OPINION OF ADVOCATE GENERAL MISCHO

delivered on 26 September 2002 [1]

1. The objective 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, [2] is the putting in place of general measures intended to guarantee the safety and health of workers in all sectors of activity whilst leaving to certain 'individual directives' the task of regulating, among others, the particular fields mentioned in the annex thereto.

2. One of those is the directive in issue in this case, namely Council Directive 89/655/EEC of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) [3] (hereinafter 'the Directive').

3. Under Article 4(1)(a) and (b) thereof, as amended by Directive 95/63/EC: [4]

'Without prejudice to Article 3, the employer must obtain and/or use:

(a) work equipment which, if provided to workers in the undertaking and/or establishment for the first time after 31 December 1992, complies with:

...

(ii) the minimum requirements laid down in Annex I, to the extent that no other Community directive is applicable or is so only partially;

1 — Original language: French.

2 — OJ 1989 L 183, p. 1.

3 — OJ 1989 L 393, p. 13.

4 — Council Directive of 5 December 1995 (OJ 1995 L 335, p. 28).

(b) work equipment which, if already provided to workers in the undertaking and/or establishment by 31 December 1992, complies with the minimum requirements laid down in Annex I no later than four years after that date.'

4. According to the Commission, those provisions have not been appropriately transposed into national law by the Italian authorities. In that regard, the Commission makes four complaints which I shall consider in turn.

The first complaint, alleging infringement of Article 4(1) of and paragraph 2.1 of Annex I to the Directive

5. The applicant accuses the Italian Government of not having correctly transposed the sixth sentence of paragraph 2.1 of Annex I to the Directive, which, in its third subparagraph, that is to say in its fourth, fifth and sixth sentences, provides:

'If necessary, from the main control position, the operator must be able to ensure that no person is present in the danger zones. If this is impossible, a safe system such as an audible and/or visible warning signal must be given automatically whenever the machinery is about to start. An exposed worker must have the time and/or means quickly to avoid hazards caused by the starting and/or stopping of the work equipment.'

6. The defendant, however, rejects the Commission's criticism and cites, in that regard, Article 80 of the Decree No 547 of the President of the Republic of 27 April 1955, [5] as amended by Legislative Decrees Nos 626/94 and 242/96 (hereinafter 'DPR No 547/55'), which provides:

'Every starting of complex machinery operated by several workers positioned at various places and not perfectly visible by the person whose task it is to set the machinery in motion shall be preceded by an agreed acoustic signal.'

7. According to the Italian Government, the Commission is wrong to disregard the connection between the three sentences of the third subparagraph of paragraph 2.1 of Annex I to the Directive and to claim that the last sentence of that subparagraph contains an independent obligation.

5 — GURI No 158 of 12 July 1955.

8. It argues that that sentence is only an extension of the two previous ones and that its only function is to specify the sense and purpose of the warning required by the second sentence.

9. It maintains that Article 80 of the DPR No 547/55 reflects exactly and coherently that interpretation of the third subparagraph of paragraph 2.1 of Annex I to the Directive. It concerns the same machinery as that referred to in that subparagraph, namely that to which several workers are assigned who are not perfectly visible to the operator responsible for setting it in motion, and is not limited to requiring a general warning prior to the machines being set in motion, but requires an 'agreed' signal, that is to say clearly differentiated in the system of acoustic signals in use in the undertaking, and encoded in such a way as to impart the required safety information.

10. According to the Italian Government, that information, in view of the cause and nature of the hazard in question, can only consist of the warning by which the persons exposed to it are made aware of the start of a process which, after a certain time — known to those concerned and appropriate to the nature of the possible dangers presented by the process — results in the effective setting in motion of work equipment. With that awareness, those exposed to the attendant hazards can avoid them.

11. The Commission does not accept that the third sentence of the third subparagraph of paragraph 2.1 of Annex I to the Directive is a sort of complement to the other two sentences of that subparagraph. On the contrary, it is precisely that sentence which fulfils the decisive role of laying down the fundamental requirement, to be mandatorily observed, of enabling the exposed person to take quick action to avoid the hazard.

