



REPORT FOR THE HEARING
in Case E-2/96

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 from the Inderøy herredsrett (the Inderøy County Court) for an Advisory Opinion in the case pending before it between

Jørn Ulstein and Per Otto Røiseng

and

Asbjørn Møller

on the interpretation of Council Directive 77/187/EEC.

I. Introduction

1. By a request dated 11 March 1996, registered at the Court on 29 March 1996, the Inderøy herredsrett (the Inderøy County Court) in Norway requested an Advisory Opinion in a case brought before it by Mr. Jørn Ulstein and Mr. Per Otto Røiseng, the plaintiffs, against Mr. Asbjørn Møller, the defendant.

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* (hereafter, the directive). The 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 a dispute between the plaintiffs and the defendant as to whether there has been a transfer of an undertaking, business or part of a business to another employer within the meaning of Article 1(1) of the directive. The background of the dispute is that the plaintiffs' former employer Hammer Syketransport held a contract with the Nord-Trøndelag County Municipality to provide ambulance services until 31 December 1995. In the autumn of 1994 the municipality issued an invitation to tender which led to the defendant entering into a contract with the municipality for the provision of ambulance services for a five year period commencing 1 January 1996. After obtaining this contract, the defendant employed

some of Hammer Syketransport's employees but not the plaintiffs. The plaintiffs claim, *inter alia*, that the defendant is obliged to employ them as ambulance personnel with the ambulance service.

4. *The directive 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;

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.

...

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.

...

Article 4 (1)

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."

III. Questions

5. The following questions were referred to the EFTA Court:

“1 Is Council Directive 77/187/EEC to be interpreted in such a way that the expression "transfer of an undertaking, business or part of a business" only covers situations where there is some form of contract between the transferor and the transferee?

2 Is the mentioned Council Directive to be interpreted in such a way that the expression quoted under point 1 above implies that the transferee must take over property or moveables from the transferor?

3 Will it make any difference and, if so, how, for the interpretation of the above-mentioned Council Directive if some, but not all employees of the transferor are employed by the transferee?

4 Will it make any difference and, if so, how, for the interpretation of the above-mentioned Council Directive if an assignment is awarded according to the rules governing tender and the provision of the service is limited in time?”

IV. Facts

6. The Inderøy herredsrett describes the facts of the case as follows:

"Until 1 January 1996 a company, Hammer Syketransport, had a contract with Nord-Trøndelag County Municipality ("Nord-Trøndelag fylkeskommune") for ambulance service, *inter alia* in the municipalities Verdal, Frosta and Levanger in Nord-Trøndelag. The company had a similar contract for the operation of the ambulance service in the region of Steinkjer. The company had no other activities. Hammer Syketransport held the ambulance service contract for the period from 1 January 1990 to 31 December 1995, when the contract terminated pursuant to its own paragraph 3.3.

Nord-Trøndelag County Municipality owns and manages Innherred Hospital ("Innherred sykehus") in Levanger, which provides service to the above-mentioned municipalities, and has a responsibility to provide the ambulance service, pursuant to Section 2 of the Hospital Act ("sykehusloven") of 19 June 1969 No. 57.

Hammer Syketransport operated the ambulance service for an agreed amount, *inter alia* in the above-mentioned municipalities. The company maintained a fleet of equipped ambulance vehicles and paid the drivers and other personnel. There are certain requirements as to how the ambulances shall be equipped and arranged. Furthermore, there are requirements regarding the education and qualifications of the personnel.

Both plaintiffs were employed with Hammer Syketransport: Per Otto Røiseng since 6 June 1976, and Jørn Ulstein since 1 March 1991.

Nord-Trøndelag County Municipality issued an invitation to tender for ambulance service in the autumn of 1994. The reason why the County Municipality instituted a tender competition is not

stated in the case. Hammer Syketransport lost the contract following the tender process. Hammer Syketransport ceased to exist from 1 January 1996. On 2 June 1995 Nord-Trøndelag County Municipality concluded an agreement with the defendant under which he would provide the ambulance services in the three municipalities, starting 1 January 1996 for a five-year period, with an obligation to have two 24-hour stand-by ambulance vehicles, of which one vehicle would be ready for turn-out within a maximum of 5 minutes, and one vehicle would be ready for turn-out within 15 minutes. The vehicles would be stationed in Levanger. The amount of the tender is not stated.

The defendant has not taken over any assets from Hammer Syketransport. Some of the employees, but not the two plaintiffs, have become employees of the defendant.

The defendant runs the ambulance service himself. He also plans to provide training in first aid for companies interested in such assistance.

