E-2/04/21

REPORT FOR THE HEARING
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 (the Gulating Court of Appeal), Norway, in a case pending before it between

Reidar Rasmussen,

Jan Rossavik, and

Johan Käldman,

and

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

concerning 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 Annex XVIII, point 23 to the EEA Agreement.

I. Introduction

1. By a reference dated 3 May 2004, registered at the Court on 6 May 2004, Gulating lagmannsrett made a Request for an Advisory Opinion in a case pending before it between Reidar Rasmussen, Jan Rossavik, and Johan Käldman (the "Appellants") and Total E&P Norge AS (the "Respondent").

II. Facts and procedure

2. The case concerns the question of whether a contract concluded between the Respondent, an operator of a gas field, and another undertaking 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. The Respondent is the operator of the Frigg field, situated on the Norwegian and the British part of the continental shelf. Originally, Elf Aquitaine Norge AS was the operator of the field, but the company later merged with TotalFina Norge AS; and in 2000 the merged company was renamed TotalFinaElf Exploration Norge AS. In 2003, the company changed its name to Total E&P Norge AS.

4. The Appellants accepted employment with the maintenance department of Elf Aquitaine Norge AS from 1981 to 1983, and their work since then has consisted of maintenance of the processing installation in the Frigg field platform. The Appellant Rasmussen is trained as an electrician, the Appellant Rossavik is trained as a mechanic, and the Appellant Källdman is an instrument technician.

5. Until 1997, the company's operation of the Frigg field was divided into a production department and a maintenance department. Following a reorganisation in 1997, the maintenance services became integrated into operations. This entailed a flatter, team-based organisation, where the teams were made up of both production and maintenance staff in an organisation of integrated operations. Planned maintenance tasks, so-called "campaign maintenance", were not part of the integrated organisation of operations. After the reorganisation, 19 employees of the Respondent, including the three Appellants and some leased personnel, performed the maintenance function.

6. In 1999, the maintenance and support function was put out to tender. An invitation to tender was issued for a contract referred to as "Elf Project and Operations Support" (the "EPOS Contract" or the "Contract"). On 17 September 1999, the EPOS Contract was awarded to Aker Offshore Partner AS, and was to take effect on 1 May 2001. The Contract covered both preventive and curative maintenance services as well as modifications. It was based on an estimated 25,000 to 35,000 hours of work annually, for a contract price of NOK 250 million. According to the Contract, Aker Offshore Partner AS was to take over the employees who worked in the maintenance function from 1 May 2001. The contracting parties agreed that the transfer of maintenance services under the EPOS Contract constituted a transfer of undertaking pursuant to Chapter XII A of the Working Environment Act of 4 February 1977 *(arbejdsmiljøloven)*, and that the employees linked to the maintenance and support function would thus have their employment relationship transferred to the transferee pursuant to the provisions of the Working Environment Act.[1] Because the Respondent had

[1] The Court notes that in the Request for an Advisory Opinion, the referring court employs the term "transfer/outsourcing" to avoid any misunderstanding that they viewed the action as a transfer pursuant to the Directive. The Court shall employ the general term "transfer", which shall not refer to a transfer within the meaning of the Directive unless so stated.

entered into a process of staff reduction, certain employees had chosen to resign with a severance package. Thus, 14 out of 19 maintenance workers covered by the Contract, including the Appellants, were transferred. Aker Offshore Partner AS assumed existing contracts for the leasing of personnel. In cases where Aker Offshore Partner AS already had a contract with the same firm, it could in principle choose either to assume the Respondent's contract or use its own. With regard to contracts that Aker Offshore Partner AS wished to assume, an "assignment agreement" was signed by the three parties, according to which the Respondent's rights and obligations under the agreement were assumed by Aker Offshore Partner AS. The service obligations of Aker Offshore Partner AS under the Contract, were performed partly by that company and partly by another affiliated company, Aker Elektro AS, which operates within the same area of activity and belongs to the same group of companies. Consequently, the employment relationship of some employees was transferred to Aker Elektro AS.

7. The production of gas in the Frigg field takes place from manned and unmanned permanently installed platforms. The activities are carried out partly by employees onshore and partly by employees offshore. Gas production takes place, in its entirety, offshore. Offshore employees work on a rotation schedule that includes 14 day periods of work offshore, followed by 21 or 28 days off. Daily work time is 12 hours, with stand-by duty beyond working hours in the event of operational disruptions. This working schedule entails the rotation of three workers in the same position/function.