12. According to the Commission, the Italian legislation leaves a serious gap by prescribing the 'agreed acoustic signal' as the only obligation and by not imposing the more general requirement of the practical possibility for those involved to withdraw themselves promptly from dangerous situations.

13. It should be noted that the two parties in fact share the same view of the function of the signal preceding the setting in motion or stopping of the machines concerned, namely to give the exposed workers the practical possibility of avoiding the hazard to which the event of starting or stopping announced by that signal exposes them. On the other hand, the Commission and the

Italian Government disagree with each other on the degree of precision required to transpose the requirements of the Directive.

14. In the eyes of the defendant, the signal prescribed by the Italian legislation can have no other function than to put the persons exposed in a position to escape from the hazard, and it is therefore pointless to set out more explicitly an obligation to provide for the possibility for those operators to retire to a place of safety.

15. It is true that the argument put forward by the Commission that it is easy to point to situations in which any warning signals relating to the starting or stopping of work equipment would not enable the operators to move rapidly out of danger, gives grounds for doubt. Such signals would be almost useless and it is therefore difficult to conceive that legislation prescribing them could be interpreted otherwise than as requiring signals which enable the workers to avoid the hazard, since otherwise that legislation would be deprived of any practical effect.

16. The fact nevertheless remains that it is clear from the wording of the third subparagraph of paragraph 2.1 of Annex I to the Directive that the fundamental objective of that provision is that, either by the siting of the main control position, or, if that is not possible, by recourse to prior warnings, the possibility, not only for an assistant operator but for every person in the danger zone, of avoiding the hazard in good time should be assured.

17. By referring only to such warnings, Article 80 of the DPR 547/55 makes no allusion to that fundamental objective expressly specified by the Community legislature. It cannot, therefore, be regarded as a satisfactory transposition of the Directive, under the pretext that the warnings in question cannot have any other objective than that set out in the Directive.

18. It is for the national authorities to adopt transposition measures which do not have the slightest ambiguity with regard to the objective of the obligations in issue. For confirmation of that I refer to the Court's settled case-law concerning the necessity for sufficient precision in the transposition of the provisions of a directive. [6]

19. It follows from the foregoing that the Commission's first complaint must be upheld.

6 — See, by way of example, Case 29/84 *Commission* v *Germany* [1985] ECR 1661.

The second complaint, alleging infringement of Article 4(1) of and paragraph 2.2 of Annex I to the Directive

20. The Commission claims that the Italian authorities have still failed to transpose paragraph 2.2 of Annex I to the Directive, which is worded as follows:

'It must be possible to start work equipment only by deliberate action on a control provided for the purpose.

The same shall apply:

— to restart it after a stoppage for whatever reason,

— for the control of a significant change in the operating conditions (e.g. speed, pressure, etc.),

unless such a restart or change does not subject exposed workers to any hazard.

This requirement does not apply to restarting or a change in operating conditions as a result of the normal operating cycle of an automatic device.'

21. The defendant argues, however, that Article 77 of the DPR No 547/55 transposes that provision into national law. That article provides:

'The starting controls of the machines must be arranged in such a way as to avoid accidental starting or engagement or be equipped with appropriate devices to fulfil the same function.'

22. The Italian Government undertakes a detailed analysis of that provision and concludes that it does in fact serve to attain the same objectives as the Community provision. Article 77 of the DPR No 547/55 requires quite simply 'in negative terms' (the avoidance of accidental starts) what the Directive requires 'in positive terms' (a deliberate action to obtain a start).

23. The Commission's response is that the national provision in issue refers, in extremely vague and general terms, to the *positioning* of the controls on the machines whereas the Directive lays down the requirement of *a deliberate action* to restart or to change the operating conditions of a machine. [7] The content of the two provisions therefore differs and the objective aimed at by the Directive is not pursued with all the necessary efficacy by Article 77 of the DPR No 547/55; which means that there is a risk of serious detriment to the actual safety of the workers concerned.

24. The applicant points, in that regard, to the Court's case-law relating to the necessity for a sufficiently clear and precise transposition of the rules of a directive, in order to ensure that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts. [8]

25. I do not subscribe to the first part of the Commission's argument, which lays stress on the fact that Article 77 of the DPR No 547/55 only covers the positioning of the controls. It is, admittedly, indisputable that it is not sufficient to regulate the positioning in order to ensure that inadvertent starts are impossible. Considerations such as the ease with which the controls engage or, again, their operating sequence are also relevant in that regard.