The plaintiffs were both dismissed from Hammer Syketransport on 27 June 1995, effective 31 December 1995, with a reference to the 'termination of the ambulance service'.

The defendant made an offer to some, but not all, of the employees of Hammer Syketransport, to continue as ambulance personnel with the defendant, instead of with Hammer Syketransport. The defendant also posted information in the ward office of Hammer Syketransport about the ambulance service after 1 January 1996. On 4 August 1995, both plaintiffs applied for positions as ambulance employees after 1 January 1996.

On 14 August 1995, the defendant informed the two plaintiffs that he had no position for them. No reasons were given other than that there was no need for more employees.

The defendant has hired a total of seven men, all after individual applications, including two not connected with Hammer Syketransport. In addition, he takes some shifts himself. All of the others who were hired are former employees of Hammer Syketransport. The number of employees with Hammer Syketransport is not stated in the case. The employees are remunerated under a collective wage agreement."

V. Written observations

7. 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. Jørn Ulstein and Mr. Per Otto Røiseng, represented by Counsel Ms. Gunvor Bryn Haavik, lawyer for the Norwegian Confederation of Municipal Employees (Kommunalansattes Fellesorganisasjon);

- Mr. Asbjørn Møller, represented by Counsel Mr. Per Solem;
- The Government of the United Kingdom, represented by Mr. John E. Collins, Treasury Solicitor's Department, acting as Agent, and Mr. Clive Lewis, Barrister;
- The EFTA Surveillance Authority, represented by Mr. Håkan Berglin, Director of the Legal and Executive Affairs Department, acting as Agent, assisted by Mr. Trygve Olavson Laake, Officer of that Department;

- The Commission of the European Communities, represented by Mr. Hans Gerald Crossland and Ms. Maria Patakia, Members of its Legal Service, acting as Agents.
8. All the questions in the Request for an Advisory Opinion deal with the concept of "transfer of undertaking" under Article 1 of Council Directive 77/187/EEC.

Mr. Jørn Ulstein and Mr. Per Otto Røiseng

First question

9. The plaintiffs state, that according to the case law of the EC Court of Justice, the directive is applicable even if there is no direct contractual relationship between the old and the new owner of the enterprise (*Tellerup v Daddy's Dance Hall*).¹ It is pointed out that the triangle relationship which is dealt with in that case has many parallels to a tender situation. The plaintiffs submit that, given the *Tellerup v Daddy's Dance Hall* case, the requirement that a transfer takes place in the context of a contractual relationship in *Berg v Besselsen* and *Bork International v Foreningen af Arbejdsledere i Danmark*², does not mean that there must be a *direct* contractual relationship between the previous and the new employer.

10. The plaintiffs stress that in the case at hand, the expiration of a fixed-term contract with the Nord-Trøndelag County Municipality led to the termination of the activities of Hammer Syketransport, and that it is a contract between Asbjørn Møller and the municipality that is the basis for Møller's activities. The transfer may therefore be said to have taken place in the context of a contractual relationship.

11. As regards to what transfer situations are covered by the directive, reference is made to *Redmond Stichting*³. It is pointed out by the plaintiffs that in the *Redmond Stichting* case the transfer was not based on any direct contract between the former and the new employer.

12. The plaintiffs propose the following answer to the first question:

"Council Directive 77/187/EEC is not to be interpreted in such a way that the expression "transfer of an undertaking, business or part of business" in Article 1(1) only covers situations where there is some form of contract between the transferor and the transferee."

Second question

¹ Case C-324/86 *Tellerup v Daddy's Dance Hall* [1988] ECR 739.

² Joined cases 144 and 145/87 *Berg v Besselsen* [1988] ECR 2559 and Case 101/87 *Bork International v Foreningen af Arbejdsledere i Danmark* [1988] ECR 3057.

³ Case C-29/91 *Redmond Stichting v Hendrikus Bartol* [1992] ECR I-3189. See also Joined Cases 171/94 and C-172/94 *Albert Merckx and Patrick Neuhuys v Ford Motors Company Belgium SA* (paragraph 30) in this context. (Judgment from 7 March 1996, not yet reported in the ECR).

13. The plaintiffs point out that according to *Spijkers v Benedik*⁴ the decisive criterion is whether the economic entity in question retains its identity after the transfer. In order to determine whether the identity is retained one must consider all the criteria listed in paragraph 13 of that judgment. The list is not exhaustive and none of the individual factors mentioned are decisive one way or the other. Each of these factors is to be treated as a single factor in the overall assessment and therefore cannot be considered in isolation.

