ADVISORY OPINION OF THE COURT

25 September 1996[*]

(Council Directive 77/187/EEC – transfer of part of a business – transfer of rights to pension benefits)

In Case E-2/95,

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 Appeals), Norway, for an Advisory Opinion in the case pending before it between

Eilert Eidesund

and

Stavanger Catering A/S

on the interpretation 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,

THE COURT,

composed of: Bjørn Haug, President, Thór Vilhjálmsson (Rapporteur) and Carl Baudenbacher, Judges,

Registrar: Per Christiansen,

after considering the written observations submitted on behalf of:

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[*] Language of the request for an advisory opinion: Norwegian.

– Eilert Eidesund, represented by Bent Endresen, Advocate, Stavanger;

– Stavanger Catering A/S, represented by Einar Østerdahl Poulsson, Advocate, Oslo;

– the Government of Sweden, represented by Erik Brattgård, Assistant Under-Secretary, Ministry for Foreign Affairs, Trade Department, acting as Agent;

– the Government of the United Kingdom, represented by John Collins, Treasury Solicitor's Department, acting as Agent, assisted by Eleanor Sharpston, Barrister;

– the EFTA Surveillance Authority, represented by Håkan Berglin, Director of its Legal & Executive Affairs Department, acting as Agent, assisted by Trygve Olavson Laake, Officer of that Department;

– the EC Commission, represented by Hans Gerald Crossland and Maria Patakia, both Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Eidesund, Stavanger Catering A/S, the Government of Sweden, the Government of the United Kingdom, the EFTA Surveillance Authority and the EC Commission at the hearing on 7 May 1996,

gives the following

Advisory Opinion

Facts, legal background and the questions referred to the Court

1 By an order dated 27 November 1995, registered at the Court on 29 November 1995, Gulating lagmannsrett (the Gulating Court of Appeals) in Norway made a request for an Advisory Opinion in a case brought before it by Mr Eilert Eidesund (hereinafter "Eidesund"), appellant, against Stavanger Catering A/S ("Stavanger Catering"), a Norwegian company, respondent.

2 The questions referred by the Norwegian court concern the interpretation of Council Directive 77/187/EEC 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 (hereinafter "the Directive"). The Directive is referred to in point 23 of Annex XVIII to the EEA Agreement. The Directive is thus, according to Article 2(a) of the Agreement, to be considered as a part of that Agreement as the Directive has been adapted by way of Protocol 1 to it. According to Article 6 of the EEA Agreement and Article 3(2) of the Surveillance and Court Agreement the jurisprudence of the EC Court of Justice ("the ECJ") is therefore relevant when interpreting the provisions of the Directive.

3 The following questions were referred to the EFTA Court:

"5.1 Does the termination of a catering contract with one company and the signing of a new catering contract with another company fall under Council Directive 77/187 No 1, when no condition is made in the contract that equipment and/or employees are also to be taken over?

5.2 Will it make any difference to the answer to question 5.1 if the new catering company takes over the employees and the stocks?

5.3 Will it make any difference to the answer to question 5.1 if the contract falls under Council Directive 77/62, 80/767 and 88/295 on the award of public supplies contracts?

5.4 Do rights under Article 3 paragraph 1 and 2 also include the right to uphold insurance schemes, including pension schemes, with the new employer that the employee had with the employer who lost the contract?

5.5 Will the answer to question 5.1 be different in cases where:

a) employees of the original catering company apply the normal way for and after competing are employed in positions in the new catering company, and

b) there is an agreement between the new catering company and the old catering company, or between the principal and the new catering company, to the effect that the employees are also to be taken over?"

4 By orders of 5 October and 27 November 1995, received at the Court Registry on 1 December 1995, Stavanger byrett (the Stavanger City Court) in Norway made a request to the EFTA Court for an Advisory Opinion in a case brought before it by Mr Torgeir Langeland against Norske Fabricom A/S. This request was registered at the Court as Case E-3/95 and concerns the interpretation of the same Directive. Although the two cases were not joined for the purposes of the hearing or the Court's opinions, oral hearings in the two cases were held consecutively on 7 May

1996, with the common understanding that arguments made in one case may also be considered in the other without the need for repetition. The advisory opinions in the two cases are delivered simultaneously. For the sake of convenience the Court's findings are included in full in both opinions.