26. It must, however, be observed that Article 77 of the DPR No 547/55 cites the positioning of the controls only as one way, admittedly the main one, of eliminating the risk of inadvertent starts. It provides also for the possibility that the controls may be equipped with appropriate devices to fulfil the same function.

27. I subscribe fully, on the other hand, to the Commission's analysis, in the second part of its argument, relating to the fact that the national provision in issue is not as precise as the Directive. In particular, it should be noted that Article 77 of DPR No 547/55 makes no reference to a significant change in the operating conditions of the machine.

28. Contrary to the Italian Government's submission, it is not obvious to me that that situation is covered by the concept of 'accidental starting or engagement', to which the national rule at issue applies.

7 — Emphasis added by the Commission.

8 — Case 363/85 *Commission* v *Italy* [1987] ECR 1733, paragraph 7.

29. It should therefore be concluded that the Commission is right in submitting that paragraph 2.2 of Annex I to the Directive has not been transposed with sufficient precision by the national rule cited by the defendant.

30. It follows that the applicant's second complaint is well founded.

The third complaint, alleging infringement of Article 4(1) of and paragraph 2.3 of Annex I to the Directive

31. The second, third and fourth sentences of paragraph 2.3 of Annex I to the Directive provide:

'Each work station must be fitted with a control to stop some or all of the work equipment, depending on the type of hazard, so that the equipment is in a safe state. The equipment's stop control must have priority over the start controls. When the work equipment or the dangerous parts of it have stopped, the energy supply of the actuators concerned must be switched off.'

32. To the Commission's assertion that the principles arising from paragraph 2.3 are not incorporated in the Italian legislation, the defendant replies that that omission is only apparent. The legislature has in fact taken them into account in a general way in Articles 69 and 71 of DPR No 547/55 and has applied those principles in a certain number of specific provisions, namely Articles 133, 157, 165, 209 and 220 of DPR No 547/55.

33. The text of those provisions is as follows:

'Article 69

If, for actual technical or operational reasons, it is impossible to protect or isolate effectively the moving parts or the danger zones of the machines, other measures must be taken to eliminate or reduce the danger, such as recourse to appropriate tools, automatic feeders, additional devices for stopping the machine and starting mechanisms with multiple simultaneous controls.

...

Article 71

In the cases provided for in Articles 69 and 70, if the operator is at risk of being caught, dragged or crushed by unprotected or incompletely protected moving parts, and if those parts have considerable inertial force, the stop mechanism of the machine must not only be provided with a control within the immediate reach of the hands or other parts of the operator's body, but it must also include an effective braking system enabling the machine to be stopped in the shortest possible time.

...

Article 133

Rolling mills and presses which, by reason of their dimensions, power, velocity or other working conditions, present particularly serious specific dangers, such as rolling mills (mixers) for rubber, presses for rubber strips and the like, must be equipped with a device enabling the immediate halting of the rollers. The control system must be designed and arranged so that the machine can be stopped by being pressed simply and lightly by any part of the operator's body should his hands be caught in the moving rollers.

Apart from the braking system, the stop mechanism referred to in the previous paragraph must also include a system enabling the simultaneous reversing of the movement of the rollers before their final stop.

...

Article 157

The reels of wire-drawing machines must be equipped with a device, which can be activated directly by the operator, enabling the machines to be stopped immediately in case of necessity.

...

Article 165

Platen printing presses and similar machines which are not provided with automatic feeders must be equipped with

a device enabling the machine to be stopped automatically by a single blow of the operator's hand, should he be in danger between the fixed bed and the moving plate, or they must be equipped with another appropriate safety device of proven effectiveness.

...

Article 209

A rapid halting system must be provided at each loading and unloading position on vertical conveyors with moving plates.

...

Article 220

Inclined surfaces must be equipped with a safety device which can bring about the halting of the wagons or trains should the traction systems break or slacken, if that proves to be necessary because of the length and gradient of the run, the operating speed or other particular features of the installation, and in any event if they are used, even sporadically, for the transport of persons.

