REPORT FOR THE HEARING

in Case E-10/14

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") by Eidsivating Court of Appeal (*Eidsivating lagmannsrett*) in the case between

Enes Deveci and Others

and

Scandinavian Airlines System Denmark-Norway-Sweden

concerning the interpretation of Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of undertakings or businesses.

I Introduction

1. By letter of 31 March 2014, Eidsivating Court of Appeal requested an Advisory Opinion in a case pending before it between Enes Deveci and others ("the appellants") and Scandinavian Airlines System Denmark-Norway-Sweden ("the defendant"). The case before the national court concerns an appeal against the decision of Nedre Romerike District Court (*Nedre Romerike tingrett*), which ruled in favour of the replacement of terms and obligations stemming from a collective agreement concluded by the transferor with a collective agreement entered into by the transferee, after the transfer of an undertaking and the expiry of the original collective agreement.

II Legal background

EEA law

2. Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of undertakings or businesses ("the Directive") (OJ 2001 L 117, p. 32) was incorporated into Annex XVIII to the EEA Agreement at point 32d by Decision of the EEA Joint Committee No 159/2001 of 11 December 2001 (OJ 2002 L 65, p. 38, and EEA Supplement No 13, p. 22).

3. Article 3 of the Directive reads:

> *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 shall, by reason of such transfer, be transferred to the transferee.*
>
> *Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.*
>
> *2. Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under this Article, so far as those rights and obligations are or ought to have been known to the transferor at the time of the transfer. A failure by the transferor to notify the transferee of any such right or obligation shall not affect the transfer of that right or obligation and the rights of any employees against the transferee and/or transferor in respect of that right or obligation.*
>
> *3. Following the transfer, 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 proviso that it shall not be less than one year.*

National law

4. The Directive has been implemented in Norwegian law, *inter alia* with reference to Article 8 of the Directive, through Chapter 16 of the Act of 17 June 2005 No 62 relating to working environment, working hours and employment protection etc. ("the Working Environment Act"). Article 3(1) and (3) of the Directive have been implemented by subsections (1) and (2) of Section 16-2 (Pay and working conditions), which read as follows:

> *(1) The rights and obligations of the former employer ensuing from the contract of employment or employment relationship in force on the date of transfer shall be transferred to the new employer. Claims pursuant to the first sentence may still be raised against the former employer.*
>
> *(2) The new employer shall be bound by any collective pay agreement that was binding upon the former employer. This shall not apply if the new employer at the latest within three weeks after the date of transfer declares in writing to the trade union that the new employer does not wish*

to be bound. The transferred employees have nevertheless the right to retain the individual working conditions that follow from a collective pay agreement that was binding upon the former employer. This shall apply until this collective pay agreement expires or until a new collective pay agreement is concluded that is binding upon the new employer and the transferred employees.

5. The first sentence of subsection (1) reflects the first subparagraph of Article 3(1) of the Directive and subsection (2) of Section 16-2 reflects the first subparagraph of Article 3(3) of the Directive, albeit with certain addenda concerning the applicability of the collective agreement in force in the transferor’s undertaking.

6. Norway has not availed itself of the possibility of limiting the period for observing the terms and conditions applicable to the transferor as provided for in Article 3(3) of the Directive.

7. According to the first and second sentences of Section 16-2(2), the employer is bound by the obligations stemming from the former employer’s collective agreements unless the transferee notifies the other party to the collective agreement in accordance with requirements set out in that provision. If a new employer exercises its right to declare itself not bound in accordance with the first and second sentences of Section 16-2(2) of the Working Environment Act, the general principles of Norwegian collective labour law apply. According to those principles, collective agreements do not pass from the transferor to the transferee in the case of a transfer of undertaking.

8. Based upon these principles, the Norwegian courts have established through case law a doctrine of “exceptionally being bound”. In the case of a non-genuine transfer, the transferee may exceptionally be bound by the collective agreements entered into by the transferor. The analysis whether a transfer is non-genuine depends on a case by case assessment. Elements of the assessment are whether the transferee is an independent legal person, whether operations have been interrupted and whether the intention was to evade obligations stemming from a collective agreement.

