REPORT FOR THE HEARING
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 the Gulating lagmannsrett (the Gulating Appeal Court) 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.

I. Introduction

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

II. Legal background

2. The questions presented 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*. This directive is referred to in Point 23 of Annex XVIII to the Agreement on the European Economic Area.

3. The case before the Norwegian court concerns the appellant's claim to have certain insurance premiums paid by the respondent. The appellant's former employer had paid these premiums. Following a tender procedure, the respondent obtained a contract to provide certain catering and cleaning services which had been provided by the appellant's former employer. After obtaining this contract, the respondent company employed the appellant but refused to pay the insurance premiums. The primary legal questions before the Court are whether the replacement of a party to a service contract 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 of an employee pension scheme which was provided by the previous employer, but which is outside the obligatory state social system.

4. *Directive 77/187/EEC* states *inter alia*:

[Preamble/first and second recital]

"...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;

[Section I/Scope and definitions]

Article 1

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.
...

[Section II/Safeguarding of employees' rights]

Article 3

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....

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."

III. Questions

5. 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?"

IV. Facts

6. The Gulating lagmannsrett describes the procedure before the Norwegian courts as follows:

"Since no agreement was reached between the employer and the employees on the transfer of the pension scheme to the new employer, Eilert Eidesund brought a suit against Stavanger Catering A/S by a writ of summons dated 17 March 1994. The Stavanger byrett [the Stavanger City Court] delivered its judgment in the case on 29 May 1995 [and rejected the claim made by Mr. Eidesund]. On 30 May 1995 Eilert Eidesund brought an appeal against the judgment before the Gulating lagmannsrett. On 4 July 1995 the Gulating lagmannsrett decided that the question of interpretation should be referred to the EFTA Court for an Advisory Opinion."

7. The parties based their submissions before the Gulating lagmannsrett on Chapter XII A of the Norwegian Act relating to Worker Protection and Working Environment (arbeidsmiljøloven). This chapter was added to the act in 1992 as part of Norway's implementation of Directive 77/187/EEC.

8. The facts of the case are summarised in the request of Gulating lagmannsrett as follows:

"... Since the late 1970s he [Mr. Eidesund] has been working as a service worker in the field of catering offshore. Over the years he has been employed by several employers and has worked on

Ekofisk field where Phillips Petroleum Norway (PPCoN) is operator. PPCoN does not itself carry out the catering service on the platform.
...

Until 21 February 1994 Scandinavian Service Partner A/S had a contract with PPCoN regarding the supply of boarding services on the Eko Alpha platform in the Ekofisk field. Well before the expiry of the contract PPCoN prepared an invitation for tenders. Stavanger Catering A/S won the tender competition with the consequence that Stavanger Catering A/S took over the boarding services as from 21 February 1994. In accordance with established practice within catering activities offshore, those who had been employed as service workers by Scandinavian Service Partner A/S were offered corresponding positions by Stavanger Catering A/S as from the time Stavanger Catering A/S took over the catering service. The normal manning of the catering service at Ekofisk Alpha is 19 persons. Senior personnel were not offered positions by Stavanger Catering A/S. 14 persons got and accepted positions with Stavanger Catering A/S.

Eilert Eidesund was one of the service workers who accepted the offer of a position with Stavanger Catering A/S. He was dismissed from Scandinavian Service Partner A/S on 16 February 1994. On the same day he received the offer of a position with Stavanger Catering A/S. The following is quoted from the letter containing the offer for employment:

"In connection with the taking over of the catering contract at Eko Alpha by Stavanger Catering as from 21.2.1994 at 00.00 hrs we hereby ask if you are interested in becoming an employee of Stavanger Catering A/S or if you will remain with S.S.P.

Since there is only a very short time until the taking over we must receive your answer as soon as possible and from those who are going out on 21.02 we must have the answer not later than 12.00 hrs on Friday 18.02.