If it is not possible, for technical reasons relating to the particular features of the installation or its operation, to use the device referred to in paragraph 1, the systems of traction and wagon-coupling must present a safety coefficient of at least eight: in such a situation, the use of inclined surfaces for the transport of persons is prohibited.

In any event, the traction and coupling systems, like the safety devices, must be checked monthly.

...'

34. The Commission admits that the requirements of the second sentence of paragraph 2.3 of Annex I to the Directive are properly transposed by the above provisions, in particular Articles 69 and 71 of DPR No 547/55, and therefore withdraws its complaint in that regard.

35. It claims on the other hand, correctly in my view, that none of the provisions cited by the defendant takes up the two specific requirements of the Directive with regard to the priority of the stop commands over the start commands and to the switching off of the energy supply to the motors. The last point, the importance of which for the safety of workers is obvious, is not mentioned in any of the national provisions cited by the defendant. As for the priority of the stop commands, here again one looks for it in vain in those provisions, since they confine themselves to referring, in certain cases, to an 'immediate halting', which cannot be equated to an explicit statement as to the priority of the stop commands, such as flows from the Directive.

36. It follows that the Commission's complaint relating to the infringement of the third and fourth sentences of paragraph 2.3 of Annex I to the Directive is well founded.

The fourth complaint, alleging infringement of Article 4(1) of and paragraph 2.8 of Annex I to the Directive

37. The Commission also accuses the Italian Republic of not having ensured the transposition of the second to fifth indents of the second sentence of paragraph 2.8 of Annex I to the Directive, which provide:

'The guards and protection devices must:

...

— not give rise to any additional hazard,

— not be easily removed or rendered inoperative,

— be situated at sufficient distance from the danger zone,

— not restrict more than necessary the view of the operating cycle of the equipment,

...'.

38. The defendant acknowledges having chosen an approach other than that prescribed by the Directive, but submits that the national legislation reaches the same safety objective as the Community rule. Furthermore, its approach encourages progress in terms of safety linked to the development of techniques of prevention.

39. According to the Italian Government, it is only ostensibly that the Directive, which sets out an exhaustive list of the performance and construction characteristics of the guards and protection devices, is more detailed than the national provisions. The Italian legislature has adopted a more open and evolutionary system including, first, a series of specific requirements covering various aspects which are regarded as particularly critical and, second, a body of general rules whose effect is to impose on the employer, under threat of criminal penalty, the obligation to seek and to apply the best current solutions in terms of safety, to be found, according to settled case-law of the Italian courts, in the state of the art as codified and set out in all the codes of good practice.

40. The specific provisions cited by the defendant are Articles 43, 44, 48 and 49 of DPR No 547/55, which are worded as follows:

'Article 43

Mechanisms which transform a rotary movement into a reciprocating movement or *vice versa* such as slides, crank arms, eccentric gears, cranks and others, must be appropriately guarded.

Guards on frames for the cutting of stones, marble and the like may be dispensed with, unless there are particular dangers, where the moving parts are inaccessible or the engine power does not exceed one horsepower or the speed 60 revolutions per minute.

Article 44

Parts of trees projecting from a machine or its supports by more than a quarter of their diameter must be cut back to that size or protected by means of a guard fixed to an immobile part.

...

Article 48

Manual cleaning, oiling or greasing of parts of a machine that are in motion are prohibited, unless this is necessary because of particular technical requirements, in which case appropriate methods must be used to avoid any danger.

The prohibition laid down by this article must be brought to the attention of operators by clearly visible notices.

Article 49

It is prohibited to carry out any repair or adjustment to parts while they are in motion.

If it is necessary to carry out such operations when the machine is in motion, appropriate precautions must be taken to ensure the safety of the operator.

The prohibition laid down in the first paragraph must be brought to the attention of operators by clearly visible notices.

...'

41. On reading those provisions, one is bound to say that their content differs objectively from that of paragraph 2.8 of Annex I to the Directive. They refer to a series of specific cases, which do not, however, necessarily concern protection devices, and do not lay down any general rule with regard to them.

42. As regards the general provisions, the defendant invokes, first, Article 2087 of the Italian Civil Code, [9] which provides:

'The employer is required to take, within the operating framework of the undertaking, the measures which, having regard to the particular features of the work, to experience and to the state of technology, are necessary in order to protect workers against physical and mental harm.'