9. The Norwegian Act of 27 January 2012 No 1 (“the Labour Dispute Act”) contains, *inter alia*, rules relating to collective agreements and their legal effects. Sections 4 and 5 of the Labour Dispute Act provide that a collective agreement is valid for a limited period of time and shall, as a rule, contain provisions concerning its date of expiry. Section 8 of the Labour Dispute Act gives collective agreements a statutory continuing effect, applicable for the time a strike, lock-out or other industrial action cannot be lawfully instigated.

10. The Norwegian system of collective agreements is based on a hierarchy of such agreements. Basic collective agreements are entered into by the general branches of employers’ confederations (i.e. the Confederation of Norwegian

Enterprises (“NHO”)) and trade unions (such as the Norwegian Confederation of Trade Unions (“LO”) and the Confederation of Vocational Unions (“YS”)) and regulate more permanent and general matters between the parties. Those basic collective agreements are supplemented by nationwide collective agreements, which are often applicable to a certain industry or occupational group. Finally, the system of collective agreements is completed by local agreements entered into at the level of an individual undertaking, laying down more specific rules (i.e. pay rates). In all cases, the specific agreements must always comply with the more general agreements, similar to the rule of “lex superior”.

III Facts and procedure

11. The appellants are former employees of Spirit Air Cargo Handling Norway AS and members of the Norwegian United Federation of Trade Unions (“Fellesforbundet”), or the Norwegian Union of Employees in Commerce and Offices (“Handel og Kontor i Norge”), both being members of LO, or members of the trade union Parat, which is a member of YS.

12. The defendant is a consortium wholly owned by three Nordic limited liability companies, themselves owned by a parent company, SAS AB, and part of the SAS Group. The defendant is member of the employers’ Confederation of Norwegian Enterprises (“NHO”) and the national employers’ Confederation of Norwegian Aviation Industries (“NHO Luftfart”).

13. The SAS Group’s main activities consist in the operation of passenger plane services and the provision of air cargo and other aviation-related services. Those services provided by the group are carried out by different companies within the group. The defendant is one of those companies. Until 2001, the defendant operated the SAS Group’s cargo services as a separate business under the name SAS Cargo.

14. The activities related to terminal operations and cargo handling gradually evolved into a separate business, which was later contained in the wholly-owned subsidiary Spirit Air Cargo Handling AB, and finally became a separate sub-group of the SAS Group (“the Spirit Group”). The Spirit Group’s operational activities were run by different national subsidiaries, e.g. Spirit Air Cargo Handling Norway AS.

15. After a planned sale of the Spirit Group was unsuccessful it was decided that the business of Spirit Air Cargo Handling Norway AS should be transferred back to the defendant’s business. The transfer was implemented through the sale of the contents of Spirit Air Cargo Handling Norway AS with effect from 1 March 2012. The employees’ employment relationships were transferred with effect from the same day.

16. Both the defendant and Spirit Air Cargo Handling Norway AS are bound by a number of collective agreements. As both were members of the same employer confederations (NHO/NHO Luftfart), both were bound by the same basic and nationwide collective agreements. However, those collective agreements were supplemented by local agreements on pay rates, which differed between the defendant and Spirit Air Cargo Handling Norway AS.

17. In January 2012, the trade unions to which the appellants belong gave timely notice of termination in relation to the nationwide collective agreements. The expiry date was 31 March 2012.

18. On 16 March 2012 the appellants' trade unions received notification, in accordance with Section 16-2(2) of the Working Environment Act, by which the defendant informed the trade unions that it did not wish to be bound by the local collective agreements on pay rates, which had applied to Spirit Air Cargo Handling Norway AS.

19. During the period after the transfer took place on 1 March 2012, the defendant continued to pay the employees who had been taken over from Spirit Air Cargo Handling Norway AS in accordance with the rates stipulated in the special agreement for that company.

20. With effect from 1 May 2012, employees who had been taken over from Spirit Air Cargo Handling Norway AS were paid in accordance with the special agreement (pay table) entered into between the defendant and the transferred employees' trade unions.

21. In a letter of 30 March 2012 from the defendant, the employees who had been taken over from Spirit Air Cargo Handling Norway AS were informed, inter alia, of the following matters:

> "... At the same time, we inform you that, from 1 April 2012, you will be covered by SAS / SHG's collective agreements as regards collective pay and terms of employment.
>
> This means that your individual terms will be adjusted in accordance with the above with effect from 1 May 2012."

22. Pursuant to the current special agreement, the pay level in the defendant's undertaking is on average between 4 and 8% lower than for corresponding employee categories in Spirit Air Cargo Handling Norway AS. Changes were made at the individual level in the magnitude of plus 3% to minus 11.5%.

