



## JUDGMENT OF THE COURT

10 December 2004\*

*(Transfer of undertakings - Council Directive 77/187/EEC – time of transfer –  
objection to transfer of employment relationship)*

In Case E-2/04,

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 by Gulating lagmannsrett (Gulating Court of Appeal), Norway, in a case pending before it between

**Reidar Rasmussen,**

**Jan Rossavik, and**

**Johan Kåldman,**

and

**Total E&P Norge AS, v/styrets formann (chairman of the board)**

on the interpretation of Article 1 and Article 3(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses, or parts of businesses, as it was referred to in point 23 of Annex XVIII to the EEA Agreement,

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\* Language of the Request: Norwegian.

THE COURT,

composed of: Carl Baudenbacher, President, Per Tresselt and Thorgeir Örlygsson, (Judge-Rapporteur), Judges,

Registrar: Henning Harborg,

having considered the written observations submitted on behalf of:

- Reidar Rasmussen, Jan Rossavik and Johan Kälđman, represented by Bent Endresen, Advokat, Stavanger;
- Total E&P Norge AS, represented by Lars Holo, Advokat, Arntzen de Besche Advokatfirma AS, Oslo;
- the EFTA Surveillance Authority, represented by Elisabethann Wright, Senior Legal & Executive Officer, and Arne Torsten Andersen, Legal & Executive Officer, acting as Agents; and,
- the Commission of the European Communities, represented by John Forman and Gérard Rozet, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral arguments of Reidar Rasmussen, Jan Rossavik and Johan Kälđman, represented by Bent Endresen; Total E&P Norge AS, represented by Lars Holo; the EFTA Surveillance Authority, represented by Elisabethann Wright; and, the Commission of the European Communities, represented by John Forman, at the hearing on 15 October 2004,

gives the following

**Judgment**

**I Facts and procedure**

- 1 By a decision of 3 May 2004, registered at the Court on 6 May 2004, Gulating lagmannsrett submitted four questions to the Court for an Advisory Opinion in a case pending before it between Reidar Rasmussen, Jan Rossavik, and Johan Kälđman (the “Appellants”) and Total E&P Norge AS (the “Respondent”).
- 2 The case before Gulating lagmannsrett concerns the question of whether a contract concluded between the Respondent, the operator of the Frigg gas field which is situated in the Norwegian and British part of the continental shelf, and

Aker Offshore Partner AS (“AOP”), concerning maintenance and support functions in the field, entails a dismissal of the three Appellants, who were employed by the Respondent, and includes the question of whether there is a transfer of undertaking within the meaning of Council Directive 77/187/EEC.

- 3 Until 1997, the Respondent’s operation of the Frigg field was divided into a production department and a maintenance department. The Appellants worked in the latter department. Following a reorganisation in 1997, a more streamlined, team-based organisation was established, where the teams comprised both production and maintenance staff in an organisation of integrated operations.
- 4 The activities in the Frigg field are carried out partly by workers onshore and partly by workers offshore. All gas production takes place offshore and occurs on manned and unmanned permanently installed platforms. Offshore workers work on a rotation schedule that entails the rotation of three workers in the same position. The same position may be staffed by both employed and leased personnel.
- 5 In 1999, the maintenance and support functions were put out to tender, and on 17 September 1999 the Respondent entered into a contract with AOP (the “Contract”) that was to take effect on 1 May 2001. The Contract covered preventative and curative maintenance services as well as modifications. The Contract established a price of NOK 250 million for an estimated 25,000 to 35,000 hours of work annually.
- 6 The parties to the Contract agreed that the transfer of maintenance services under the Contract constituted a transfer of undertaking pursuant to Chapter XII A of the Working Environment Act of 4 February 1977 (*Lov av 4. feb. 1977 nr 4 om arbeidervern og arbeidsmiljø m.v.*). According to the Contract, AOP was to take over those of the Respondent’s employees who performed maintenance functions from 1 May 2001.
- 7 Due to the fact that the Respondent had entered into a process of staff reduction, five of 19 maintenance workers employed by the Respondent had chosen to resign with a severance package. Thus, 14 maintenance workers employed by the Respondent, including the Appellants, were taken over pursuant to the Contract. AOP also took over existing contracts for the leasing of personnel.
- 8 In a letter of 23 January 2001 the Respondent informed the Appellants and others that 30 April 2001 would be their last day of duty in the service of the Respondent. They were also informed that AOP and another affiliated company, Aker Elektro AS (“AE”), would thenceforth be their sole employer. AOP and AE sent written letters of employment to all the 14 employees they had taken over, including the Appellants. When the Contract came into effect, the service obligations of AOP under the Contract were performed partly by AOP and partly by AE.