The employment with Stavanger Catering A/S will be in accordance with the practice and the local agreements that exist in the company."

After having received the offer a letter was sent on 21 February 1994 by the company branch of the Oljearbeidernes Fellessammenslutning (OFS-klubben) (the Federation of Oil Workers Trade Union) at Scandinavian Service Partner A/S to Stavanger Catering A/S. The following is quoted from the letter:

"On 20 February 1994 at 24.00 hrs the catering services onboard the "Ekofisk Alpha" were transferred from SCANDINAVIAN SERVICE PARTNER OIC A/S to Stavanger Catering. In that connection we wish to submit the following:

The offer from Stavanger Catering of employment in that company (enclosure 1) is contrary to Section 73 B of the Act relating to Worker Protection and Working Environment. A new employer is bound by those rights the employees had concerning salary and other working conditions, *inter alia* the obligation to maintain those insurance schemes including pension insurance, that the employees were entitled to before the transfer of this part of the activities took place.

It is therefore incorrect of Stavanger Catering to claim that the "employment" is in accordance with practice and local agreements in the company.

On behalf of our members: ...

we hereby demand that all rightful work and employment conditions are applied after the formal transfer of the mentioned part of SSP's activities."

With the reservation that appears from the above quotation Eilert Eidesund accepted the offer of employment with Stavanger Catering A/S and took up his duties.

The pension insurance referred to in the letter quoted above is a pension insurance scheme that covered all employees of Scandinavian Service Partner A/S. The insurance consists of an old age pension part. The premiums are paid partly by contributions from the employer and partly by the employees themselves. The employer's obligations under the pension insurance agreement cease when the employment ends. Insurance premiums are paid by the employer only as long as the employment relationship exists.

In connection with the taking over of the catering contract an agreement was also concluded between Scandinavian Service Partner A/S and Stavanger Catering A/S that the latter would take over the stocks (food and cleaning agents) on the platform, but not table linen and bed linen with company logos. These items were replaced in connection with the change of contractor. ..."

9. In his written observations, counsel for Mr. Eidesund states that he is in agreement with the description of facts as set out by the Gulating lagmannsrett. He adds that Scandinavian Service Partner A/S now owns Stavanger Catering A/S. Counsel for the respondent also states that he is in agreement with the description of facts as set out by the lagmannsrett. He adds that most of those who are at present employed by Stavanger Catering A/S do not have a pension scheme.

V. Written observations

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

– Mr. Eilert Eidesund
– Stavanger Catering A/S
– The Government of the United Kingdom
– The Government of Sweden
– The EFTA Surveillance Authority
– The Commission of the European Communities

The written observations from the Government of Sweden deal exclusively with question 5.4.

11. In the following summary of the written observations the questions from Gulating lagmannsrett will be dealt with in three parts:

A. Transfer of undertakings (questions 5.1, 5.2 and 5.5);
B. Contracts subject to public procurements (question 5.3); and
C. Transferred rights (question 5.4).

A. Transfer of undertakings

Mr. Eilert Eidesund

12. In his written observations Mr. Eidesund refers to the following judgments of the EC Court of Justice: *Rygaard* v *Strø Mølle Akustik,*[1] *Schmidt,*[2] *Watson Rask and Christensen,*[3] *Tellerup* v *Daddy's Dance Hall*[4] and *Redmond Stichting.*[5]

13. Mr. Eidesund refers to the objective of the directive, which he submits is to safeguard employees' rights in the event of a transfer of undertaking. He also submits that from the judgments referred to above, it can be concluded that the directive covers the particular change of contractor at issue.

14. The appellant claims that a catering service, even though it may be organised in different ways, forms a necessary part of activity on a platform. By its very nature, this service is easily distinguishable from other activities that take place on board. It will remain necessary for as long as continuous oil operations are carried out at sea. Even if it is carried out under a fixed-term contract, the nature of the specific activity is the same. Mr. Eidesund adds that this continuity is further strengthened by the fact that, by tradition, workers are transferred to a new contractor who takes over operations on a North Sea platform.