23. When the employees were assigned a grade in the applicable pay tables in the defendant's undertaking, the employees were fully credited for their seniority and qualifications etc. under their former employment relationship with Spirit Air Cargo Handling Norway AS.

24. The appellants, 129 former employees of Spirit Air Cargo Handling Norway AS, did not accept the pay reduction, which resulted from the transfer to the new collective agreement and sought an order, before the Nedre Romerike District Court, requiring the defendant, *inter alia*, to continue to apply the higher pay rates, in accordance with the local agreement entered into by Spirit Air Cargo Handling Norway AS. However, Nedre Romerike District Court found in favour of the defendant.

25. The appellants appealed against this decision before the requesting court. According to the information received by Eidsivating Court of Appeal, the appellants argue, in essence, that Article 3 of the Directive precludes the transfer of the employees of Spirit Air Cargo Handling Norway AS to the collective agreement applicable in the defendant's undertaking, which contains materially lower pay levels.

26. Based upon the information contained in the request, it would appear that the defendant argues, in principle, that Article 3(3) of the Directive does not require the transferee to be bound by the collective agreements entered into by the transferor after the date of expiry of such agreements.

27. The requesting court underlines the fact that a transfer of an undertaking has undoubtedly taken place. It observes further that it is common ground between the parties that the defendant's notification, served in accordance with Section 16-2 of the Working Environment Act, was received in due time.

28. On 31 March 2014, Eidsivating Court of Appeal decided to seek an Advisory Opinion from the Court, and referred the following questions:

1. **Is it consistent with Article 3(1), cf. Article 3(3), of Council Directive 2001/23/EC that the transferee undertaking assigns the individual employees covered by the transfer a place in a pay table set out in a collective agreement that applies in the transferee undertaking, with effect from a date after the collective agreement that applied in the transferor undertaking has expired, even if this results in pay reduction for the individual employees?**

2. **Does the answer to Question 1 depend on whether the collective agreement that applied to the employees of the transferor was still in force when the transferee's collective agreement was made applicable to the employees covered by the transfer of the undertaking?**

3. **Does the answer to Question 1 depend on whether the reduction in pay is significant or not?**

IV Written observations

29. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the appellants, represented by Sigurd-Øyvind Kambestad, advokat, and Christen Horn Johannessen, advokat;
- the defendant, represented by Frode Martin Toftevåg, advokat, and Bjørnar Alterskjær, advokat;
- the Swedish Government, represented by Anna Falk, Director, Charlotta Meyer-Seitz, Deputy Director, Ulrika Persson, Emil Karlsson, Lars Swedenborg, Natacha Otte-Widgren, Legal Advisers, as well as Fredrik Sjövall, Special Adviser, and Karin Sparrman, Desk Officer, within the Legal Secretariat of the Ministry of Foreign Affairs, acting as Agents;
- ESA, represented by Maria Moustakali, Officer, and Janne Tysnes Kaasin, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Johan Enegren, Member of its Legal Service, acting as Agent.

V Summary of the arguments submitted

The appellants

30. In the appellants' view, Eidsivating Court of Appeal has sufficiently presented their arguments in its request to the Court under Article 34 SCA and, thus, they refer to page 8 of that request.

31. According to the arguments presented in the request, the appellants take the view that Article 3(1) and (3) of the Directive precludes the defendant from applying another local agreement, applicable within the transferee undertaking, after the expiry of the collective agreement that initially applied, entered into by the transferor, as the other local agreement contains materially lower pay rates.

32. According to the request from the Eidsivating Court of Appeal, in the proceedings before the national court, the appellants contended that the Directive is intended to protect workers' rights as regards the transfer of undertakings. The Directive's objective consists, in essence, of preventing workers subject to a transfer from being placed in a less favourable position solely as a result of the transfer.[1]

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[1] Reference is made to Case C-108/10 *Scattolon* [2011] ECR I-7491, paragraph 75.

33. The appellants argue that this objective sets an outer limit on what the social partners, in the situation of a transfer of an undertaking, may agree. It may be deduced from the request by the Eidsivating Court of Appeal that the appellants argue that the protection provided for by the Directive applies notwithstanding the expiry of the collective agreement that initially applied.