- 9 According to information provided by the Respondent, AOP and AE are subsidiaries of the same company, Aker Maritime AS. The Contract was concluded solely between the Respondent and AOP, but with a guarantee from the mother company.
- 10 The Appellants have continued their work on the Frigg field without interruption, and they have performed the same duties there both before and after the Contract entered into force. Reporting lines and work descriptions have remained unchanged. In operational matters, and in accordance with the Contract, the Appellants report to employees of the Respondent's organisation.
- 11 In a letter of 28 August 2001, the Appellant Rasmussen gave notice that he did not accept the transfer of the employment relationship. As concerns the Appellants Rossavik and Kåldman, their opposition to the transfer of the employment relationship was made known on 18 December 2001, the same day as the three Appellants brought a suit against the Respondent before Stavanger tingrett.
- 12 The Appellants demanded that their alleged dismissals be declared void and claimed damages on the grounds that the Contract did not entail a transfer of undertaking pursuant to Chapter XII A of the Working Environment Act and infringed Section 60(2) of the same Act. The Respondent disputed this claim. In a judgment of 8 October 2002, Stavanger tingrett ruled in favour of the Respondent, concluding that there had been a transfer of undertaking within the meaning of Council Directive 77/187/EEC and that the Appellants' employment relationships with the Respondent had thus been transferred to a new employer.
- 13 The judgment of Stavanger tingrett was appealed to Gulating Court of Appeal, which decided to refer the following questions to the Court:
  1. *Is Article 1 of Council Directive 77/187/EEC of 14 February 1977 applicable in a situation where part of an undertaking, provided that it is organised as an independent economic entity, is handed over from one company to another and where the same or corresponding activities are carried out by the acquiring company and an affiliated company within the same group of companies? Does the fact that some working relationships are directly handed over from the transferor to the acquiring company, and others to its affiliated company, preclude the application of the Directive?*
  2. *Is application of the Directive, pursuant to Article 1, precluded in the event that the maintenance and support functions of the undertakings are handed over while the production function is not, and the employees of all these functions work as a team both before and after the transfer?*
  3. *Is the Directive applicable, pursuant to Article 1, in the event of a handover of maintenance tasks on a fixed offshore installation for*

*gas production where a considerable part, in terms of numbers and qualifications, of the workforce which performed this function with the transferor, is handed over to an acquirer that continues to carry out these maintenance tasks on the same installations under a service contract? Is application of the Directive precluded if the ownership of the tools and instruments which the maintenance staff used before the handover, and which they have continued to use after the handover, is not taken over by the acquirer?*

4. *Does it follow from Article 3(1) of the Directive that employment relationships are transferred to the transferee simultaneously with and by virtue of the transfer of the undertaking for those employees who have not, prior to the time of transfer, declared that they do not wish to work for the transferee?*

## **II Legal background**

- 14 The dispute before the national court relates to the second paragraph of Article 60(2) and Chapter XII A of the Norwegian Working Environment Act. Chapter XII A of the Act was adopted as part of the implementation in Norwegian law of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses, or parts of businesses (OJ 1977 L 61, p. 26), as amended by Council Directive 98/50/EC (OJ 1998 L 201, p. 88) (the "Directive").
- 15 Council Directive 98/50/EC was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 57/1999 of 30 April 1999, which entered into force 1 July 2000. This Directive, for which the period prescribed for implementation ended on 17 July 2001, entered into force and was implemented in Norwegian law prior to the events at issue before the national court, and is therefore relevant to the case. Council Directive 2001/23/EC that repealed the Directive, was incorporated into the EEA Agreement by EEA Joint Committee Decision No 159/2001 that entered into force on 12 December 2001, i.e. after the events at issue, and is therefore not relevant to the case.
- 16 Article 1(1)(a) and (b) of the Directive reads as follows:

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

*(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.*

17 Article 3(1) of the Directive reads as follows:

*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.*

(...)