15. The appellant maintains that when an ongoing activity is transferred from one employer to another, it cannot be decisive for the rights of the employee that a transfer is labelled "change of supplier" or "change of contractor". The employee's need for protection of his interests are the same.

16. Mr. Eidesund maintains that judgments of national courts are of limited value for the interpretation of the directive and that it is the EC Court of Justice which provides the relevant precedents.

17. Mr. Eidesund proposes the following answer to questions 5.1, 5.2, 5.3 and 5.5.

"The transfer of the catering service on the Eko Alpha platform from SSP to Stavanger Catering AS is covered by Council Directive 77/187."

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1 Case C-48/94 *Rygaard* v *Strø Mølle Akustik* [1995] ECR I-2745.

2 Case C-392/92 *Schmidt* [1994] ECR I-1311.

3 Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755.

4 Case 324/86 *Tellerup* v *Daddy's Dance Hall* [1988] ECR 739.

5 Case 29/91 *Redmond Stichting* [1992] ECR I-3189.

Stavanger Catering A/S

18. Stavanger Catering A/S draws attention to the fact that this case concerns the interpretation of a Norwegian statute, the relevant sections of which were enacted as Norway's implementation of Directive No. 77/187/EEC.

19. As to the question of what constitutes a transfer of an undertaking within the meaning of the directive, Stavanger Catering A/S maintains that there is a clear distinction to be made between a transfer of an undertaking and a replacement of a contractor. By comparing the wording of the Norwegian translation of the term "undertaking" ("foretak" in the directive and "virksomhet" in the implementing directive) to translations of other Member States and by tracing the background of the Norwegian translation, he comes to the conclusion that the Norwegian word "virksomhet" must mean the same as "foretak". The Norwegian word "foretak", however, does not include replacement of a contractor.

20. The respondent maintains that the replacement of a contracting party is fundamentally different from the transfer of an undertaking. The replacement of a contracting party (supplier, contractor) has a number of special features that distinguish it from the transfer of an undertaking:

1) It is a business contract, made for a fixed term, which does not itself affect the means of production.

2) Unlike the transfer of an undertaking, the replacement of a contracting party is not final; it is normally understood to be of limited duration and thus open for re-evaluation.

3) When an undertaking is transferred the transferor withdraws from the activity. Under a service contract, on the other hand, the recipient of the service continues to be the same and he retains certain rights of control and instruction as well as the possibility of terminating the contract.

21. The respondent continues by setting out what he submits are the disadvantages of determining that the replacement of a contractor on a North Sea platform falls under the directive. It would, he says, have a very restrictive effect on competition in bidding situations. The only party which has full knowledge of the rights of the employees that may continue with a new contractor is the party already holding a contract. The respondent further submits that long-term personnel policy would also be adversely affected for a number of reasons, including an employer's inability to maintain his employees.

22. The respondent refers mainly to three judgments of the EC Court of Justice: *Watson Rask and Christensen*,[6] *Schmidt*[7] and *Rygaard* v *Strø Mølle Akustik*.[8] The third is the only case where the EC Court of Justice considered the directive in relation to a situation where a contractor lost a contract to another contractor. The question was whether the employees of the losing contractor could demand work with the new one. The Court came to the conclusion that such a situation did not fall within the scope of the directive.

23. The respondent then cites case law from Denmark, Sweden and France. He also refers to an exchange of letters between the Norwegian Shipping and Offshore Federation and the EFTA-Surveillance Authority. Stavanger Catering A/S interprets a letter from the Authority dated 9 January 1995, as saying that in the sense of the directive, the replacement of a catering company is a change of supplier and not a transfer.