34. The appellants submit that, even after the date of expiry, an employer is not completely free to change the pay level, as the employer must in every case obey the outer limit set by the objective of the Directive.[2]

35. Finally, it follows from the request that, according to the appellants, the outer limit set by the Directive cannot be said to conflict with "the very essence of the transferee's freedom to conduct a business",[3] as it is based on a pay level the transferee must have been aware of even before the transfer took place.

The defendant

Second question

36. The defendant submits that the second question must be deemed inadmissible, as the question has no bearing in the factual circumstances. Nedre Romerike District Court found that the local agreement, entered into by the transferor, had already expired at the time the local agreement, entered into by the transferee, was applied in relation to the transferred employees.

37. The defendant argues further that national law already precludes a transferee from applying another collective agreement as long as the collective agreement concluded with the transferor is still in force. Hence, had the collective agreement still been in force, once the defendant applied its own collective agreement, the question raised could have been resolved within the national legal system.

38. Thus, the defendant considers the second question hypothetical and unrelated to the facts of the underlying case, as well as being solvable based on national law alone.

First and third questions

39. As regards the first and third questions, the defendant suggests that, as they are closely related, they can be analysed together.

40. The defendant argues that, according to the Directive, the obligation to continue to observe the terms and obligations agreed in any collective agreement on the same terms applicable to the transferor under that agreement only lasts

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[2] Reference is made to *Scattolon*, cited above.

[3] Reference is made to Case C-426/11 *Alemo-Herron*, judgment of 18 July 2013, published electronically, paragraphs 33-35.

until the termination or expiry of that agreement or the entry into force or application of a new agreement.

41. The defendant's argument is based on the view that the Directive does not aim solely at safeguarding the interests of employees in the event of a transfer of an undertaking, but also seeks to ensure a fair balance between the interests of the employees and the transferee. It relies on case law, according to which the transferee must be in a position to make adjustments and changes necessary to carry on its operations.[4] Accordingly, the Directive allows the transferee to replace the original collective agreement by another collective agreement, even if the new collective agreement is less favourable than the original agreement.[5] Further, the obligation of the transferee to continue to observe the terms and obligations agreed in any collective agreement on the same terms applicable to the transferor does not result in the transfer of the collective agreement as such.

42. Moreover, in the defendant's view, the second subparagraph of Article 3(3) of the Directive cannot deprive the first subparagraph of that provision of its substance. The former provision does not prevent working conditions specified in the collective agreement to which the employees concerned were subject prior to the transfer from ceasing to apply during the year after the transfer, e.g. immediately on the date of the transfer itself, if one of the events mentioned in the first subparagraph arises.[6]

43. Furthermore, the defendant points out that, since the Directive seeks to secure a fair balance between the employees and the transferee, any such fair balance between the two groups requires temporal limitations on the transferee's obligation to continue to observe terms and conditions under collective agreements entered into by the transferor.

44. According to the defendant, this is also supported by the legislative background to the Directive. The previous provision, i.e. Article 3(2) of Council Directive 77/187/EEC, was modelled on German law and intended to create a legal safeguard against repudiation of collective agreements simply by reason of a change of employer.[7] The original drafts of Council Directive 77/187/EEC[8]

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[4] Reference is made to *Alemo-Herron*, cited above, paragraph 25, and Case C-499/04 *Werhof* [2006] ECR I-2397, paragraph 31.

[5] Reference is made to K. Riesenhuber, *European Employment Law*, 2012, p. 590.

[6] Reference is made to *Scattolon*, cited above, paragraph 73, and Case C-396/07 *Juuri* [2008] ECR I-8883, paragraph 34.

[7] Reference is made to B. Hepple, "The Transfer of Undertakings (Protection of Employment) Regulations", *Industrial Law Journal*, 1982 (29), p. 36, and S. Evju, *Arbeidsrett:Utvalgte artikler 2001-2010*, Universitetsforlaget, 2010, pp. 463-483.