5 The case before Gulating lagmannsrett concerns a claim of Eidesund to the effect that his present employer Stavanger Catering shall pay certain pension insurance premiums. Eidesund's former employer, Scandinavian Service Partner ("SSP"), had paid these premiums into an insurance scheme, apparently on the basis of a local collective agreement with its employees.

6 SSP provided catering and cleaning services to a number of customers, including the operator of an oil drilling platform in the North Sea. A total of 19 persons were employed by SSP to perform the services on the platform. Following a tender procedure, Stavanger Catering obtained a contract to provide the same services on the platform that had previously been provided by SSP. After obtaining this contract, Stavanger Catering offered 14 of the 19 employees, including Eidesund, continued work on the platform, but refused to pay the pension insurance premiums.

7 The primary legal questions before the Court are whether the replacement of a service provider following a tender procedure constitutes a transfer of an enterprise, business or part of a business within the meaning of the Directive, and, if so, whether the transferee is under a legal obligation to pay the premiums for a supplementary pension scheme which was provided by the previous employer, but which is outside the mandatory State social security system.

8 The facts of the case and the procedure before Gulating lagmannsrett are further described in the Report for the Hearing.

9 The first and second recital of the Directive's preamble reads:

> "Whereas economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of businesses to other employers as a result of legal transfers or mergers;
>
> Whereas it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded;"

10 Article 1(1) of the Directive provides:

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

11 Article 3 of the Directive provides:

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

Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.

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

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

3. Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer within the meaning of Article 1(1) in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary schemes referred to in the first subparagraph."

12 Article 4 of the Directive provides:

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

Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal.

2. If the contract of employment or the employment relationship is terminated because the transfer within the meaning of Article 1(1) involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship."

General remarks

13 The relevance of national legislation and decisions by national courts of law has been the subject of discussion, both in the written observations and at the oral hearings.

14 In the case of advisory opinions, as opposed to direct actions before the Court, the sole task of this Court is to interpret provisions of EEA law. It is not the role of this Court in such cases to interpret provisions of national law or to ascertain to what extent provisions of EEA law have been transposed into national law. Nor is this Court in any way bound by findings or decisions by national courts of law.

15 However, in the interpretation of EEA law, it may be a factor of some interest to ascertain how the different Member States have demonstrated, through their implementation into national law of EEA legal provisions, how they perceived and interpreted those EEA legal provisions which the Member States have adopted and which the Court is called upon to interpret. In connection herewith, the interpretation and application by national courts of implementing national legislation may cast light on the contents given to that legislation by the state's legislators. Obviously, how much reliance is to be placed on a national court decision will depend on whether the decision stands out as representative, as does, for instance, an authoritative interpretation given by the highest court of appeals in the country in question.

Whether there is a transfer of undertaking, business or part of a business.

16 Questions 5.1, 5.2 and 5.5 in the request for an Advisory Opinion all concern the concept of transfer of an undertaking, business or part of business within the meaning of Article 1(1) of the Directive.

17 In the present case the alleged transfer of an undertaking or business followed a tender procedure where Stavanger Catering obtained a five-year, time-limited contract to provide certain catering and cleaning services on board the Eko Alpha platform ("the platform") in the North Sea which had previously been provided by SSP under a similar, time-limited contract. Eidesund, who had worked on the platform since 1985, was dismissed by SSP on 16 February 1996 but was at the same time offered, and accepted, employment with the new contractor.

18 *Eidesund* underlines that catering services form a necessary part of the activity on an oil platform and submits that when an ongoing service activity is transferred from one employer to another, it cannot be decisive for the rights of the employees that a transfer takes the form of a change of contractor for the supply of services. The employees' need for protection of their interests is the same. Eidesund

emphasises that it is a well established practice that workers on North Sea platforms are given the opportunity to continue in the service of the new employer.

19 At the oral hearing Eidesund further stated that the work on the platform requires special skills because of the conditions at sea. He also underlined that a majority of the workers continued their work, without interruption, as employees of a new service provider, although for the same platform operator. According to Eidesund, an overall assessment based on the relevant case law of the ECJ results in the conclusion that there was, under the specific circumstances of the case, a transfer within the meaning of the Directive.