24. With regard to questions 5.1 - 5.3 and 5.5 in the request for Advisory Opinion, Stavanger Catering A/S comes to the following conclusions:

"The situation whereby Scandinavian Service Partner A/S loses its catering contract with Phillips on Eco Alfa and Stavanger Catering A/S is awarded the new contract is <u>not</u> a situation that falls under Council Directive No 77/187. The EFTA Court's answer to Questions 5.1, 5.2, 5.3 and 5.5 must be no."

The Government of the United Kingdom

25. In its observations, the UK states that the case law of the EC Court of Justice clearly indicates that the individual elements signalled by the Gulating lagmannsrett are not, by themselves, conclusive factors one way or the other (*Bork International* v *Foreningen af Arbejdsledere i Danmark*,[9] *Tellerup* v *Daddy's Dance Hall*;[10] *Watson Rask and Christensen*[11] and *Botzen* v *Rotterdamsche Droogdok Maatschappij*[12]). Nevertheless, all of these elements are relevant.

26. The UK then refers to and quotes extensively from *Spijkers* v *Benedik*.[13] In the understanding of the UK, the essence of this judgment is that the directive is only applicable if an economic entity is transferred.

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6 See footnote 3.

7 See footnote 2.

8 See footnote 1.

9 Case 101/87 *Bork International* v *Foreningen af Arbejdsledere i Danmark* [1988] ECR 3057.

10 See footnote 4.

11 See footnote 3.

12 Case 186/83 *Botzen and Others* v *Rotterdamsche Droogdok Maatschappij BV* [1985] ECR 519.

13 Case 24/85 *Spijkers* v *Benedik* [1986] ECR 1119 (mainly paragraphs 11 -14).

27. The observations emphasize that later judgments of the EC Court of Justice apply the same formula (*Landsorganisationen i Danmark for Tjenerforbundet i Danmark* v *Ny Mølle Kro*,[14] *Redmond Stichting*[15] and *Schmidt*[16]). The UK understands the EC Court of Justice, in Schmidt, to have singled out a particular factor (continuation or resumption of the same or similar activities) amongst the various relevant factors and, on the basis of an order for reference that enabled it to focus on that factor specifically, indicated the conclusion to be drawn from finding that the activities were indeed the same or similar. The UK further draws attention to *Rygaard* v *Strø Mølle Akustik*[17] and points out that the duration of the works in question could be of relevance.

28. The UK proposes that questions 5.1, 5.2 and 5.5(a) and (b) should be answered in the following terms:

"The decisive criterion for establishing whether there is a transfer for the purposes of Article 1(1) of Council Directive 77/187/EEC is whether the business in question retains its identity as an economic entity.

To determine whether that is the case, the national court must consider all the facts characterising the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and 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."

The EFTA Surveillance Authority

29. The EFTA Surveillance Authority emphasizes the prime objective of the directive by referring to the preamble. Even if the preamble, where the social objective is emphasized in general terms, states that the directive was prompted by changes in the structure of undertakings caused by economic trends, a corresponding limitation of the directive's potential is not reflected in the operative text or in the judgments delivered by the EC Court of Justice.

30. The EFTA Surveillance Authority maintains that the EC Court of Justice has systematically given a broad interpretation to the expression "legal transfer" (*Stitching* v *Bartol*; *Schmidt; Botzen* v *Rotterdamsche Droogdok Maatschappij*[18]). It is noted in particular that the concept of legal transfer does not presuppose that ownership is transferred; furthermore, a transfer may come within the scope of the directive even if it does not take place directly between the previous employer and a new one.

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14 Case 287/86 *Landsorganisationen i Danmark for Tjenerforbundet i Danmark* v *Ny Mølle Kro* [1987] ECR II-5465.

15 See footnote 5.

16 See footnote 2.

17 See footnote 1.

18 *Redmond Stichting* (see footnote 5); *Schmidt* (see footnote 2) and *Botzen* v *Rotterdamsche Droodok Maatschappij* (see footnote 12).