8. The function of the Appellant Rasmussen was, during his off-duty periods, performed partly by a person leased from another company and partly by an employee of the Respondent. When the EPOS Contract took effect, his function was split between two teams, the core team and the backup team, in which about half of the workers were leased from other companies. As of 1 May 2001, Rasmussen became part of the "Frigg Process Team". Two employees of Aker Elektro AS replaced workers who had resigned. The function of the Appellant Rossavik was, during his off-duty periods, performed by two persons leased from another company. This distribution of tasks did not change as a result of the EPOS Contract. The function of the Appellant Käldman was, during his off-duty periods, performed by two employees of the Respondent. These persons accepted severance package and resigned. After the Contract came into effect, the function of Käldman was, during his off-duty periods, performed by persons leased from other companies.

9. In a letter of 28 August 2001, the Appellant Rasmussen gave notice that he did not accept the transfer to Aker Elektro AS. As concerns the Appellants Rossavik and Käldman, their opposition to the transfer was made known on 18 December 2001. Initially, the Respondent argued that the employees concerned in the transfer had to sign new employment contracts with Aker Offshore Partner AS. This argument was later abandoned. The Appellants did not express their reservations to Aker that they still considered themselves employees of the Respondent. Aker Offshore Partner AS and Aker Elektro AS sent written letters

of employment to all the 14 employees they had taken over, including the Appellants. The Appellants continued their work without interruption, and they have carried out the same work before and after the EPOS Contract entered into force. Reporting lines and work descriptions have remained unchanged. They have not been given new work descriptions by Aker Offshore Partner AS. In operational matters, and in accordance with the services contract, the Appellants report to employees in the Respondent's organisation. They have received salaries from their respective Aker companies and are members of those companies' insurance and pension schemes.

10. By a statement of claim form of 18 December 2001, the three Appellants brought suit against the Respondent before Stavanger tingrett (the Stavanger District Court) demanding that their alleged dismissals be declared void, and demanding damages. The case was brought on the grounds that the Contract entailed "outsourcing", contrary to the second paragraph of Article 60(2), of the Working Environment Act, and not transfer of undertaking pursuant to Chapter XII A of the same act. The Respondent made the opposite claim, demanding that the Appellants' claims be dismissed. In a judgment rendered on 8 October 2002, Stavanger tingrett ruled in favour of the Respondent, concluding that there had been a transfer of an undertaking within the meaning of the Directive, and that the Appellants' employment relationship with the Respondent had thus been transferred to a new employer. Further, Stavanger tingrett ruled that the employees bringing the case had no right (under domestic rules) to maintain their employment relationship with the transferor, and that any such right had in any event been forfeited because the claims to this effect were brought too late. The judgment of Stavanger tingrett was appealed to Gulating lagmannsrett on 8 November 2002, where the questions referred to the Court arose.

III. Questions

11. The following questions were referred to the EFTA 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?

IV. Legal background

12. 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 transfer of undertakings, businesses, or parts of businesses[2], as amended by Council Directive 98/50/EC[3].

13. Council Directive 77/187/EEC, as amended, was repealed and its provisions consolidated by Council Directive 2001/23/EC[4]. Council Directive 2001/23/EC was incorporated into the EEA Agreement, at Point 32d of Annex XVIII thereto, by a Decision of the EEA Joint Committee which entered into force on 12 December 2001.[5] As the entry into force of Council Directive 2001/23/EC was subsequent to the facts giving rise to the present case, the

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2 OJ 1977 L 61, p. 26.

3 OJ 1998 L 201, p. 88. 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.

4 OJ 2001 L 82, p. 16.

5 Decision of the EEA Joint Committee No 159/2001 of 11 December 2001 amending Annex XVIII to the EEA Agreement, OJ 2002 L 65, p. 38 and EEA Supplement No 13, 7.3.2002., p. 22.

request by the national court is based on Council Directive 77/187/EEC, as amended (the "Directive").

14. Article 1(1) 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.*
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> *(c) This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive."*

15. Article 2(1)(a) and (b) of the Directive reads as follows:

> *"(a) 'transferor' shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the undertaking or business;*
>
> *(b) 'transferee' shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the undertaking or business;"*

16. 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.*
>
> *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."*

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

"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."

18. Article 4(1) of the Directive reads as follows:

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

19. Article 6 of the Directive stipulates the information that the transferor and the transferee are required to send representatives of their respective employees and provides that it must be sent out in good time before the transfer is effected.

V. Written Observations

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

- the Appellants, represented by Bent Endresen, Advokat, Stavanger;

- the Respondent, 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;

- the Commission of the European Communities, represented by John Forman and Gérard Rozet, Members of its Legal Service, acting as Agents.

The Appellants

21. As a general remark, the Appellants express the opinion that the questions must be seen in context, and cannot be answered in isolation and independently of the facts on which Gulating lagmannsrett has based its questions.

