee. It is conceivable only that rights associated with length of service may be transferred. The employee's right will accordingly consist of his claim for payment of a length-of-service payment which is part of the legal terms of his former employment. This severance claim is divided into two legally relevant aspects, the basis of the entitlement and its amount.

92. If there is an entitlement to a length-of-service payment from the former employer and transferor, Article 3 of the directive requires this entitlement to be transferred in respect of both elements, viz. the ground of the entitlement and its amount, so that it can subsequently be claimed from the transferee. This means that the new employer and transferee is bound to determine the amount of the severance pay due according to the method of calculation applied by the transferor. Length of service must be taken into account in this process. The transferee is also bound by the other conditions for claiming the length-of-service payment in the transferred employment relationship. Depending on the manner in which the relevant employment contract is framed, this may also mean that the new employer must pay a length-of-service payment for the years of service accrued with him, even though he has not himself made any such provision. In calculating this claim, the periods of service accrued with the transferor must also be taken into account.

93. In this connection mention must be made of the fact that according to the Court's case law the terms of employment may be altered, even to the disadvantage of the employee, if this would have been possible for the transferor too, under national law irrespective of the transfer of the undertaking. The directive is intended to protect the employee in his legal relationship with the transferee only to the extent to which he was protected vis-a-vis the transferor under the rules of the Member State. It follows that an alteration of the employee's rights by the new employer is permissible to the extent that such an alteration by the transferor would have been possible. For if it was possible for the transferor to alter the employee's rights, this possibility cannot be excluded for the future solely because the undertaking has been transferred. The directive is merely seeking to prevent the transfer as such from being treated as a pretext to worsen the employee's existing position, by reducing or ceasing to grant entitlements already acquired. The directive does not therefore prevent a temporal limitation or non-uniform calculation of the length-of-service payment, if the new employer is allowed to alter the terms of employment in that regard irrespective of the transfer of the undertaking.

94. It may be noted in passing that in the present case a length-of-service payment is provided for both by the old and the new employer, and in the main proceedings probably only the manner of its calculation is in dispute. Since the rights which existed with the transferor are transferred unaltered, the method of calculation which had been agreed with the transferor also passes to the transferee. Future calculations or adjustments which were merely in prospect, without giving rise to any entitlement on the employee's part, are not transferred. The rights which matter are those which could be claimed from the transferor. Accordingly, there is no entitlement to comparability with new colleagues in the private sector (who may be better off), nor is there any entitlement to retrospective extension of more favourable arrangements made by the transferee to the years of service accrued with the transferor.

95. It is for the national court to determine, using these yardsticks, whether the payment made to the plaintiffs met the conditions set at ASST, or whether the defendant, as transferee, has altered to an extent not allowed at ASST the entitlement to a length-of-service payment, independently of the fact that the undertaking has been transferred. If the national court, on examining this question, concludes that an inadmissible reduction has been made in the plaintiffs' claim for severance pay, the payment will have to be recalculated for the entire period of service on the basis of the method of calculation used at ASST.

96. The answer to Question b1 should therefore be that an employee is entitled to payment of a single length-of-service payment which takes account of the entire period of employment (with the old and the new employer) if the contract of employment with the transferor made provision for such an entitlement and it has not been altered in an admissible manner by the transferee, independently of the transfer of the undertaking.

IV - Question b2

97. The second part of the question concerns the system applicable to the period following the transfer of the undertaking for the purpose of determining regular increases in salary.

Arguments of the parties

98. The plaintiffs, the Finnish and Austrian Governments, and the Commission answer this question in the affirmative, in the light of the grounds adduced for Question b1.

99. The defendant states that length of service is itself neither a right nor an advantage, but merely a factual circumstance which may have legal consequences. The defendant then refers to the collective agreement which governs the salary claims arising from length of service in this case for the former employees of ASST.

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100. As already explained in answer to question b1, the defendant is correct that a given length of service does not in itself constitute a right of the employee within the meaning of Article 3(1). Specific rights, such as an entitlement to a salary increase, must rather be associated with length of service, and this must already be the case under the employment relationship with the transferor. These rights are then transferred to the transferee. If these entitlements vis-a-vis the transferor were already provided for by collective agreements, the transfer is governed by Article 3(2) of the directive, under which agreements with the transferor remain valid, although only until termination or expiry of the collective agreement.

101. The question whether future salary increases are also covered in this sense will depend on whether they were agreed with the transferor in such a way as to give the employee a claim to these increases. This is for the national court to decide. In this regard it must again be pointed out that according to the Court's case-law a change in the terms of employment is possible if it could have been made by the transferor, irrespective of the transfer.

102. The answer to Question b2 should therefore be that Article 3(1) of the directive is to be interpreted to mean that the length of service attained is transferred to the transferee only in connection with the rights as against the transferor associated therewith.

E – Conclusion

103. In the light of the foregoing considerations, I propose that the questions referred to the Court should be answered as follows:

Regardless of the manner in which the directive is applied on the basis of the considerations set out above, it should be interpreted as follows:

(a) A transfer for value, authorised by law promulgated by the State and implemented by ministerial decree, of an undertaking which is transferred from a public entity owned directly by the State to a private company belonging to another public entity which holds all its shares, where the activity transferred is assigned to the private company under an administrative concession, falls within the scope of Article 1 of Directive 77/187/EEC.

(b1) According to Article 3(1) of the directive, the continuation of the employment relationship with the transferee is mandatory, and employees are entitled to payment of a single length-of-service payment which takes account of the entire period of employment (with the new and the old owner), if the contract of employment with the transferor provided for such an entitlement.

(b2) Article 3(1) is to be interpreted as meaning that the length of service attained is transferred to the transferee only in connection with the rights as against the transferor associated therewith.