31. As to the type of activities that fall under the directive, the EFTA Surveillance Authority states, referring to its summary of the case law of the EC Court of Justice, that the subject matter of the transfer must be a business constituting an organizational unit with its own identity. It is pointed out that the EC Court of Justice has found activities such as canteen services and cleaning services capable of coming within the scope of the directive.[19]

32. The EFTA Surveillance Authority also notes that the EC Court of Justice has identified a number of factors that may be taken into account when determining whether a legal transfer has taken place. In general terms, a legal transfer has been found when the economic unit in question retains its own "identity". When making this determination, the court repeatedly refers to the following characteristics: the type of undertaking or business concerned, whether or not tangible assets are transferred, the value of the intangible assets, whether or not the majority of the employees is 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.[20]

33. In considering the question of identity, the subject matter of the transaction must be seen as a whole, comprising of the employees, the organizational structure and the assets used for carrying out the activities. The relative importance of these elements is bound to vary. A transaction in which an undertaking entrusts a service to a provider does not in itself lead to the conclusion that it falls under the terms of the directive. Nevertheless, it may be so in some circumstances.

34. The EFTA Surveillance Authority recognizes that it must be for the national court to establish the facts of the case. It notes, however, that in this case the catering service appears to have been continued without interruption and that a considerable number of the employees were taken over by the transferee. While these circumstances are obviously relevant to the question of identity, in the opinion of the EFTA Surveillance Authority, there are a number of other important facts that need to be established before a conclusion can be reached as to whether this is just a matter of the platform operator changing from one service provider to another, in which case the directive would not apply, or, whether the subject matter of the transaction was in fact arranged so as to constitute an organizational unit with its own identity and whether that identity was in fact retained, in which case the directive would apply.

35. The EFTA Surveillance Authority proposes that questions 5.1 - 5.3 and 5.5. should be answered in the following terms:

"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 do not as such fall within the scope of the Directive. However, where the subject matter of the transaction is arranged so as to form an organizational unit with its own identity, the transaction may come within the scope of the Directive, provided that the identity of the unit is retained. In order to

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19 *Watson Rask and Christensen* (see footnote 3); *Schmidt* (see footnote 2).

20 *Spijkers* v *Benedik* (paragraph 13) (see footnote 13); *Bork International* v *Foreningen af Arbejdsledere i Danmark* (paragraph 14) (see footnote 9).

ascertain whether these conditions are fulfilled, it is necessary to have regard to all facts characterizing the services and the transaction in question, such as the type of undertaking or business concerned, whether or not tangible assets are transferred, the value of intangible assets, whether or not the majority of the employees is 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."

The Commission of the European Communities

36. The directive does not, according to the Commission of the European Communities, contain any express definition of transfer of an undertaking. The basis for the case law of the EC Court of Justice was put forth in its judgment in *Spijkers* v *Benedik.*[21] In the Commission's opinion, it follows from this judgment that two conditions must be met. First, the undertaking being disposed of must constitute a business with its own identity, and second, that business and its identity must be preserved after the change of ownership. If either of these conditions is not met there is no transfer within the meaning of the directive.

37. In order to assess whether these conditions are met, the EC Court of Justice laid down further criteria as listed in paragraphs 13 and 14 in *Spijkers* v *Benedik*. The same approach, it is submitted, is followed in subsequent judgments. The Commission then proceeds to analyse this case law. The criteria expressed by the EC Court of Justice in *Spijkers* v *Benedik* is examined in each individual case to determine it there has been a transfer within the meaning of the directive. The Commission refers to the following cases: *Watson Rask and Christensen,*[22] *Redmond Stichting*[23] and *Rygaard* v *Strø Mølle Akustik.*[24]

38. Based on this case law, the Commission considers it helpful to distinguish between three categories or types of situations, differentiated by the degree to which the substance of what is transferred between undertakings is tangible. The first category consists of businesses with means of production, such as a company's locksmith's workshop. The second consists of businesses offering a service which involves principally the use of non-material assets, such as knowledge and experience. The third category consists of businesses providing services where no specific knowledge, experience or expertise is required, such as cleaning services and the care of children.