[8] Reference is made to the *Proposal for a Council Directive on the harmonization of the legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations* (COM(74) 351 final/2), OJ 1974 C 104, p. 1, and *Amended proposal for a Directive of the Council on the harmonisation of the legislation of the Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations* (COM(75) 429 final).

were based on the presumption that the transferee's obligations were time limited. That time limitation was kept in the final text of Council Directive 77/187/EEC, even if it differed to some extent from the original wording of the proposal. The defendant adds that the temporal limitations are also to be found in various Commission documents.[9]

45. By reference to case law,[10] the defendant argues that Article 3 of the Directive imposes no obligation on the transferee to continue to observe the terms and conditions deriving from a collective agreement beyond the date of expiry of that agreement. In the view of the defendant, in particular the case of *Juuri*[11] supports this argument and is, moreover, fully applicable in the case at hand since the collective agreements the transferor had entered into had expired when the transferee's collective agreement was applied to the transferred employees.

46. The defendant notes that the Directive only provides for partial harmonisation. It is not intended to establish a uniform level of protection, but to ensure that the employee is equally protected in his relations with the transferee as he was in his relationship with the transferor under the law of the EEA State in question.[12]

47. Thus, the defendant maintains that it is consistent with the Directive to assign the individual employees a place in a pay table in accordance with the collective agreement entered into by the transferee, with effect from the date the original collective agreement expired, even if this results in a significant wage reduction for the individual employee.

48. Hence, the defendant concludes that the question whether a transferee may apply its own collective agreements to the transferred employees is a question of national law.

49. Furthermore, the defendant argues that the Advocate General's Opinion in the pending case of *Österreichischer Gewerkschaftbund* only contemplates an extension of the protective effects of the Directive if and insofar as national law extends the corresponding temporal limitations afforded to the protection of working conditions following from a collective agreement beyond the date of

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[9] Reference is made to the *Memorandum from the Commission on acquired rights of workers in case of transfer of undertaking* (COM(97) 85 final), at pp. 8-9, and 15, and *Commission Report on Council Directive 2001/23/EC of 12 March 2001 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 undertakings or businesses* (COM(2007) 334 final), at pp. 6-7.

[10] Reference is made to Case C-4/01 *Martin* [2003] ECR I-2859, paragraph 48, *Werhof*, cited above, paragraphs 28 and 30, and *Juuri*, cited above, paragraphs 32-34.

[11] Reference is made to *Juuri*, cited above, paragraphs 32-34.

[12] Reference is made to Case C-458/12 *Lorenzo Amatori*, judgment of 6 March 2014, published electronically, paragraph 41.

expiry.[13] In this regard, the defendant observes that under Norwegian law[14] such continued effect of collective agreements is only granted in favour of employees until the time they are lawfully bound by new collective agreements, and hence no additional protection in time is afforded by Article 3 of the Directive whether or not the employee has been subject to a transfer of an undertaking. In the case at hand, a continued effect or prolonged protection is not an issue.

50. In relation to *Scattolon*[15] and the appellants' arguments based on that judgment, the defendant argues that the judgment is irrelevant as regards the case at hand and therefore supporting arguments cannot be derived from it.

51. In the defendant's view, the question raised in *Scattolon* is different to that raised in the request by Eidsivating Court of Appeal; in *Scattolon* a new collective agreement was applied to the transferred employee, even though the original collective agreement was seemingly still in force on that date. On the contrary, in the case at hand, the question to be answered is whether the terms and conditions guaranteed by a collective agreement entered in the transferor's undertaking need to be obeyed by the transferee after the proper expiry and replacement of that agreement.

52. Moreover, the defendant submits that the extended protection stemming from the Directive is limited to workers who are being placed, solely by reason of a transfer to another employer, in a less favourable position. In its view, in the case at hand, the employees' position results from the fact that the collective agreements applicable previously expired and thereafter the collective agreements concluded in the defendant's undertaking before the transfer also apply to the transferred employees. Hence, the defendant continues, the situation of the appellants does not result solely from the transfer, but is a legal consequence of the collective agreements applicable and the general principles of collective labour law in Norway.

53. The defendant also argues that where the more favourable terms previously offered by the transferor arose from a collective agreement which is no longer legally binding on the employees of the entity transferred the protection granted by the Directive (including any temporal limitation thereupon) does not apply.[16]

54. Moreover, the defendant submits that it has fully taken account of length of service for the purposes of calculating remuneration.

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[13] Reference is made to the Opinion of Advocate General Cruz Villalón of 3 June 2014 in Case C-328/13 *Österreichischer Gewerkschaftbund*, published electronically.

[14] Reference is made to the observations in the request by the Eidsivating Court of Appeal, pp. 3-4.

[15] Reference is made to *Scattolon*, cited above.

[16] Reference is made to *Martin*, cited above, paragraph 48.