9 — GURI No 79, of 4 April 1942.

43. The Italian Government relies, second, on Article 4(5)(b) of the Legislative Decree No 626 of 19 September 1994 'implementing Directives 89/391/EEC, 89/654/EEC, 89/655/EEC, 89/656/EEC, 90/269/EEC, 90/270/EEC, 90/394/EEC and 90/679/EEC concerning the improvement of the safety and health of workers at work', [10] as amended by the Legislative Decree No 242 of 19 March 1996, [11] according to which employers, managers and personnel who carry out, direct or supervise the activities referred to in Article 1 [namely, 'all private and public sectors of activity' save the exceptions provided for], in the context of their respective powers and spheres of competence, are to take the necessary measures to secure the safety and health of workers, and in particular, are to take the preventive measures necessary on the basis of the changes in organisation and production which are of importance for the purposes of workers' health and the safety of the work, that is to say, on the basis of current developments in technology, prevention and protection.

44. The defendant cites, third, Article 374 of DPR No 547/55, which provides:

'Buildings and facilities, including their associated services, intended for a place of work and its environment, must be constructed to good standards of stability, durability and efficiency, commensurate with their conditions of use and with the requirements of work safety, and must be so maintained.

Plant, machinery, equipment, tools and instruments, including protection equipment, must have the qualities of resistance and suitability demanded by the requirements of work safety and must be maintained in a good state of repair and efficiency. When maintenance manuals are supplied with the equipment referred to in paragraph 2, they must be kept up to date.'

45. The Commission disputes the relevance of those general provisions on the ground that they necessarily presuppose, in order to have their full legal effect, the existence of sufficiently detailed provisions to ensure the protection of workers, such as those contained in paragraph 2.8 of Annex I to the Directive, which are not transposed expressly and clearly.

46. In any event, it must be observed that, while there is nothing to prevent a Member State from enacting legislation based on the

10 — GURI No 265, of 12 November 1995, general supplement No 141.

11 — GURI No 104, of 6 May 1996, general supplement No 75, p. 5.

necessity of adaptation to progress — the Commission points out, in that regard, that Article 6(1) of Directive 89/391 is inspired by the same concern — that consideration cannot, however, relieve it of the duty to enact the minimum requirements of the Directive.

47. The Directive is intended, as the Commission stresses, to guarantee for all the workers of all the Member States a minimum level of protection such as to avert in an appropriate manner the risks connected with the use of work equipment. Its provisions therefore imply the adoption by the Member States of clear and precise provisions, leaving no doubt as to the extent of the rights which the Directive confers on individuals and corresponding to the minimum requirements arising from the Directive.

48. It must be observed that none of the provisions cited by the defendant reflect, precisely and unquestionably, the provisions of paragraph 2.8 of Annex I to the Directive relating to protection devices.

49. It must therefore be concluded that the Commission's fourth complaint is well founded. Since such was also the case in relation to its three other complaints, it follows that the action is well founded in its entirety.

50. As for the costs, while it is true that the Commission withdrew one of its complaints or, more precisely, part of the complaint relating to the infringement of paragraph 2.3 of Annex I to the Directive, that is insufficient to enable the Italian Republic to escape being ordered to pay all the costs.

51. It is not disputed that it was only with the service of the defence that the defendant notified the Commission of the measures providing for the transposition of the Community rules. It is therefore not proper to make the Commission pay part of the costs on the ground that it partly withdrew one of its complaints.

52. I therefore propose that the defendant be ordered to pay the costs.

Conclusion

53. For the foregoing reasons I propose that the Court should:

— Declare that, by not adopting the laws, regulations and administrative provisions necessary to transpose into national law the minimum requirements arising from Article 4(1) of, and the sixth sentence of paragraph 2.1, the second sentence of paragraph 2.2, the third and fourth sentences of paragraph 2.3, and the second, third, fourth and fifth indents of the second sentence of paragraph 2.8 of Annex I to, Council Directive 89/655/EEC of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), the Italian Republic has failed to fulfil its obligations under that directive;

— Order the Italian Republic to pay the costs.