39. According to the Commission, there is usually no difficulty in determining the existence of a business with its own identity when a situation comes within the first category. In the case of the second category, it is necessary to determine whether the knowledge or other assets can be delimited from an organizational point of view. What matters is whether the functions, within the same or similar activities, are carried out by the new legal person. If they are of a special nature, constituting an independent function, they may fall under the directive. In the case of the third category, the Commission submits that the central element is the work force and the somewhat unskilled work they perform. If the staff is disposed of in its entirety together with the order book, goodwill, client relationship, organizational structure etc., a business with its own identity can be

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21 See footnote 13.

22 See footnote 3.

23 See footnote 5.

24 See footnote 1.

said to exist, even if it is difficult to determine when this is so. The Commission carries its analysis further by contrasting *Watson Rask and Christensen*[25] against *Rygaard* v *Strø Mølle Akustik*.[26] The conclusion of this analysis is that if services are continually provided by the same members of the staff, the group to which they belong may be regarded as a distinct business which falls under the terms of the directive. The Commission further states that the complexity of the present rules has prompted the Commission to make proposals for modifying the directive.

40. Thereafter, the written observations of the Commission deal with the questions posed by the Norwegian court. It mentions, in connection with the first question, that the fact that a disposal is carried out in two stages does not prevent the directive from being applied. The directive may be applied if first one company and subsequently another provide a given service. A factor indicating that the transaction is covered by the directive is a large amount of staff and equipment transferring from the first to the second company; it is not necessary that the second company is under an obligation to take over staff and equipment. Such an approach is in accord with the purpose of the directive, as it is the facts of the actual transfer which are of overriding importance. The points raised in the second question and second part of the fifth questions are also of relevance. As regards the first part of the fifth question (whether it matters if the employees of the old company apply in the normal way for work with the new one), the Commission remarks that such a situation does not necessarily indicate that a business with its own identity has been transferred by one company to another.

41. The Commission proposes the following answers to questions 5.1, 5.2 and 5.5:

"Council Directive 77/187/EEC, properly construed, envisages the disposal of a business with its own identity and the retention of that identity after it has changed hands. In order to ascertain whether this is the case, account must be taken of all the factual circumstances surrounding the transaction in question, including, where appropriate, whether or not the agreement to dispose of the business to the transferee includes a provision for equipment and / or employees to be taken over, whether or not the transaction in fact involves the taking-over by the transferee of employees and stocks, and whether or not the employees of the transferor apply to the transferee for employment in the normal way and are indeed appointed to a position by the transferee. The presence or absence of one or more of these facts is, of itself, not conclusive in ensuring or precluding the applicability of the Directive."

B. Contract subject to public procurement

42. In a separate question, 5.3, the Norwegian court seeks the opinion of this Court on whether the applicability of Directive 77/187/EEC is affected by the contract falling under three specified council directives on public procurement: a) *Directive 77/62/EEC of 21 December 1976 co-ordinating procedures for the award of public supply contracts*; b) *Directive 80/767/EEC of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC*; and c) *Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the co-ordination of procedures for the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC*.

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25 See footnote 3.

26 See footnote 1.

43. Neither of the two parties before the Norwegian Court address this question separately in their written observations, apart from counsel for Stavanger Catering A/S noting that reference should be made to Directives 90/531/EEC and 93/38/EEC.

The Government of the United Kingdom

44. In the written observations of the UK, question 5.3 is dealt with under the sub-heading "Issue 2". It is stated that there seems no reason to exclude a contract from the scope of the directive by the fact that it also comes under the scope of some other directive. The texts of the three directives cited as a possible basis for such an exclusion contain no reference to the directive on transfers. The terms of the directive on transfers indicate that it shall be applied even if the contract in question is in the field of public procurement. The EC Court of Justice has focused on the "economic entity" test in interpreting the directive, not on the particular features of a given transfer. Accordingly, the UK proposes the following response to question 5.3:

"The answer to Issue 1 is unaffected by whether or not the provisions of Directives 77/62 and/or 80/767 and/or 88/295 are applicable to the contract in question."