The first and second questions

22. The Appellants state that the premise for questions 1 and 2 is the fact that only one out of three workers alternating in the same position was transferred to a new employer, whereas the two others remained with their old employer – employers who are neither the transferor nor the transferee. The Appellants claim that this fact alone indicates that there can be no transfer of undertaking within the meaning of the Directive – of an economic entity organised in a stable manner, an organised entity of personnel and assets – as it was arbitrary which employees working in the same position were transferred to a new employer and which employees remained with their old employer. Nor, in such a situation, was any identifiable economic entity being transferred; merely individual employment contracts were transferred.

23. With respect to the first question, the Appellants submit that the Directive does not apply in a situation where certain employment relationships are transferred directly from the transferor to two different companies. In such a situation, there will not exist a single, identifiable entity following the transaction, since the entity has been split between two companies. Whether or not the companies may be described as sister companies is of no relevance.[6] Under the Directive, independent, private limited companies in the same group must be considered as separate legal entities and not as a single entity.

24. With respect to the second question, the Appellants submit that the Directive does not apply to a contract such as the one concluded between the Respondent and Aker Offshore Partner AS, since what was transferred was not a part of an undertaking but merely an employment relationship. When employees work in teams as in the Frigg field, the Directive cannot apply when certain workers in the team are transferred to new employers, while others, rotating in the same position with the transferred workers, continue to work in the same team, in the same manner, and with the same reporting lines as prior to the transfer. The transferred employees did not constitute a separate economic entity or an organised entity prior to the transfer, nor did they subsequently represent any separate, identifiable identity. In the view of the Appellants, the problem as presented does not appear to have been considered earlier, but the judgment of

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[6] The Appellants refer in this regard to Case C-234/98 *Allen and Others* v *Amalgamated Constructions*, [1999] ECR I-8643.

the Court in *Ask*[7] supports the views of the Appellants. What was transferred to Aker Offshore Partner AS and in particular to Aker Elektro AS has the character of labour contracting, whereas the Respondent runs an industrial undertaking, consisting of oil/gas platforms and processing plants. Finally, the Appellants assert that the assets transferred are insufficient to constitute a transfer of an undertaking or of a part thereof[8].

The third question

25. The Appellants claim that the Directive does not apply when an operator transfers certain workers to a contractor without transferring other assets, such as operating equipment or organisation. Regarding the facts of the case at hand, the Appellants emphasise that the transfer of ten offshore workers represented an insignificant portion of the EPOS Contract, and within the overall context of the Contract the ten employees represented no identifiable entity after the transaction. It is further pointed out that the Appellants are technical personnel, who are dependent both on tools and materials, and parts (i.e. processing plant) in order to carry out their functions. When only the employment relationship is transferred from operator to contractor, as in the case at hand, without tools or processing installation being transferred in conjunction with the employment relationship, and the reporting lines remain the same as prior to the transfer, no entity is being transferred.

26. The Appellants assert that when deciding this question, the EFTA Court must have regard for the industry in question. Offshore oil and gas production in Norway is characterised by major investment of capital in platforms, installations, and equipment. None of this was transferred to Aker Offshore Partner AS. In certain industries where economic entities are largely based on personnel, a group of employees working together on a permanent basis could represent an economic entity.[9] In other industries, a precondition would be that more than just personnel were involved in the transfer.[10]

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7 Case E-3/96 *Ask and Others* v *ABB Offshore Technology*, [1997] EFTA Court Report 1, at paras 20 and 21.

8 The Appellants refer for comparison to Case 24/85 *Spijkers* v *Benedik*, [1986] ECR 1119.

9 The Appellants mention as an example the service industry and refer to Case C-340/01 *Abler and Others* v *Sodexho MM Catering Gesellschaft*, judgment of 20 November 2003, not yet reported; Case E-2/95 *Eidesund* v *Stavanger Catering*, [1995-1996] EFTA Court Report 1.

10 In this regard the Appellants refer to Case 24/85 *Spijkers*, cited above; Case E-3/96 *Ask*, cited above; Case C-172/99 *Liikenne* v *Liskojärvi and Juntunen*, [2001] I-745. Also Case C-392/92 *Schmidt* v *Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen*, [1994] ECR I-1311; C-209/91 *Watson Rask and Christensen* v *Iss Kantineservice*, [1992] ECR I-5755.

The fourth question

27. The Appellants submit that the fourth question must be answered in the negative since employees cannot be required to object to being transferred to a new employer prior to the transfer. In the view of the Appellants, this applies particularly in a situation as the one at hand, where the transferor initially stated that the workers had to sign new employment contracts with their new employer as a precondition for the transfer of their employment relationship and thereafter abandoned this assertion, stating to the workers that their employment relationships were automatically transferred to the new employer by virtue of the agreement between the employers.