18 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

### **III Findings of the Court**

#### *General remarks*

19 The first three questions referred to the Court concern the concept of transfer of an undertaking, business or part of an undertaking or business as a result of a legal transfer or merger within the meaning of Article 1(1) of the Directive. The fourth question concerns the time of the transfer of employment relationships according to Article 3(1) of the Directive and objections to such a transfer.

20 The Court understands the first question to the effect that the national court is essentially asking whether an independent economic entity can retain its identity pursuant to Article 1(1)(b) of the Directive in a situation where the entity is transferred to a company that entrusts another affiliated company with some of its obligations and that company takes over some of the employees of the transferred entity. In contrast, the second and the third questions are not based on a similar assumption of an existing independent entity. They are thus broader in scope. The Court therefore considers it appropriate to deal with the second and the third questions first. All these questions deal with the issue of transfer of undertaking within the meaning of Article 1(1) of the Directive and therefore the Court will initially consider the issue in general terms.

21 The general principles of interpretation of the Directive are well established in the case law of the Court and the Court of Justice of the European Communities, and the decisions of both courts can give considerable guidance with respect to the situation in this case. In this respect it has to be borne in mind that Council Directive 98/50/EC incorporated important elements of the case law into the text of the Directive.

22 Pursuant to Article 1(1), the applicability of the Directive is subject to three conditions: the transfer must result in a change of employer; it must concern an undertaking, a business or part of an undertaking or business; and, it must be the result of a legal transfer or merger.

- 23 The aim of the Directive is to ensure, as far as possible, that the rights of employees are safeguarded in the event of a change of employer as a result of a merger or a transfer of an undertaking, business or part of an undertaking or business by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor (see Case E-2/95 *Eidesund v Stavanger Catering* EFTA Court Report [1995-1996] 1, at paragraph 26). However, the Directive is not intended to achieve a uniform level of protection throughout the European Economic Area on the basis of common criteria. It can thus only be relied on to ensure that the employees are protected in their relation to the transferee to the same extent as they were in their relation to the transferor under the legal rules of the Contracting Party concerned (see, inter alia, Case 324/86 *Foreningen af Arbejdsledere v Daddy's Dance Hall* [1988] ECR 739, at paragraph 16).
- 24 According to Article 1(1)(b) of the Directive and in light of its aim, the decisive criteria for establishing the existence of a transfer within the meaning of the Directive are: whether the economic entity in question is transferred as a going concern with its own identity; and whether it retains this identity after the transfer, as indicated inter alia by the fact that its operation is actually continued or resumed (see Case E-3/96 *Ask v ABB Offshore Technology and Aker Offshore Partner* [1997] EFTA Court Report 1, at paragraph 19; and Case C-13/95 *Süzen* [1997] ECR I-1259, at paragraph 10).
- 25 For the Directive to be applicable, the transfer must relate to a stable economic entity whose activities are not limited to performing one specific works contract (see *Ask*, at paragraph 19; and *Süzen*, at paragraph 13). Accordingly, Article 1(1)(b) of the Directive states that the term, entity, refers to an organised grouping of resources with the objective of pursuing an economic activity, whether or not that activity is central or ancillary.
- 26 In order to determine whether there is a transfer within the meaning of the Directive, it is necessary to consider all the facts characterising the transaction in question. These facts include, in particular: the type of undertaking or business; whether or not tangible assets, such as buildings and moveable property, are transferred; the value of its tangible assets at the time of the transfer; whether or not a majority of its employees are taken over by the new employer; whether or not its customers are transferred; the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended (see *Eidesund*, at paragraph 32; and Case 24/85 *Spijkers v Benedik* [1986] ECR 1119, at paragraph 13).
- 27 In assessing the facts characterising the transaction in question, the national court must take into account the type of undertaking or business concerned. It follows that the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of the Directive will necessarily vary according to the activity pursued, or the production or operating methods employed by the relevant undertaking, business or part of an undertaking or business (see *Süzen*, at paragraph 18).