55. Finally, the defendant claims that the Directive must be interpreted in accordance with the Charter of Fundamental Rights of the European Union ("the Charter") and more precisely with the freedom to conduct a business enshrined in Article 16 of the Charter, which finds expression also in Article 3 of the Directive. Even though the Charter has not been incorporated into the EEA Agreement, in the defendant's view, the Charter is relevant, in accordance with the principle of homogeneity, to the interpretation of the provision at hand, since there are no differences in scope and purpose of the provision at issue between EEA and EU law.

56. In principle, the defendant takes the view that the interpretation sought by the appellants would result in the collective agreements of the transferor becoming the threshold from which subsequent collective agreements may only derogate in favour of the employees. The defendant argues that this would ignore the interests of the transferee with regard to saving costs and good industrial relations and therefore restrict a transferee's freedom to conduct a business.

57. The defendant proposes that the Court should answer the questions as follows:

1. *Question 2 is inadmissible*

2. *Questions 1 and 3: It is compatible with Article 3 of Council Directive 2001/23/EC to place individual employees covered by the transfer in a pay table set out in a collective agreement that applies in the transferee undertaking with effect from a date after the collective agreement that applied in the transferor undertaking has expired, even if this results in a pay reduction for the individual employee, and regardless of whether this reduction in pay is significant or not.*

The Swedish Government

First question

58. The Swedish Government observes that the wording of Article 3(3) of the Directive suggests, in principle, an obligation on the transferee to observe the collective agreements concluded by the transferor. However, it follows from its wording that the obligation lasts only until the expiry of the collective agreement concerned.

59. In the view of the Swedish Government, this interpretation is also supported by the fact that Article 3(3) of the Directive cannot impose an obligation on the transferee to guarantee specific working conditions, which have been agreed on by the transferor, after the agreed date of expiry of the collective agreement, if the contracting parties have agreed not to guarantee certain working

conditions beyond a particular date.[17] After expiry, the agreement is no longer in force.

60. The Swedish Government emphasises that the judgment in *Scattolon*[18] does not establish a general rule concerning the interpretation of the Directive but stems from the very specific circumstances of the case. On its reading of the case, the judgment in *Scattolon* applies to situations where the collective agreement applicable was immediately replaced upon transfer and the qualifications of the employees, such as length of service, were not properly taken into account after the transfer, leading to a substantial reduction in the remuneration of the employees concerned.[19] Thus, *Scattolon* supports the view that the Directive is aimed at avoiding workers being placed, solely by reason of a transfer to another employer, in an unfavourable position compared with that which they previously enjoyed.[20]

61. Conversely, the Swedish Government submits that in a situation, such as in the case at hand, where the transferred employees no longer enjoy rights under a previously applicable agreement, due to the fact that this agreement has expired, the loss of their right to a particular salary is not directly linked to the transfer, but to the expiry of the collective agreement. In such a situation, the Swedish Government adds, the *Juuri* case law applies.[21]

62. Moreover, the Swedish Government takes the view that, if Article 3(3) of the Directive were to be interpreted as continuing obligations for the transferee resulting from a previous collective agreement now expired, this would risk perpetuating expired collective agreements. The transferee would be bound indefinitely by collective agreements whose terms it could not affect. That would reduce contractual freedom to the point where it would adversely affect the very essence of the transferee's freedom to conduct a business.[22]

63. As a final point, the Swedish Government argues that the perpetuation of expired collective agreements would make it impossible for the transferee to apply, in a non-discriminatory manner, the terms of a collective agreement to transferred and non-transferred employees alike, as possibly several collective agreements – or rights deriving from expired collective agreements – would have to be applied in the undertaking.

64. Consequently, the Swedish Government proposes that the first question should be answered in the affirmative.

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17 Reference is made to *Juuri*, cited above, paragraph 33.

18 Reference is made to *Scattolon*, cited above.

19 Ibid.

20 Ibid., paragraph 77.

21 Reference is made to *Juuri*, cited above, paragraph 33.

22 Reference is made to *Alemo-Herron*, cited above, paragraphs 33-36.

Second question

65. According to the Swedish Government, it follows from the national court's request that the collective agreement which applied to the transferor has expired. In light of the answer proposed to the first question, it is consequently unnecessary to answer the second question.