20 *Stavanger Catering* maintains that the replacement of a contracting party in this way has a number of special features which make it fundamentally different from a transfer of an undertaking within the meaning of the Directive. Its further arguments on this point are set out in the Report for the Hearing.

21 The Report also summarises Stavanger Catering's remarks on what it sees as disadvantages of considering these transactions as a transfer within the meaning of the Directive, in particular the impediment to competition and the adverse effect on long-term personnel policy. At the oral hearing Stavanger Catering developed its arguments in the case at hand which, according to it, is not one where an economic and organisational entity was transferred and continued to carry out work under the second contractor. It emphasised that not all the employees were engaged by the new employer, who, in its opinion, was not under an obligation to take over any of them.

22 *The Government of the United Kingdom*, *the EFTA Surveillance Authority* and *the Commission of the European Communities* do not propose a definite answer to the question of whether there has been a transfer within the meaning of Article 1 of the Directive in the present case. Instead they suggest that the Court lay down the criteria for assessment of the question, based on the case law of the ECJ, and leave it to the requesting court to make the final factual appraisal based on those criteria.

23 The ECJ has dealt with the concept of transfer in Article 1 of the Directive in numerous cases, in particular, Case 186/83 *Botzen* v *Rotterdamsche Droogdok Maatschappij* [1985] ECR 519, Case 24/85 *Spijkers* v *Benedik* [1986] ECR 1119, Case 287/86 *Landsorganisationen i Danmark for Tjenerforbundet i Danmark* v *Ny Mølle Kro* [1987] ECR 5465; Case 324/86 *Tellerup* v *Daddy's Dance Hall* [1988] ECR 739 and Case 101/87 *Bork International* v *Foreningen af Arbejdsledere i Danmark* [1988] ECR 3057. Of cases decided after 2 May 1992, the date of signing of the EEA Agreement: Case C-29/91 *Redmond Stichting* v *Hendrikus Bartol* [1992] ECR I-3189, Case C-392/92 *Schmidt* [1994] ECR I-1311, Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755, Case C-48/94 *Rygaard*

v *Strø Mølle Akustik* [1995] ECR I-2745, Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* v *Ford Motors Company Belgium*, judgment of 7 March 1996, not yet published in the ECR.

24 Although none of these cases deal directly with the situation now before the EFTA Court, the general principles of interpretation of the Directive seem to be well established, and the decisions of the ECJ can give considerable guidance with respect to the present case.

25 As stated in the second recital of its preamble the aim of the Directive is, *inter alia*, to "provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded." To that end Article 3(1) of the Directive provides that 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. According to Article 3(2), the transferee shall, following the transfer, continue to observe the terms and conditions agreed in any collective agreement. Furthermore, Article 4(1) provides for the protection for the employees concerned against dismissal by the transferor or the transferee on account of the transfer only.

26 It follows from the preamble and from those provisions that the objective of the Directive is to ensure, so 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, a business or part of a business, by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor.

27 The ECJ has consistently referred to the stated purpose of the Directive and given the concept of transfer of an undertaking a wider and more flexible interpretation than would usually be understood as the scope of the expressions "mergers" and "transfers". Thus, the ECJ has held that the Directive applies, or is not excluded from being applicable, in a case where the owner of a leased undertaking takes over its operation following a breach of the lease by the lessee (see judgment in *Ny Mølle Kro*, cited above); where a non-transferable lease of a restaurant is terminated and the owner leases it to a new lessee who carries on the business without interruption and with the same staff (see judgment in *Daddy's Dance Hall*, cited above); where the owner of an undertaking, after giving notice bringing the lease to an end or upon termination thereof, retakes possession of the undertaking and thereafter sells it to a third party who, shortly afterwards, brings it back into operation (see judgment in *Bork International*, cited above); where a public authority decides to terminate the subsidy paid to one legal person, as a result of which the activities of that legal person are fully and definitively terminated, and to transfer it to another legal person with a similar aim (see judgment in *Redmond*

Stichting, cited above). In *Merckx and Neuhuys* v *Ford Motors Company Belgium* (cited above), an undertaking holding a motor vehicle dealership for a particular territory discontinued its activities and the dealership was then transferred to another undertaking which took over part of the staff and was recommended to customers.

28 Some decisions concern service functions comparable to the present case: see in particular the judgment in *Schmidt* (cited above), where a bank had entrusted by contract a cleaning company the responsibility for carrying out cleaning operations which it previously performed itself; and the judgment in *Watson Rask and Christensen* (cited above), concerning a similar arrangement for the running of a canteen.