28. The Appellants suggest answering the first and the second question as follows:

> *"Council Directive 77/187 EEC is not applicable in a situation where an operating company in the North Sea outsources some of its workers to a contractor as a part of a larger modification and maintenance agreement and some workers to the contractor's sister company. This is particularly true in a situation where the transferred workers work in the same team before and after the transfer together with the operator's employees and rotate with other workers who are not affected by the transfer."*

29. The Appellants suggest answering the third question as follows:

> *"When an operator of an oil and gas field in the North Sea outsources certain workers in its operations organisation, without transferring either fixed or movable operating equipment, and the work is organised in the same manner as prior to the transfer, Directive 77/187 EEC is not applicable."*

30. The Appellants suggest that the fourth question be answered in the negative.

The Respondent

31. At the outset the Respondent claims that the transfer of the maintenance and support functions in the Frigg field, pursuant to the EPOS Contract, entailed that maintenance and support activities were continued by Aker Offshore Partner AS and that these activities constituted an independent entity that maintained its identity following the transfer. This implies that Article 1 of the Directive is applicable.[11]

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[11] Case C-340/01 *Abler*, cited above, at paras 28-30 and Case C-172/99 *Liikenne*, cited above, at paras 27-31.

The first question

32. The Respondent argues that Article 1 of the Directive is applicable in a situation where part of an undertaking, provided that it is organised as an independent economic entity, is transferred from one company to another, when the same or corresponding functions are carried out by the acquiring company and a sister company within the same group. Three arguments are presented for this position. First, it is asserted that the maintenance and support functions, as organised following the reorganisation of the functions in 1997, constituted an independent economic entity within the meaning of the Directive. Stating that it appears from the questions referred that the Court is not asked to take a direct stand on this issue, the Respondent points out that the EPOS Contract indicates the existence of an independent economic entity. A precondition for entering into the EPOS Contract was that the functions transferred to Aker constituted an organised entity of personnel and assets, making it possible to engage in an economic activity with an independent purpose.[12] Second, the objective of the Directive, to ensure the continuity of existing employment relationships within an economic entity in the event of a change of ownership, would be jeopardised if the Directive is not to be applied when two companies carry out activities that were formerly provided by one.[13] Third, it is submitted that Stavanger tingrett interpreted the Directive correctly when it ruled that further organisation by a transferee for the purpose of fulfilling contractual obligations did not preclude the application of the rules on the transfer of undertakings. Thus, that a direct contractual relationship exists between the transferor and transferee is not a condition to the application of the Directive. The Directive may also be applied where the transfer takes place through a third party.[14] In the opinion of the Respondent, a similar view must be applied to the present case.

The second question

33. The Respondent claims that the application of the Directive is not precluded where the undertaking's maintenance and support functions are transferred while its production functions are not, when employees in all functions work in teams before and after the transfer. A distinctive feature of the transfer of the maintenance and support functions in the Frigg field was that all the employees attached to those functions were transferred to the new company. All the employees belonged to the maintenance department and worked with maintenance duties. The fact that the employees worked and work in teams together with workers in the production function cannot preclude the application of the Directive, as long as the maintenance and support functions constitute an independent economic entity within the meaning of the Directive.

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12 In relation to this the Respondent refers to Case C-13/95 *Süzen* v *Zehnacker Gebäudereinigung GmbH Krankenhausservice*, [1997] ECR I-1259, at para 13.

13 Case C-340/01 *Abler,* cited above.

14 In relation to this the Respondent refers inter alia to joined Cases C-171 and 172/94, *Merckx and Neuhuys* v *Ford Motors Company Belgium,* [1996] ECR I-1253.

The third question

34. The Respondent submits that Article 1 of the Directive applies to a transfer of maintenance tasks on a fixed offshore gas production unit if a significant part, in terms of numbers and qualifications, of the workforce that performed this function for the transferor is transferred to a transferee that continues to perform those maintenance tasks on the same installations pursuant to a service contract. This applies even if the ownership of the tools and instruments that those maintenance workers used prior to the transfer, and which they continued to use after the transfer, were not taken over by the transferee. In support of these submissions, the Respondent quotes paragraph 42 of the judgment of the Court of Justice of the European Communities in *Abler*.[15] There it is stated that "*the fact that the tangible assets taken over by the new contractor did not belong to its predecessor but were provided by the contracting authority cannot* [ ] *preclude the existence of a transfer within the meaning of Directive 77/187.*" According to the Respondent, similar reasoning is applicable in the case at hand.