Third question

66. Finally, in the view of the Swedish Government, the third question must be answered in the negative, since a transferee is no longer bound by obligations established in a previous collective agreement if that collective agreement has expired.

67. The Swedish Government proposes that the Court should answer the questions as follows:

1. *Question 1: It is consistent with Article 3(1) and 3(3) of Council Directive 2001/23/EC that the transferee undertaking assigns the individual employees covered by the transfer a place in a pay table set out in a collective agreement that applies in the transferee undertaking with effect from a date after the collective agreement that applied in the transferor undertaking expired, even if this results in a pay reduction for the individual employees.*

2. *Question 3: The third question must be answered in the negative.*

ESA

Introductory remarks

68. In its introductory remarks, ESA observes that the Directive seeks to ensure a fair balance between the interests of transferred employees and those of the transferee. [23] Moreover, it follows from case law that Article 3 of the Directive, read in conjunction with Article 8, cannot be interpreted as entitling the EEA States to introduce measures which are liable to adversely affect the very essence of the transferee's freedom to conduct a business.[24]

69. ESA submits further that the Directive is intended to achieve only partial harmonisation and not intended to establish a uniform level of protection throughout the EEA.[25] The Directive can only be relied upon to ensure that the transferred employee is protected in his relations with the transferee to the same

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[23] Ibid., paragraph 25.

[24] Ibid, paragraphs 25-36.

[25] Reference is made to *Juuri*, cited above, paragraph 23, and Case C-425/02 *Delahaye* [2004] ECR I-10823.

extent as he was in his relations with the transferor undertaking under the legal rules of the EEA State concerned.[26]

First question

70. ESA observes that the Directive does not harmonise the conditions under which an existing collective agreement expires nor does it harmonise how another collective agreement enters into force or is made applicable. Thus, it is for national law to determine the conditions under which another collective agreement may enter into force or take effect after the expiry of a previous collective agreement.

71. ESA submits that, pursuant to the wording of Article 3(3) of the Directive, the obligation on the transferee to obey the terms and conditions of the collective agreements in force with the transferor ends when those collective agreements expire.[27]

72. In ESA's view, there is no indication that the transferee should be bound by collective agreements other than those in force at the time of the transfer,[28] as the Directive aims merely to safeguard the rights and obligation of employees in force on the day of the transfer and is not intended to protect mere expectations.[29]

73. ESA observes, in addition, that the Directive does not preclude the transferee from reducing the amount of remuneration paid, e.g. for the purpose of complying with national rules in force for public employees, as long as those national rules are interpreted in light of the purpose of the Directive and the length of service is taken into account.[30]

74. ESA submits that the obligation to take account of factors such as the length of service, education and type of experience that affect the calculation of remuneration appears to reflect aspects of fairness that must be taken into account such as to determine remuneration in accordance with the Directive's aims.

75. Hence, ESA takes the view that the first question must be answered in the affirmative in as much as the conditions of a collective agreement in a transferee undertaking may be applied to the transferred employees, even if this results in a reduction of pay, provided that the relevant rules of national law are interpreted

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[26] Reference is made to *Juuri*, cited above, paragraph 23, *Martin*, cited above, paragraph 41, and Case 324/86 *Tellerup* v *Daddy's Dance Hall* [1988] ECR 739, paragraph 16.

[27] Reference is made to *Juuri*, cited above, paragraphs 33-34.

[28] Reference is made to *Werhof*, cited above, paragraph 29.

[29] Reference is made to *Werhof*, cited above, paragraph 29, and the Opinion of Advocate General Cruz Villalón in *Österreichischer Gewerkschaftbund*, cited above, point 51.

[30] Reference is made to *Delahaye*, cited above, paragraph 35.

in the light of the Directive and due account is taken of the qualifications of the employees.

Second question

76. According to ESA, there are two aspects to the second question, as it concerns both the conditions for the application of another agreement and the content of such an agreement.

77. If the collective agreement that applied in the transferor undertaking is still in force, it follows from the wording of Article 3(3) of the Directive that one of the alternative conditions mentioned therein will, when fulfilled, end the obligation of the transferee to observe the terms and conditions of the collective agreement that applied in the transferor undertaking. The Directive does not rank the alternatives but presents them as equal in value and effect.

78. ESA submits that, as the Directive does not harmonise the conditions under which an existing collective agreement expires, nor how another collective agreement enters into force or is made applicable, it is for national law to regulate such situations.