29 From the former group of decisions it must be seen as established that the transfer can be effected in two stages and that there is no requirement that there is a direct contractual relationship between the first and the second employer. The latter group of decisions shows that where a businessman entrusts some of his business-related activity to an outside contractor, this may also constitute a transfer. Considering the wide scope of the transfer concept established through the ECJ jurisprudence, it may be concluded that a succession of two independent service contracts does not *as such* fall outside the scope of the Directive**.**

30 The fact that the new service contract was awarded as the result of a tender procedure underscores that the alleged transfer was not based on a direct contractual relationship between the former and the new service provider. However, as pointed out above, the absence of a direct contractual relationship does not exclude the applicability of the Directive if other factors result in an assessment of the transaction as constituting a transfer within the meaning of the Directive.

31 As pointed out in the judgment in *Rygaard* v *Strø Mølle Akustik* (cited above), at paragraphs 15 and 16, it is clear from the scheme of the Directive and from the terms of Article 1(1) thereof that the Directive is intended to ensure continuity of employment relationships existing within a business, irrespective of any change of ownership. It follows from the ECJ case law that the decisive criterion for establishing whether there is a transfer for the purposes of the Directive is whether the business in question is transferred as an ongoing concern and retains its identity, see, in particular, the judgment in *Spijkers* v *Benedik* (cited above), at paragraphs 11 and 12. According to that judgment, in order to ascertain whether that criterion is satisfied, it is necessary to consider whether the operation of the entity in question is actually continued or resumed by the new employer, with the same or similar economic activities. The case law of ECJ also presupposes that the

transfer relates to a stable economic entity whose activity is not limited to performing one specific works contract.

32 It is further well established that it is necessary to consider all the facts characterising the transaction in question, including the type of undertaking or business concerned, whether or not tangible assets, such as buildings and moveable property, or intangible assets, such as patents or know-how, are transferred, the value of the assets at the time of the transfer, whether or not most of the personnel is taken over by the new employer, whether or not customers are transferred, and the degree of similarity between the activities carried on before and after the transfer and the period of any suspension of those activities. All those circumstances are, however, only individual factors in the overall assessment to be made and cannot therefore be considered in isolation. The elements to be considered were set out in *Spijkers* v *Benedik*, paragraph 13, and have consistently been invoked and referred to by the ECJ. It has also been consistently held that it is for the national court to perform this overall assessment in respect of the case before it.

33 The situation where an alleged transfer consists of a succession of two independent service providers calls for some general observations.

34 First, the business or part of business to be considered must be the business activity carried out by the service provider. Where the services have been carried out by an independent supplier and not by the recipient itself, there would not seem to be a basis for considering a part of the recipient's business as being transferred.

35 In the present case, although the supply of continuous canteen and cleaning services is an important and necessary ancillary function for the operation of the oil platform, the performance of these functions was not part of the operator's own business operation, and workers were not employed by the platform operator to perform these functions. The case at hand is therefore distinguishable from several of the cases decided by the ECJ, where certain functions or activities had been carried out by the business operator itself, but later had been entrusted to an independent outside supplier.

36 Secondly, for a service provider's business activity to be considered a separate economic entity it must be distinguishable from his other service activities, and normally have employees mostly assigned to that unit. The supply of services, or goods, to one among several customers would normally not qualify as a distinct part of the supplier's business within the meaning of the Directive. Correspondingly, the loss of one customer to a competing company would normally not qualify as a transfer of a business within the meaning of the Directive.

37 Thirdly, for a supply of services, or goods, to be considered a separate business there must be a certain minimum of activity and continuity. A few deliveries, or non-continuous deliveries, would hardly qualify, even if one or several employees were selected to serve a particular customer. Seen from that perspective, the present case concerns the supply of services on a continuous, round-the-clock basis for a period of several years, and the nature of the services being such that it is found convenient to train and attach a specific group of employees for the tasks to be performed.