The fourth question

35. In the view of the Respondent, Article 3(1) of the Directive entails 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. When there is a transfer within the scope of the Directive, there is an automatic and unconditional transfer of the original employer's rights and obligations solely by virtue of the transfer of the undertaking.[16] It is evident, however, that a worker has the right, under the Directive, to oppose the transfer of his or her employment relationship to the transferee.[17] The Respondent asserts that any rights under the Directive are transferred at the time of the transfer and after that point in time it is a question of national law to what extent there exist legal grounds to assert claims against the transferor.

The EFTA Surveillance Authority

36. Before dealing with the questions referred to the Court, the EFTA Surveillance Authority recalls the case law of the Court of Justice of the European Communities and the EFTA Court on the objective of the Directive,

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15 Case C-340/01 *Abler*, cited above, at paras 40-42.

16 The Respondent refers to Case C-305/94 *De Hertaing* v *J. Benoidt, in liquidation and IGC Housing Service*, [1996] I-5927; Joined Cases 144 and 145/87 *Berg and Busschers* v *Besselsen*, [1988] ECR 2559.

17 The Respondent refers to joined Cases C-132, 138 and 139/91 *Katsikas* v *Konstantinidis and Skreb* and *Schroll* v *PCO Stauereibetrieb Paetz & Co. Nachfolger*, [1992] ECR I-6577, at paras 34 and 35; Joined Cases C-171 and 172/94 *Merckx*, cited above, at paras 34 and 35.

which is to safeguard the rights of employees through partial harmonisation.[18] It is submitted that according to the case law, the decisive criterion for establishing the existence of a transfer within the meaning of the Directive is whether the entity in question retains its identity, as indicated, inter alia, by the fact that its operation is actually continued or resumed.[19] It is also stated that the Directive is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person who incurs the obligations of an employer towards employees of the undertaking.[20]

The first and second questions

37. The EFTA Surveillance Authority first turns to the second question and submits at the outset that transfer of undertakings within the meaning of the Directive must relate to a stable economic entity, an organised grouping of persons and assets, whose activity is not limited to performing one specific works contract.[21] It is thus considered necessary to determine first whether the maintenance and service function could constitute a stable economic activity that has retained its function and identity as provided for in Article 1(1)(b) of the Directive.[22] If so, it has to be addressed whether a transfer of such a stable economic activity has, in fact, taken place in the present case. It is recalled that, according to Article 1(1)(a) of the Directive, a transfer can also concern part of a business. The EFTA Surveillance Authority considers that it is essentially for the national court to answer these questions, by making an overall assessment of the facts characterising the transaction at issue.[23] These include, in particular, the type of undertaking or business involved, whether or not its tangible assets are transferred and their value at the time of the transfer, the number of employees that are taken over, 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.[24] The EFTA

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18 Case C-4/01 *Martin and Others* v *South Bank University*, judgment of 6 November 2003, not yet reported, at para 41; Case 324/86 *Foreningen af Arbejdsledere i Danmark* v *Daddy's Dance Hall*, [1988] ECR 739, at para 16; Case E-2/95 *Eidesund* cited above, at paras 25-26.

19 The EFTA Surveillance Authority refers to Case E-3/96 *Ask*, cited above, at para 19; C-48/94 *Ledernes Hovedorganisation, acting for Ole Rygaard* v *Dansk Arbejdsgiverforening, acting for Strø Mølle Akustik A/S*, [1995] ECR I-2745.

20 The EFTA Surveillance Authority refers to joined Cases C-171 and 172/94 *Merckx*, cited above, at para 28.

21 Case C-48/94, *Rygaard*, cited above, at para 20; Case C-13/95 *Süzen*, cited above, at para 13; Case C-51/00 *Temco Service Industries* v *Imzilyen and Others*, [2002] ECR I-0969, at para 23.

22 With respect to the criterion of a stable economic entity, the EFTA Surveillance Authority refers to the judgment of the Court of Justice of the European Communities in Case C-234/98 *Allen*, cited above, at para 37.

23 The EFTA Surveillance Authority refers, inter alia, to Case C-172/99 *Liikenne*, cited above, at para 32.

24 Case E-3/96 *Ask*, cited above, at para 20; Case C-13/95 *Süzen*, cited above, at para 14; Case 24/85 *Spijkers*, cited above, at para 13; C-29/91 *Dr. Redmond Stichting* v *Bartol and Others*, [1992] ECR I-3189, at para 24; Case C-175/99 *Mayeur* v *Association Promotion de l'information messine*, [2000] ECR I-7755, at para 52.