79. Hence, ESA continues, if the national rules for replacing the collective agreement applicable in the transferor's undertaking by the agreement applicable in the transferee's undertaking are fulfilled, the conditions of the collective agreement applicable in the transferee undertaking will apply and a reduction in pay will be possible. Similarly, the same conclusion must be reached if the national rules governing the replacement of an existing collective agreement by a new collective agreement are fulfilled.

80. At the same time, ESA also emphasises that if the national rules governing the replacement of collective agreements are not fulfilled, the terms and conditions of the existing collective agreement will continue to apply after the transfer.

81. Hence, ESA proposes that the second question should be answered in the affirmative, namely, the answer to the first question may depend on whether the collective agreement in the transferor undertaking was still in force when the transferee's collective agreement was made applicable. However, whether and, if so, to what extent this may affect the entry into force or application of another agreement will depend on the rules of collective labour law in the EEA State concerned.

Third question

82. With regard to the third question, ESA observes that, in addition to the obligation on the transferee to interpret the relevant rules in line with the aim of

the Directive, as already stated with regard to the other questions, Article 4(2) of the Directive provides for further restrictions on the discretion of the transferee to determine the conditions of work in relation to the transferred workers after the date of expiry of the previous collective agreements.

83. In the view of ESA, a significant reduction in remuneration may entail a substantial change in working conditions within the meaning of Article 4(2) of the Directive. Thus, if the employment relationship is terminated because of this change in working conditions, Article 4(2) will impose the responsibility for the termination on the employer, the consequences of which have to be determined by national law. Therefore, Article 4(2) limits the employer's discretion to adjust working conditions to the detriment of the transferred workers.

84. Consequently, ESA proposes that, due to the close relationship between the answers to questions 1 and 3, those two questions should be answered together.

85. ESA proposes that the Court should answer those questions as follows:

1. *Questions 1 and 3: The conditions of the collective agreement in the transferee undertaking may be applied to the transferred workers after the expiry of the collective agreement in the transferor undertaking even if this results in a reduction of pay, provided that the relevant rules are interpreted in light of the purpose of the Directive and account is taken of the length of service with the transferor undertaking and other equivalent factors when calculating the remuneration in the transferee undertaking. The amount of the reduction in pay will be of significance in so far as it may entail a substantial change in working conditions within the meaning of Article 4(2).*

2. *Question 2: If the collective agreement in the transferor undertaking is in force on the date of the transfer, this may affect the application of the collective agreement of the transferee, depending on the regulation of collective labour law in the respective State.*

The Commission

First and third questions

86. The Commission submits that, since the collective agreement at issue in the national proceedings expired before the date of transfer, the defendant is not obliged to observe the terms and conditions set out therein.

87. According to the Commission, this interpretation results from the fact that the first subparagraph of Article 3(3) of the Directive cannot override the intentions of the parties to a collective agreement as expressed therein. Thus, if the parties have limited the enjoyment of certain rights guaranteed by an

agreement to a particular date, Article 3(3) cannot impose an obligation on the transferee to observe those working conditions after that specific date.[31]

88. The Commission argues that *Scattolon*[32] does not support an alternative interpretation of the Directive, as, unlike in *Scattolon*, in the case at hand, the previous collective agreement had expired, and hence, no collective agreement entered into by the transferor was in force on the date of the transfer. Moreover, it is not disputed in the present case that the transferred employees were fully credited for their seniority and qualifications, unlike the situation in *Scattolon*.

89. The Commission proposes that the Court should answer the first and third questions as follows:

> *Questions 1 and 3: Art. 3(3) of the Directive does not preclude a transferee undertaking from assigning the individual employees covered by a transfer a place in a pay table set out in a collective agreement that applies in the transferee undertaking with effect from a date after the expiry of the collective agreement that applied in the transferor undertaking, irrespective of the size of any resulting reduction in pay.*

Second question

90. In the Commission's view, application of Article 3(3) of the Directive does not limit a transferee undertaking's non-observance of a collective agreement that bound the transferor undertaking, but which expired prior to the transfer, to instances where any pay reduction as a result of the transfer is not significant.

91. Thus, the Commission considers the second question hypothetical.

Carl Baudenbacher
Judge-Rapporteur

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[31] Reference is made to *Juuri*, cited above, paragraph 33.

[32] Reference is made to *Scattolon*, cited above.