The EFTA Surveillance Authority

45. The EFTA Surveillance Authority submits, in its written observations, that the fact that a contract by which a transfer is effected falls under a directive on public supplies contracts does not in itself exclude the transfer from coming within the scope of the directive on transfers. There is nothing, according to the EFTA Surveillance Authority, in the preamble or the text of the directive to indicate that this was intended to be otherwise, even if the public supplies directive was already in force when it was enacted. Further, there is no conflict between the interests pursued by the two directives such that they could not be simultaneously applied. If the applicability of the directive on transfers was limited by the other directive, it would nevertheless be applicable to public procurements of a value under the threshold stated in the public supply directive. This fact makes it unlikely that the directive on public supplies limits the applicability of the directive on transfers. Such a limitation is also unlikely given the EC Court of Justice's broad interpretation of Directive 77/187/EEC. The EFTA Surveillance Authority continues these arguments in its answer to questions 5.1, 5.2 and 5.5.

The Commission of the European Communities

46. The Commission submits that the purpose of the directive is to make it possible for the worker to continue to work for the transferee under the same conditions as before the transfer of the undertaking or business. In order to provide the protection intended, these terms must be interpreted broadly and not exclude public supplies contracts from its scope of application. Accordingly, the Commission submits that the question under scrutiny here should be answered as follows:

"Once the conditions for the application of Directive 77/187/EEC are met, it is irrelevant that the transaction in question is also subject to the provisions of other directives."

C. Transferred rights

Mr. Eilert Eidesund

47. The appellant submits that the new employer is obliged to maintain the pension insurance scheme which was provided by the previous employer. The scheme requires the employer to pay a premium to an insurance company which is responsible towards the employee for subsequent payments from the scheme. He proposes the following answer to question 5.4:

"The rights of the employees under Council Directive 77/187 also include pension insurance schemes."

Stavanger Catering A/S

48. Stavanger Catering A/S refers to Article 3(3) of the directive and compares the English and the Danish versions. Stavanger Catering maintains that it is obvious that the directive does not mean that the new employer is obliged to provide pension schemes for employees who are following along with a business or part of a business. Article 3(3) provides that Member States are obliged to ensure that pension rights accrued at the previous employer are protected. He draws attention to the fact that Stavanger Catering A/S has about 260 employees senior to the appellant. It would be morally wrong and practically impossible to set up a special insurance scheme for newer employees without providing employees with a longer service record a similar scheme. The cost would be so high that it would not be financially justifiable given Stavanger Catering A/S' revenues.

49. Stavanger Catering A/S further states that the claim for payment of pension premiums illustrates the uncertainties that will arise in competitive situations if the replacement of a contracting party/contractor falls under the directive. Collective wage agreements do not contain provisions on pension rights and it will be difficult for a competitor in a tender situation to assess the real costs involved.

50. As to question 5.4. in the request for Advisory Opinion, Stavanger Catering comes to the following conclusion:

"Stavanger Catering A/S is not obliged to set up a pension scheme for Eidesund. The EFTA Court's answer to question 5.4 must be no."

The Government of the United Kingdom

51. The UK states that even if Article 3(3) of the directive must be interpreted narrowly, the derogation set out therein is one of substance. It expressly covers the right to payment of pension benefits. Therefore, by necessary implication, this derogation covers the right to payment of the contributions required to generate such benefits. This conclusion is supported by the provision in the same sub-paragraph which provides that Member States shall adopt measures to protect the interests of employees. The conclusion proposed by the UK follows:

"The substance of the derogation contained in Article 3(3), first indent, ARD [Acquired Rights Directive], covers rights to payments of contribution to, and benefits from, the supplementary schemes there referred to. It is for the Member State to make the appropriate arrangements to discharge the duty imposed upon them by Article 3(3), second indent, ARD in respect of accrued rights."