38 Similarly, with reference to questions 5.1, 5.2 and 5.5 posed by the Norwegian court, the absence of contract conditions providing that equipment, employees and/or stocks are to be taken over does not in itself preclude the applicability of the Directive. As established by the ECJ, decisive for the conclusions will be an overall assessment of all aspects of the transaction. The taking-over of assets, employees and/or stocks may, depending on the circumstances, be important or even decisive factors in such an assessment, but the outcome of the assessment may well be that a transfer within the meaning of the Directive is found to have taken place even if one or more of the circumstances mentioned are missing.

39 The taking-over of assets may constitute an important element in the overall assessment of the transaction. Where machinery or equipment needed for the further production is taken over and used in the continued activity, it may underscore that the business is taken over as a going concern and that the identity and continuity of the business are maintained.

40 In the case at hand the services were carried out on the platform operator's premises and presumably with the main part of the equipment on the platform owned by the operator. The operator's machinery and other assets were not transferred, but the fact that the continued services were rendered on the same premises and with the same equipment as before would support a finding that the same business activity was continuing.

41 On the other hand, all linen and tableware was owned by SSP and carried SSP's logo. These were not taken over. Stavanger Catering supplied their own material, with their own logo, even small flags with the new logo placed on the canteen tables to demonstrate that the service provider had changed.

42 In connection with the new catering contract a special agreement was concluded between SSP and Stavanger Catering to the effect that the latter would take over stocks owned by SSP (food and cleaning agents) remaining on the platform. This taking-over of remaining stores of food and cleaning agents appears to be of little significance in the overall assessment. Presumably there is a continuous supply of such material which makes the taking-over of remaining stores a matter of

convenience, not important or necessary for the continuation of the service activity. But it is a matter for the national court to ascertain the facts of the case and assess its influence on the total picture.

43 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. If the work to be performed does not require any particular expertise or knowledge, the taking-over of personnel becomes less indicative of the identity of the undertaking. The perspective here is whether the qualifications required of the personnel is of relevance for the assessment of whether a transfer has taken place. Another matter is that all categories of personnel are entitled to employment protection in the event of a transfer.

44 It may also be a matter for consideration whether the taking-over of personnel is caused by a desire to carry on the same business as before, or merely represents a convenient way for the new service provider to fill his increased need for employees to service the new contract. In that connection it may be an indication of the former if the taking-over of employees is a condition for the transfer, while an advertisement of vacancies under free competition and on the new contractor's terms may be an indication of the latter. For this reason, the procedures and basis for the taking-over of employees may be of significance for the total assessment to be made.

45 In the present case, as mentioned above, a total of 19 persons had been especially assigned by SSP to carry out the services on board the platform. Of these, 14 persons were offered, and accepted, to continue with the new contractor. However, none of the management personnel was taken over.

46 Based on the foregoing, the answer to questions 5.1, 5.2 and 5.5 is that the termination of a catering contract with one company and the signing of a new contract with another company does not as such fall outside the scope of the Directive. Nor does the absence of contract provisions to the effect that equipment and employees are to be taken over exclude the application of the Directive. However, all aspects of the matter must be taken into consideration in the overall assessment to be made. An assessment of whether the Directive applies must be made in the light of the criteria laid down in paragraphs 25 to 45 above. It is for the national court to make the necessary factual appraisal, in order to finally establish whether or not there has been a transfer within the meaning of the Directive.

Contract subject to public procurement

47 In question 5.3, Gulating lagmannsrett seeks to ascertain whether the fact that a contract falls under Council Directives 77/62/EEC, 80/767/EEC and 88/295/EEC on the award of public supplies contracts makes any difference as to the application of Council Directive 77/187/EEC in the circumstances of this case.

48 The written observations on this question are summarised in the Report for the Hearing. In brief, *the Government of the United Kingdom*, *the EFTA Surveillance Authority* and *the Commission of the European Communities* note that there is nothing in the Directive, neither in its main text nor the preamble, indicating that its scope of application should be limited by the aforementioned directives on public procurement. Furthermore, there is nothing in those directives preventing them form being simultaneously applied.

49 The Court notes that the above-mentioned directives have been replaced by Council Directive 93/36/EEC. Furthermore, the respondent before the national court points out that reference should rather be to Council Directive 90/531/EEC, replaced by Council Directive 93/38/EEC, referred to in point 4 of Annex XVI to the EEA Agreement, as amended by Decision of the EEA Joint Committee No 7/94 of 21 March 1994, see also Parliament and Council Directive 94/22/EC, referred to in point 12 of Annex IV to the EEA Agreement, as amended by Decision of the EEA Joint Committee No 19/95 of 5 April 1995.