28 In the first three questions, the referring court identifies certain factual elements of the case and essentially asks whether they preclude the application of the Directive. The Court recalls that these elements are only individual factors in the overall assessment that must be made in order to determine whether the Directive applies. They cannot be considered in isolation (see *Eidesund*, at paragraph 32; and *Spijkers*, at paragraph 13).

*The second question*

29 The second question relates to organisational matters concerning an entity. It relates primarily to the question of whether, in a situation where maintenance and production workers work together in teams, both before and after the effective date for the Contract, the maintenance function alone can be regarded as an entity which may retain its identity within the meaning of Article 1(1)(b) of the Directive.

30 In the view of the Appellants, only individual employment contracts, and not an independent economic entity, were transferred in the case at hand. At the hearing they emphasised that no real distinction could be drawn between maintenance and production work in the field. Some maintenance work, such as the work carried out by the Appellants, was vital for the day to day operation of the gas platform. The Respondent expressed the opposite view and stressed that the Contract itself indicated, per se, that the maintenance function was organised as an independent entity. The Respondent pointed out that the three Appellants were highly skilled technicians who could not be replaced by any of the production workers.

31 The Court recalls that in assessing the identity of the entity in question, it must be borne in mind that the activities pursued are not the only factors that characterise an entity. An entity cannot be reduced to the activity pursued by it. Its identity also emerges from other factors, such as its workforce, its management staff, the manner in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it (see *Ask*, at paragraph 21; and *Sützen*, at paragraph 15).

32 Furthermore, as held by the Court in *Eidesund*, at paragraph 36, for a part of a business' activity to be considered a separate economic entity, it must be distinguishable from its other activities, and normally have employees mostly assigned to that unit.

33 Article 1(1) of the Directive expressly provides that a transfer of an entity may concern only a part of an undertaking or business. In the case at hand, the entity in question is the maintenance and support functions of the Respondent. Whether the maintenance and support functions can be sufficiently distinguished from the production function and otherwise fulfil the conditions of Article 1(1)(b) of the Directive is a factual assessment for the national court to make, taking into account all the relevant factors.



- 34 In this regard, the Court notes that organisation by teams as opposed to organisation by formally defined departments, potentially makes it more difficult to identify an entity within the meaning of Article 1(1)(b). However, choice of organisational structure, as such, cannot render the Directive inapplicable. If that was the case, the Directive could be circumvented and thus its above-described aim to protect the rights of employees would be undermined.
- 35 In light of the above, the answer to the second question must be that the application of the Directive, pursuant to Article 1, is not precluded when the maintenance and support functions of an undertaking are transferred while the production function is not, and the employees of all these functions work as a team both before and after the transfer.

*The third question*

- 36 The third question is in two parts and concerns the situation on a fixed offshore installation for gas production. Firstly, the referring court seeks to establish whether the Directive may be applicable in the case of a transfer of maintenance tasks, where a considerable part, in terms of numbers and qualifications of the workforce that performed the transferred functions, is taken over by a company that continues to carry out these tasks on the same installation. Secondly, the referring court asks whether the application of the Directive is precluded if the ownership of the tools and instruments, which the staff used before the transaction in question, and which they continued to use afterwards, is not taken over by the company in question.
- 37 The Appellants submit that the tangible assets are essential to the entity in question and were not transferred. The Respondent, on the other hand, submits that the elements characterising the entity are both the skilled and experienced employees that were transferred and the tangible and in some respects intangible assets. The Respondent contends that even though the ownership of tangible assets was not transferred to AOP, both AOP and AE have the right to use these assets under the Contract, and refers in that regard to the judgment of the Court of Justice of the European Communities in Case C-340/01 *Abler v Sodexo* (judgment of 20 November 2003, not yet reported).
- 38 As stated above, the finding of a transfer of an undertaking within the meaning of the Directive is dependent on an overall assessment by the referring court taking into account various factors. The transfer of assets may, depending on the circumstances, such as the particular industry and its method of operation, be a decisive factor. However, certain economic entities are less dependent on tangible and intangible assets for their operation than are others, in which case the absence of transferred assets does not in itself render the Directive inapplicable (see *Ask*, at paragraph 25).
- 39 Where tangible assets are present and are an important factor for the performance of the activity in question and it is established that the transferee has the right to use any relevant assets in such a way as is necessary to enable the transferee to

continue to perform the transferred activities, it is immaterial whether ownership of the assets is transferred. This is a matter for the referring court to determine.