Surveillance Authority submits that the degree of importance to be attached to each criterion will necessarily vary according to the activity at issue or the operating methods employed. Thus, if an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot depend on the transfer of such assets.[25]

38. With respect to the case at hand, the EFTA Surveillance Authority submits that there is evidence to support a conclusion that the maintenance and support function constitutes a functional and independent unit, which could be the subject of a transfer within the meaning of the Directive. In this respect, it is pointed out that despite the organisational structure set up in 1997, it is arguable from the previous independence of the maintenance and production activities one from the other that they are two distinct economic entities. As the judgment of the Court of Justice of the European Communities in *Schmidt* illustrates, it is not necessary for an undertaking to have a large number of employees for a transfer to be considered to have taken place.[26] Moreover, as judgments such as that of the Court of Justice of the European Communities in *Süzen*[27] demonstrate, it is possible to give a very narrow construction of what constitutes an economic entity. The EFTA Surveillance Authority also points to the fact that 14 of the 19 employees who provided maintenance and support services under the previous scheme were taken over by the transferee and their contracts maintained. In this regard, the EFTA Surveillance Authority refers to the judgment of the Court in *Eidesund*.[28]

39. For guidance as to whether a transfer of undertaking has occurred in the present case, the EFTA Surveillance Authority refers to the judgment of the Court of Justice of the European Communities in *Süzen*, according to which the way the work was organised, the operational methods, and the operational resources must be examined.[29] According to that judgment, the mere fact that the services provided by the old and new entities are similar is not sufficient to conclude that an economic entity has been transferred. However, the EFTA Surveillance Authority is of the opinion that certain elements in the present case appear to support a transfer. In that respect, reference is again made to the fact that 14 of 19 employees who had previously provided maintenance services to the Respondent continue to do so. Moreover, the services provided, both while the maintenance was a separate function prior to 1997 and after it had been

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25 Case C-13/95 *Süzen*, cited above, at para 18; Case C-51/00 *Temco*, cited above, at para 25; Case C-172/99 *Liikenne*, cited above, at para 35.

26 Case C-392/92 *Schmidt*, cited above.

27 Case C-13/95 *Süzen*, cited above.

28 Reference is made to Case E-2/95 *Eidesund*, cited above, at para 43, where it was concluded that where a high percentage of the personnel is taken over, and where the previous business is characterised by a high degree of expertise of its personnel, the continued activities of the personnel may support a finding of identity and continuity of the business.

29 Case C-13/95 *Süzen*, cited above, at para 15.

merged with the production procedure, do not appear to have been substantially altered. The EFTA Surveillance Authority concludes that, without prejudice to the conclusions of the national court, it would appear that the Contract entailed a transfer of undertaking within the meaning of Article 1 of the Directive. The fact that the maintenance and support employees continued to work with the production team would not alter this conclusion.

40. The EFTA Surveillance Authority then turns to the first question and asserts that the absence of a contractual link between the transferor and transferee does not preclude a transfer within the meaning of the Directive. It is sufficient for such a transfer to be part of a web of contractual relations even if they are indirect.[30]

41. With respect to the facts of the case at hand, the EFTA Surveillance Authority points out that the Respondent and Aker Offshore Partner AS appear to believe that a transfer, within the meaning of Article 1(1)(a) of the Directive, took place between them. Moreover, Aker Elektro AS is a part of the same group of companies as Aker Offshore Partner AS and is involved in the same area of activity. Thus, there is a direct link between Aker Offshore AS and the Respondent and between Aker Offshore AS and Aker Electro AS. From this, the EFTA Surveillance Authority concludes that the transfer of a part of the Respondent's maintenance facilities to Aker Elektro AS constituted a valid transfer of undertakings within the meaning of Article 1(1)(a) of the Directive in the same way as did the transfer from the Respondent to Aker Offshore Partner AS.

The third question

42. With respect to the third question, the EFTA Surveillance Authority repeats its reference to the judgments of the Court of Justice of the European Communities in *Süzen* and *Temco*, reflected upon in paragraph 37 of this Report, and adds that in the judgments it is concluded that, in certain labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity. The identity may be maintained where the new employer not merely pursues the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by the employer's predecessor to that task.[31] It is on the other hand also possible, under other circumstances, that tools and equipment are essential elements of the identity of an economic entity.[32]

43. With respect to the facts of the present case, the EFTA Surveillance Authority reiterates that it is for the referring court to determine whether the

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30 Case C-51/00 *Temco*, cited above, at paras 31-32.

31 Case C-13/95 *Süzen*, cited above, at para 21; Case C-51/00 *Temco*, cited above, at para 26.

32 Case C-172/99 *Liikenne*, cited above, at paras 39-42; Case C-234/98 *Allen*, cited above, at paras 29-31.

conditions of the case law are fulfilled. That applies also to the significance of the absence of transfer of equipment. In this respect, the referring court could take into account the fact that maintenance services often rely to a significant extent on the skill and experience of the employees. This may, depending on the circumstances, be the most important asset in the transfer of undertakings in dispute. Also of potential relevance, in this respect, is the proportion of original members of the maintenance service that were transferred and continue to do the same tasks and report to employees in the Respondent's organisation. Finally, the EFTA Surveillance Authority submits that the referring court might also, if it concludes that tools and equipment do indeed form an essential element of the identity of the economic entity, examine whether it is common in this industry that such tools and equipment be provided by the operator rather than the service provider.