50 It is not clear from the facts presented to the Court whether the above-mentioned public procurement directives apply to the present situation. However, the Court notes that the Directive by its wording and purpose is general in its application. There is nothing in the case at hand which would justify a restriction in its application.

Interpretation of Article 3(3) of the Directive

51 It will be recalled that question 5.4 is formulated as follows:

"Do rights under Article 3 paragraph 1 and 2 also include the right to uphold insurance schemes, including pension schemes, with the new employer that the employee had with the employer who lost the contract?"

52 As a starting point there would seem to be little doubt that the expression "The transferor's rights and obligations arising from a contract of employment or from an employment relationship" in Article 3(1) includes rights and obligations in respect of insurance schemes vis-à-vis its employees. Some questions of application and adaptation may arise as a result of the transfer itself, for instance, where an insurance scheme is limited to employees of a certain company or group of companies and cannot be extended to an employee no longer in the service of that company or group of companies. However, the question relates in essence to the interpretation of Article 3(3), first subparagraph. It will be recalled that this provision reads as follows:

"Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States."

53 More specifically, the question is whether this provision excludes from automatic transfer to the transferee an obligation to pay premiums to a supplementary pension scheme which the transferor was under an obligation to pay by virtue of its employment relationship to the employee.

54 The arguments put forward in the written comments to the Court are summarised in the Report for the Hearing. At the oral hearing held on 7 May 1996 these arguments were developed further and will be set out below to the extent necessary.

55 *Eidesund* is of the opinion that the exception contained in Article 3(3) of the Directive does not apply to payments of insurance premiums to supplementary pension schemes. *The Government of Norway* and *the Government of Sweden* are of the same opinion and so is *the EFTA Surveillance Authority*. *The Government of the United Kingdom*, on the other hand, concludes that this clause, by necessary implication, exempts the transferee from paying premiums of this type. This view is shared by *Stavanger Catering* whose further arguments are set out in the Report for the Hearing. *The Commission of the European Communities* proposes to construe Article 3(3) in accordance with the general purpose of the Directive which is to protect the rights of employees as far as possible in the event of a

transfer. Any limits to or exceptions from this protection should therefore be interpreted in a restrictive way. The Commission points out, however, that as much as Article 3(3), first subparagraph, excludes certain rights from automatic transfer, employees are not necessarily deprived of all protection. The second subparagraph of Article 3(3) instead imposes an obligation on the Member States to protect the interests of employees regarding certain of these rights.

56 The Court notes that no decision of the ECJ directly concerns the scope of the exception clause in Article 3(3). The interpretation must be made on the basis of recognised methods of interpretation, bearing in mind that the ECJ, in its construction of the Directive, has consistently referred to the aim of the Directive to "ensure, as far as possible, that the employment relationship continues unchanged with the transferee" after the transfer, see, for instance, Case 19/83 *Wendelboe* v *L.J. Music* [1985] ECR 457, paragraph 15, and that the same conditions as those agreed with the transferor should continue with the transferee after a transfer, see Case 105/84 *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventor* [1985] ECR 2639.

57 The wording "employees' rights to old-age, invalidity or survivors benefits" in Article 3(3), first subparagraph, is not clear.

58 Even a narrow interpretation would seem to cover current payments to the beneficiary when or if payments become due under the supplementary pension scheme. Such payment obligations are clearly not transferred to the transferee, whether or not such payments under the pension scheme were to be made by some insurance company or by the employer directly.

59 A wider and more natural understanding of "rights to ... benefits" would, in the view of the Court, include the employee's right to enjoy the continued accrual of pension rights during the whole term of his employment. It is not unusual for a pension scheme to stipulate that the pension amounts eventually due to the beneficiary increase with the number of years the employee is in service and premiums are paid in. A finding that the expression "rights to ... benefits" covers the right to further accrual of pension rights after the date of the transfer would mean that the right to claim such further accrual is excluded.

60 In the Court's view, the wording of Article 3(3) first and second subparagraphs, read in conjunction with the general principle in Article 3(1), points to the conclusion that all rights and obligations pertaining to old-age, invalidity and survivors' benefits have been excluded from the general transfer of rights and obligations to the transferee.