14. Furthermore, it appears from the operative part of the judgment that the economic entity in question must be considered to have retained its identity, if the new employer actually continues or resumes the operation with the same or similar activities (*Spijkers v Benedik*, *Schmidt*⁵ and *Redmond Stichting*).

15. According to the case law of the EC Court of Justice a transfer of assets is not necessary for a transaction to fall within the scope of the directive (*Schmidt, Merckx*⁶ and *Redmond Stichting*). It is also pointed out that avoiding the transfer of assets could, in certain cases, be used in an attempt to prevent the application of the directive.

16. The answer to the second question should therefore, according to the plaintiffs, be the following:

“The expression “transfer of an undertaking, business or part of a business” in Council Directive 77/187/EEC is not to be interpreted in such a way that the expression implies that the transferee must take over property or moveables from the transferor.”

Third question

17. The plaintiffs refer to *Spijkers v Benedik* and state that the majority of the employees being taken over by the transferee is one of the relevant factors in deciding whether or not the identity is retained. However, this specific factor is not decisive. If it were decisive, the transferee could attempt to bypass the directive by not taking over a majority of the employees of the transferee.

18. One relevant criterion in determining whether the identity has been retained is whether the new employer needs employees with the same background as the employees of the former employer. For example, when the new owner, like the former owner, is in need of ambulance personnel, this is one factor that indicates identity has been retained.

19. If the employees are not all offered employment with the transferee, this may be due to economic, technical or organisational reasons entailing changes in the workforce. It follows from Article 4(1) of the directive that the transfer of an undertaking does not prevent dismissals for such reasons.

20. The plaintiffs propose that the answer to the third question should therefore be:

⁴ Case 24/85 *Spijkers v Benedik* [1986] ECR 1119.

⁵ Case C-392/92 *Schmidt* [1994] ECR I-1311

⁶ Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys v Ford Motors Company Belgium SA*, see footnote 3.

“The fact that some but not all of the employees of the transferor are taken over by the transferee is not decisive in determining whether a transfer within the meaning of the directive has taken place.”

Fourth question

21. The plaintiffs assume that *Council Directive 92/50/EEC of 18 June 1992 relating to the co-ordination of procedures for the award of public service contracts* does not require the provision of ambulance services to be put out for tender. The answer to the fourth question must be the same regardless of whether there is an obligation to invite tenders or not. The wording of Council Directive 77/187/EEC does not indicate that the directive should not be applicable in a tender situation.

22. The objective of the directive argues against letting the actual form of the transfer prevent it from being considered as a transfer of an undertaking within the meaning of the directive. In those cases where there is an obligation to invite tenders, the obligation is linked to the value of the contract. To exclude tender situations from the scope of the directive in cases where invitations to tender are obligatory would make the employees' rights dependent on the value of the contract. This cannot have been the intended objective of the directive.

23. Allowing the directive to apply in a tender situation does not impede free competition any more than any other statutory provision on the protection of workers' rights.

24. The fact that the contract is time-limited cannot be decisive for the application of the directive, especially when the tasks which are to be carried out are of a permanent nature. For example, the tasks that are carried out in providing ambulance services.

25. The plaintiffs are accordingly of the opinion that the answer to the fourth question should be:

“The fact that an assignment is awarded in accordance with the rules governing tender is not decisive for the interpretation of Council Directive 77/187/EEC. It is insignificant in this connection that the assignment is limited in time, as long as the tasks which are to be carried out are of a permanent nature.”

Mr. Asbjørn Møller

26. The defendant refers to the preparatory work relating to the implementation of the directive into Norwegian national law and points out that the situation relating to a tender competition was not explicitly considered. The tender situation is also not discussed in the preparatory work on the directive. He concludes that if the directive was meant to cover tender situations, this would have been discussed in the preparatory work. Should the provisions regarding the transfer of undertakings be applicable to tendering, this will have major consequences for industries that are dependent upon competition. The tendering system could easily disappear for the simple reason that it will be impossible to submit a tender. If the tenderer risks being obliged to take over one or more of the employees of his or her competitor, there will be an element of uncertainty which will make it impossible to submit a tender. Such applicability would also come into conflict with the aim of the EEA Agreement on equal conditions of

competition based upon the principles of free movement of goods, persons, services and capital. Such rules would also be contrary to the regulations regarding public procurement, where the purpose is to prevent lengthy contracts that lead to a limited number of suppliers monopolising a business.