- 40 One of the factors to be considered by the national court when deciding whether an undertaking, business or part of a business has been transferred is whether the transferee has employed the transferor's employees. If the work to be performed does not require any particular expertise or knowledge, the assumption of personnel is less indicative of the identity of the undertaking. On the other hand, where a high percentage of the personnel is taken over, and where the previous business is characterised by the high degree of expertise of its personnel, the engagement of that same personnel by the transferee, may support a finding of identity and continuity of the business. Where a business activity is characterised by a stable workforce carrying out the activity and where the transferee chooses to engage the workforce of the transferor for the continued operation of the business, this may suffice to constitute a transfer within the meaning of the Directive (see Case E-2/96 *Ulstein and Røiseng v Møller* [1995-1996] EFTA Court Report 65, at paragraph 36; *Ask*, at paragraph 29; and *Süzen*, at paragraph 21).
- 41 In a situation, as in the case at hand, where part of the workforce engaged in an activity is leased, it is necessarily only employed workers that may be taken over. In such a situation, the fact that the leasing contracts for leased personnel are taken over, supports the finding of identity of an entity within the meaning of the Directive and its continuity.
- 42 Finally, the Court notes that an agreement on transfer within the meaning of Article 1(1) can be a part of a contract covering other issues, and employees of the transferred entity can thus, contrary to what the Appellants submit, constitute a small portion of the overall agreement without affecting the applicability of the Directive.
- 43 The answer to the third question must therefore be that the Directive may, pursuant to Article 1, be applicable in a situation of a transfer of maintenance tasks on a fixed offshore installation for gas production where a considerable part of the workforce, in terms of numbers and qualifications, that performed the transferred function is taken over by a company that continues to carry out these tasks on the same installation. The application of the Directive is not precluded by the mere fact that the ownership of the tools and instruments, which the maintenance staff used before the transaction in question and which they have continued to use afterwards, is not taken over by the company in question.

*The first question*

- 44 By the first question, the referring court seeks to establish whether an economic entity within the meaning of Article 1(1)(b) of the Directive may retain its identity in a situation where part of an undertaking is transferred from one company to another that carries out the same or corresponding activities together

with another company within the same group of companies, and each company takes over some of the employees in question.

- 45 The Appellants submit that an entity cannot retain its identity in such a situation. The Respondent, on the other hand, stresses that it is of no relevance for the application of the Directive how the transferee chooses to fulfil its contractual obligations.
- 46 The Directive is applicable where, in the context of contractual relations, there is a change in the legal or natural person who is responsible for carrying on the business, and who, by virtue thereof, incurs the obligations of an employer vis-à-vis the employees of the undertaking (see, inter alia, *Abler*, at paragraph 41).
- 47 Furthermore, the absence of a direct contractual link between the transferor and the transferee cannot preclude the application of the Directive if an overall assessment of the transaction indicates a transfer within the meaning of the Directive (see, inter alia, *Eidesund*, at paragraph 30). The Directive has also been held applicable to a subcontracting situation on the ground that it is sufficient for a transfer to be part of the web of contractual relations even if indirect (see Case C-51/00 *Temco v Imzilyen and Others* [2002] ECR I-969, at paragraph 32).
- 48 Provided that other conditions for the application of the Directive have been met, its applicability is similarly not precluded by the fact that the transferee carries out the transferred functions together with an affiliated company within the same group of companies, which also engages some of the transferred employees. Determinative, is whether the same functions will continue to be performed. A different result would make the application of the Directive subject to the transferee's organisation of its work.
- 49 Based on the foregoing, the answer to the first question is that an economic entity within the meaning of Article 1(1)(b) of the Directive may retain its identity in a situation where part of an undertaking is transferred from one company to another that carries out the same or corresponding activities together with another affiliated company within the same group of companies, and when each company takes over some of the employees in question.