The fourth question

44. In connection to this question, the EFTA Surveillance Authority reiterates the objective of the Directive to safeguard the rights of employees in the event of a change of employer as a result of a transfer of undertaking.[33] Article 3(1) of the Directive provides for the automatic transfer to the transferee of the transferor's rights and obligations arising from the contract of employment existing on the date of the transfer of the undertaking. As this provision is mandatory, the rights conferred on employees by the Directive may not be made subject to the consent of either the transferor or the transferee or to the consent of the employees' representatives or of the employees themselves.[34] Also, according to the judgment of the Court of Justice of the European Communities in *Berg*,[35] the Directive must be interpreted as meaning that after the date of transfer and by virtue of the transfer alone, the transferor is discharged from all obligations arising under the employment contract, or the employment relationship, even if the workers employed in the undertaking did not consent or if they object. This is, however, subject to the power of the EEA States to provide for joint liability of the transferor and the transferee after the date of the transfer. However, the employee has the option of refusing to have his or her contract of employment transferred to the transferee.[36] If the employee does so, the protection the Directive is intended to guarantee is redundant.[37] Under such circumstances, the employment contract or relationship becomes a matter to be determined under

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33 Case E-2/95 *Eidesund*, cited above, at paras 25-26; Joined Cases C-132, 138 and 139/91 *Katsikas*, cited above, at para 21.

34 Case C-362/89 *D'Urso, Ventadori and Others* v *Ercole Marelli Elettromeccanica Generale and Others*, [1991] ECR I-4105, at para 11.

35 Joined Cases 144 and 145/87 *Berg*, cited above, at para 14.

36 Joined Cases C-132, 138 and 139/91 *Katsikas*, cited above, at para 33; Case C-51/00 *Temco*, cited above, at para 36.

37 Case 105/84 *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar*, [1985] ECR 2639, at para 16 and Joined Cases C-132, 138 and 139/91 *Katsikas*, cited above, at para 30.

national law, in particular, whether it should be regarded as terminated or be maintained with the transferor.[38]

45. The EFTA Surveillance Authority proposes that the questions be answered as follows:

> *"(1) Article 1 of the Act* [the Directive] *applies to a situation in which employees are transferred from the transferor undertaking both to the acquiring undertaking and directly to an affiliated company of the transferee company that is involved in the same area of activity as the transferee.*
>
> *(2) Application of the Act is not precluded in circumstances in which a production and maintenance team is divided and the maintenance function made subject to a transfer of undertaking while the production function is retained by the original employer.*
>
> *(3) A transfer of undertakings within the application of the Act can be said to occur where a considerable part of an undertaking's workforce is transferred to a transferee and continues to carry out the same maintenance tasks on the same installations under a service contract. The absence of transfer of the equipment used by the employees does not necessarily, in such circumstances, undermine the transfer.*
>
> *(4) It follows from Article 3(1) of the Act that the employment contract of employees who fail to express a wish not to be part of the transfer of an undertaking are automatically transferred by virtue of the transfer of the undertaking. It is for national law to determine whether any objection to a transfer by an employee should be made prior to or subsequent to the transfer."*

The Commission of the European Communities

46. At the outset the Commission recalls the case law of the Court of Justice of the European Communities[39] and the EFTA Court[40] on the objective of the Directive to safeguard rights of employees. However, the Directive does not lay down a uniform level of protection throughout the Community.[41]

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38 Joined Cases C-132, 138 and 139/91 *Katsikas*, cited above, at paras 33 and 36; Case C-51/00 *Temco*, cited above, at para 36.

39 Case 287/86 *Landsorganisationen i Danmark for Tjenerforbundet i Danmark* v *Ny Mølle Kro*, [1987] ECR 5465, at para 12; Case 324/86 *Daddy's Dance Hall*, cited above, at para 9.

40 Case E-2/95 *Eidesund*, cited above, at paras 25-26.

41 In this regard the Commission refers to Case 324/86 *Daddy's Dance Hall*, cited above, at para 16; Case 105/84 *Danmols Inventar*, cited above, at para 26.