61 Although preparatory work relating to the Directive is not of direct help in defining the scope of Article 3(3), first subparagraph, Commission documents relating to the Directive elucidate the complications envisaged if the transferee were to be obliged to take over obligations of the transferor in the area of supplementary pension schemes. In view of the preparatory work and in view of the inclusion of the exception clause (Article 3(3)) in the final directive text, the Court finds support for interpreting the provision as exempting the transferee from all involvement in this specific area.

62 This does not mean, as also pointed out by the EC Commission, that the employees were left without any protective measures. As an alternative measure, the provision was introduced in Article 3(3), second subparagraph, stating that the Member States shall be under obligation to adopt the measures necessary to protect the interests of present and previous employees in respect of rights conferring on them immediate or prospective entitlements to old-age benefits, including survivors' benefits (but not invalidity benefits).

63 There is a principle of interpretation expressed by the ECJ that exemption clauses reducing rights granted to employees must be interpreted narrowly. The same principle was relied on by the EFTA Court in Case E-1/95 *Samuelsson* [1994-95] EFTA Report 145 paragraph 22 *et seq*. This principle of interpretation cannot, however, lead to a situation in which the exemption clause becomes deprived of any reasonable content or is virtually abolished.

64 On a proper interpretation of Article 3(3) it must be assumed that the transferee is not obliged to provide for further accruals of rights to old-age, invalidity or survivors' benefits, after the date of the transfer.

65 With that finding as a basis it becomes untenable to hold that the transferee is under an obligation to continue payment of pension premiums in accordance with the supplementary pension scheme established by the transferor.

66 As pointed out by the Government of the United Kingdom the accrual of pension benefits and the payment of pension premiums are inseparable. In any insurance scheme each element presupposes the other. It would be without any economic sense requiring premium payments to be made when no further pension benefits are to accrue. The sole purpose of paying premiums into an insurance scheme must be the creation of further insurance coverage.

67 From this it must follow that the transferor's obligation to pay premiums for old-age, invalidity and survivors' benefits is excluded. At the oral hearing various opinions were expressed with regard to the amount of the premium payments to be made by the transferee, if ruled applicable. Some were of the opinion that the same

amount should be paid as had been paid by the transferor, regardless of whether the employee was able to continue as member of the company or inter-company scheme. Others suggested that the transferee should be under an obligation to pay whatever amount, normally higher than before, that would be required to establish the same future coverage and accrual as the employee had enjoyed before. In the view of the Court, the uncertainty and unreasonableness of these alternatives illustrate the lack of logic in maintaining a payment obligation without a corresponding obligation to uphold a previous pension scheme.

68 The conclusion must therefore be that no obligation to continue payment of premium amounts relating to old-age, invalidity and survivors' benefits is transferred to the transferee.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by Gulating lagmannsrett, by an order of 27 November 1995, hereby gives the following Advisory Opinion:

1. Article 1(1) of the Act referred to in point 23 of Annex XVIII to the EEA Agreement (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) is to be interpreted so as to mean that, where catering services for an undertaking have by contract been entrusted to a company, the termination of that contract and the conclusion of a new contract for the same services with another company does not exclude the Directive from being applicable. For there to be a transfer of an undertaking, business or

part of a business within the meaning of the Directive, an economic entity with its own identity must be transferred and this identity must be retained. In order to ascertain whether these conditions are fulfilled in a case such as that which is the subject of the main proceedings, it is necessary to have regard to all facts characterising the transaction in question, including the type of undertaking or business concerned, whether or not tangible or intangible assets are transferred, the value and the nature of such assets, whether or not a majority of the employees, or employees with a special expertise or experience are taken over, whether customers are transferred, the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which the activities were suspended.

2. **Whether the new catering company is to take over employees and stock must be taken into account in the overall assessment referred to in 1 above.**

3. **The fact that a transaction is subject to public procurement directives does not as such prevent Council Directive 77/187/EEC from being applicable in a case such as the one at hand.**

4. **According to Article 3(3) of Council Directive 77/187/EEC the employer's obligation to pay premiums to supplementary pension schemes for an employee is not transferred.**

Bjørn Haug Thór Vilhjálmsson Carl Baudenbacher

Delivered in open court in Luxembourg on 25 September 1996

Per Christiansen
Registrar

Bjørn Haug
President