The Government of Sweden

52. In its written observations, the Swedish Government only refers to question 5.4. It submits that the exception in Article 3(3) shall not cover the responsibility to pay contributions (insurance premiums) to pension schemes flowing from a contract of employment. According to the Swedish government, it would be unreasonable for Member States to be required to take measures to protect the payment of future insurance premiums. That obligation must be a part of the contract safeguarded by Article 3(1) and 3(2).

53. The Government of Sweden proposes an answer to the question in the following terms:

"The exception clause contained in Article 3(3) of the Council Directive 77/187/EEC does not cover the right of an employee to coverage of insurance premiums to pension schemes. That right must therefore be a part of the contract safeguarded for in Article 3(1) and 3(2)."

The EFTA Surveillance Authority

54. The EFTA Surveillance Authority is of the opinion that Articles 3(1) and 3(2) of the directive must include an obligation of an employer to maintain and pay premiums for an insurance or pension scheme for the benefit of an employee. This interpretation is also consistent with the purpose of the directive and finds general support in the case law of the EC Court of Justice *(Wendelboe* v *L.J. Music; Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar)*.[27]

55. Article 3(3) excludes from the scope of Articles 3(1) and 3(2) rights to old age, invalidity or survivor's benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States. This provision is an exception from the main principles and must be interpreted narrowly.

56. What is exempted are rights to benefits. The ordinary meaning of the words in the provision, as well as practice in the field of insurance indicate that the meaning is to exclude the benefits provided for in particular schemes, for example, the payment of pension benefits. The payment of premiums is, by contrast, normally not a benefit of the pension scheme itself. The right to payment of the premiums is a corollary to the obligations undertaken by the employer.

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[27] Case 19/83, *Wendelboe* v *L.J. Music*, [1985] ECR 457; Case 105/84, *Foreningen af Arbejdsledere i Danmark* v *AS Danmols Inventar*, [1985] ECR 2639.

57. The EFTA Surveillance Authority proposes an answer to the fourth question in the following terms:

"Article 3 of the Act is to be interpreted so as to mean that, in the case of a transfer within the meaning of Article 1(1), an obligation of the transferor to maintain and pay the premiums for an insurance scheme for the benefit of an employee, such as a pension scheme, is automatically transferred to the transferee."

The Commission of the European Communities

58. The Commission states that while Article 3(3) of the directive excludes certain rights from the scope of the directive, it does not deprive the employees having those rights of all protection. The directive's thrust is that protection is to be provided, but not in the form set out in Article 3(1) of the directive. It is therefore clear that the protection of the directive in the case of a transfer does not extend to the rights and obligations of the transferor in respect of employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes. It is, however, not clear whether the exemption covers the benefit derived by an employee from an employer paying all or part of the premiums of a pension insurance scheme. In light of the primary objective of the directive, any limitations to or exceptions from the protection it is supposed to provide must be interpreted in a restrictive manner. It must also be borne in mind that the Member States are under an obligation to protect the interests of employees in respect of rights conferring on them pension benefits; the domestic law of a given Member State may provide extremely comprehensive and effective protection.

59. Based on the these considerations the Commission proposes the following answer to question 5.4:

"Article 3 of Directive 77/187/EEC must be interpreted as meaning that the Directive transfers to the transferee all rights and obligations vis-à-vis employees arising from an employment relationship with the transferor existing on the date of transfer with the exception of employees' rights to old-age, invalidity or survivor's benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States, Member States being required to adopt the measures necessary to protect the interests of employees and former employees of the transferor in respect of rights conferring on them entitlement to old-age benefits under such supplementary schemes."

Thór Vilhjálmsson
Judge-Rapporteur