*The fourth question*

- 50 By the fourth question, the referring court seeks to establish whether Article 3(1) is to be interpreted to the effect that employment relationships are automatically transferred at the time of the transfer of an undertaking if the employees concerned have not by that time objected to the transfer of the employment relationships.
- 51 Article 3(1) of the Directive must, in light of the stated aim of the Directive and its actual wording, be understood as meaning that the transfer of the employment relationships existing on the date of the transfer of an undertaking automatically occurs upon the transfer of the undertaking by virtue of the transfer (see Case C-

305/94 *De Hertaign v J. Benoidt, in liquidation and IGC Housing Service* [1996] I-5927, at paragraph 18 and 23).

- 52 After the date of the transfer and by virtue of the transfer alone, the transferor is discharged from all obligations of the employment relationship. Consequently, the rights of the employees can only be protected if all the obligations in question are transferred to the transferee as from the date of the transfer (see *Benoidt*, at paragraph 24).
- 53 It follows from the judgment of the Court of Justice of the European Communities in Joined Cases C-132/91, 138/91 and 139/91 *Katsikas* [1992] ECR I-6577, at paragraphs 31 - 32, that the Directive cannot be interpreted as obliging employees to continue their employment relationships with the transferee. Such an obligation would jeopardise the rights of the employees, who must be free to choose their employer and cannot be obliged to work for an employer whom they have not freely chosen.
- 54 If employees decide of their own accord not to continue the employment relationship with the new employer after the transfer, the protection which the Directive is intended to guarantee is without object (see Joined Cases C-171/94 and 172/94 *Merckx and Neuhuys v Ford* [1996] ECR-1253, at paragraph 33).
- 55 The purpose of the Directive is not to ensure that the employment relationship with the transferor is continued where the undertaking's employees object to employment with the transferee (see *Katsikas*, at paragraph 34). In the event of such objection, the objector's employment situation is governed by national law.
- 56 The answer to the fourth question must be that Article 3(1) of the Directive is to be interpreted to the effect that employment relationships are transferred to the transferee simultaneously with and by virtue of the transfer of the undertaking for those employees who have not, prior to the time of transfer, declared that they do not wish to work for the transferee.

#### **IV Costs**

- 57 The costs incurred by the EFTA Surveillance Authority and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. In so far as the parties to the main proceedings are concerned, these proceedings are a step in the proceedings pending before the national court. The decision on costs is therefore a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the *Gulating lagmannsrett* by a reference of 3 May 2004, hereby gives the following Advisory Opinion:

- 1. An entity within the meaning of Article 1(1)(b) of 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 part of businesses as amended by Directive 98/50/EC and incorporated into the EEA Agreement may retain its identity in a situation where part of an undertaking is transferred from one company to another that carries out the same or corresponding activities together with another affiliated company within the same group of companies, and where each company takes over some of the employees in question.**
- 2. The application of the Directive, pursuant to Article 1, is not precluded when the maintenance and support functions of an undertaking are transferred while the production function is not, and the employees of all these functions work as a team both before and after the transfer.**
- 3. The Directive may, pursuant to Article 1, be applicable in the situation of a transfer of maintenance tasks on a fixed offshore installation for gas production where a considerable part of the workforce, in terms of numbers and qualifications, that performed the transferred function is taken over by a company that continues to carry out these tasks on the same installation. The application of the Directive is not precluded by the mere fact that the ownership of the tools and instruments, which the maintenance staff used before the transaction in question, and which they have continued to use afterwards, is not taken over by the company in question.**
- 4. Article 3(1) of the Directive is to be interpreted to the effect that employment relationships are transferred to the transferee simultaneously with and by virtue of the transfer of the undertaking for those employees who have not, prior to the time of transfer, declared that they do not wish to work for the transferee.**

Carl Baudenbacher

Per Tresselt

Thorgeir Örlygsson

Delivered in open court in Luxembourg on 10 December 2004.

Henning Harborg  
Registrar

Carl Baudenbacher  
President