The first, second, and third questions

47. The Commission regards the first three questions to be essentially concerned with the matter of whether there was a transfer of undertaking, within the meaning of the Directive. According to the case law of the Court of Justice of the European Communities and of the EFTA Court, the decisive criterion in that respect is whether the entity in question, i.e. an organised grouping of persons and assets exercising economic activity which pursues a specific objective, retains its identity, as indicated, inter alia, by the fact that its operation is actually continued or resumed.[42] In order to establish whether the conditions for transfer of an organised economic entity are met, it is necessary to make an overall assessment of all the facts characterising the transaction in question,[43] taking into account the activity carried on by the relevant undertaking, business or part of business, or the production or operating methods employed by it.[44]

48. In the view of the Commission, the information provided in the Request is not sufficient for the Court to establish whether there is, in fact, the required set of persons and elements, organised in a stable manner and exercising an economic activity with its own specific objective. In particular, details are lacking on the "maintenance" and "support" activities in the field, what material is involved, and the organisation and management of the staff in question. These are all matters for the referring court to consider. Also, unless additional information is submitted to the Court in the course of the proceedings, the Court cannot reply to the second question as well as to the first part of the third question to the extent that the question deals with the overlapping of the maintenance activities transferred and the other production activities retained by the Respondent.[45]

49. With respect to the second part of the third question, the Commission submits that the fact that, according to the Contract, the tools and instruments taken over by the transferee to provide maintenance services were used by the Respondent beforehand and remain in its ownership, cannot preclude the existence of a transfer according to the Directive. In this regard the Commission deduces from the judgment of the Court of Justice of the European Communities in *Abler* that the Directive is applicable whenever, in the context of contractual relations, there is a change in the legal or natural person who is responsible for

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42 The Commission refers to the judgment of the EFTA Court in Case E-2/96 *Ask*, cited above, at para 19; Judgment of the Court of Justice of the European Communities in Case C-340/01, *Abler*, cited above, at paras 29-30.

43 The Commission refers to the elements described in paragraph 37 of this Report.

44 The Commission refers to Case C-340/01 *Abler*, cited above, at paras 33-35; Case E-2/96, *Ulstein*, [1995-1996] EFTA Court Report, 65, at para 20.

45 However, as to the scope of Article 1(1), the Commission refers to the judgment of the Court of Justice of the European Communities in Case C-209/91 *Watson Rask*, cited above, at para 17.

carrying on the business and who, by virtue of that fact, incurs the obligations of an employer vis-à-vis the employees of the undertaking.[46]

50. The Commission then turns to the first question and expresses the view that if, following the transfer, the identity of the economic entity is maintained, the fact that, formally, there is not just a single but several new employers does not appear to be decisive. A result that excluded transfers between companies, where the potential transferee had some of its obligations assumed by a subsidiary, would be contrary to the aim of the Directive.[47]

The fourth question

51. The Commission's submissions in relation to this question essentially coincide with the submissions of the EFTA Surveillance Authority. The Commission submits that Article 3(1) of the Directive is a mandatory provision that provides for automatic transfer of employment rights and obligations but with the possibility for the employee to refuse to have his or her contract of employment transferred since otherwise the fundamental rights of the employee, who must be free to choose an employer, would be jeopardised.[48] If the employee decides not to continue with the contract of employment or employment relationship with the transferee, it is for each Member State to determine what the fate of the employment contract or employment relationship should be, e.g. whether it is terminated or maintained with the transferor.[49] Finally, the Commission asserts that it follows from the concept of automatic transfer, as laid down in the Directive, that the transfer of contracts of employment takes place at the time of the transfer of the undertaking. The employee who decides not to carry on with the contract or working relationship with the transferee must, therefore, make this known before this date. In relation to this, reference is made to Article 6 of the Directive.

52. The Commission suggests that the questions to the Court be given the following replies:

> *"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 undertakings or businesses is to be interpreted as meaning that it may apply to the transfer of the maintenance and support activities undertaken on behalf of an offshore gas platform, even though, on the one hand, it is the transferor's tools and instruments, in whose ownership they remain, which are used to this end*

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46 Case C-340/01 *Abler,* cited above, at para 41.

47 Case C-234/98 *Allen,* cited above, at para 20.

48 Case C-51/00 *Temco,* cited above, at paras 35 and 36; Joined Cases C-171 and 172/94 *Merckx,* cited above, at para 34 .

49 Joined Cases C-171 and 172/94 *Merckx,* cited above, at para 35.

by the transferee and whose obligations, on the other, are taken over, in part, by one of the transferee's subsidiaries.

It follows from Article 3(1) of Directive 77/187 that employment relationships are transferred to the transferee by reason of and simultaneously with the transfer of the undertaking in respect of those employees who, having been informed of the transfer, have not, prior to the moment of transfer, stated that they do not wish to work for the transferee."

Thorgeir Örlygsson
Judge-Rapporteur