27. The defendant refers to the case law of the EC Court of Justice and submits that certain factors have emerged from the case-law that are important for the overall assessment which has to be made. In *Spijkers v Benedik*⁷ the EC Court of Justice stated that there must be "an economic entity which has retained its identity". Further, in *Berg v Besselsen*⁸ the Court stated that the transfer must occur on "the basis of an existing" contract. Finally, the defendant refers to *Bork International v Foreningen af Arbejdsledere i Danmark*⁹ where the Court stated that the transfer must take place in "the context of an existing" contract.

28. The defendant submits that *Rygaard v Strø Mølle Akustik*¹⁰ is one of the few judgments of the EC Court of Justice which may have relevance to the case at hand. He is of the opinion that the approach in *Rygaard* should be adapted by the EFTA Court.

29. The defendant further refers to case law in Norway and Sweden in support of his views, including two Norwegian cases with advisory opinions of the EFTA Court pending.¹¹

30. The defendant points out that the plaintiffs have presented a number of judgments from the EC Court of Justice in support of their view. In his opinion none of these are relevant since the factual circumstances are different from the case at hand. It is noted that the defendant did not take over any vehicles, moveable property, buildings or other assets from the previous provider of the ambulance services.

31. In the view of the defendant the Court should base its assessment upon the following facts: (A) The previous provider of the ambulance services, Hammer Syketransport, had a time-limited contract and no claim to continue the business at the expiration of the contract; (B) It was only parts of the assignments that Hammer Syketransport had previously carried out that were put out for tender; (C) Hammer Syketransport still existed after the defendant was awarded the contract and the winding up of this business at a later date, due to a lack of work, has no relevance; (D) The five former employees of Hammer Syketransport who were hired by the defendant were hired on the basis of individual, independent applications and not by automatic transfer from the previous employer; (E) There has never been any contractual relationship between the defendant and Hammer Syketransport; (F) No assets of Hammer Syketransport were taken over by the defendant and in no way can what has taken place be compared to a change of owner; (G) The defendant's business is a new project which focuses as much on prevention and safety as it does on pure transport of injured and sick persons and as such is clearly distinct from the business of Hammer Syketransport; and (H) The defendant has concluded a time-limited

⁷ See footnote 4.

⁸ See footnote 2.

⁹ See footnote 2.

¹⁰ Case C-48/94 *Rygaard v Strø Mølle Akustik AS* [1995] ECR I-2745.

¹¹ Case E-2/95 *Eidesund v Stavanger Catering A/S* and Case E-3/95 *Langeland v Norske Fabricom A/S*.

contract with the Nord-Trøndelag County Municipality for five years commencing 1 January 1996, with no right of extension.

32. If the term transfer of an undertaking is to be applied in the manner claimed by the plaintiffs, this must follow from new legislation and not from interpretation. There is no support in existing legal theory or practice for such an interpretation.

33. With reference to the statements above the defendant requests the EFTA Court to give the following answers to the questions referred:

“1. *It is a precondition for the application of EC Council Directive 77/187 that there has been some form of contract between the transferor and the transferee.*

2. *It is not a precondition for the application of the Council Directive that the transferee has to take over property or movables from the transferor, but if such a take-over has taken place, this factor must be included in an assessment of whether the directive is applicable.*

3. *If employees are transferred without applying for a new position with the transferee, this clearly indicates that the transfer of an undertaking has taken place.*

4. *The Council Directive is not applicable when an assignment is awarded in accordance with the rules governing tender and the provision of the service is limited in time.”*

The Government of the United Kingdom

34. The Government of the United Kingdom submits that the questions deal with two issues: (1) whether the directive is to be interpreted in a way that the expression "transfer of an undertaking, business or part of a business" only covers situations where there is some form of contract between the transferor and the transferee, and (2) what is the relevance of certain specified factors (the transfer of property or moveables, the transfer of some but not all employees, the fact that the services are assigned under a tendering process and for a limited period) in assessing whether there has been a transfer of an undertaking within the meaning of the directive.

35. Concerning the first issue the Government of the United Kingdom submits that it is settled case law of the EC Court of Justice that for the directive to be applicable "it is not necessary for there to be a direct contractual relationship between the transferor and the transferee" (*Merckx*¹², *Tellerup v Daddy's Dance Hall*¹³, *Redmond Stichting*¹⁴ and *Bork*¹⁵). The Government of the United Kingdom therefore suggests that the first question can be answered by stating that in circumstances where services are provided under contract between a municipality and a company, and that contract ceases, and the municipality then enters into another contract with a second company, the absence of a direct contractual relationship between the first and a

¹² See footnote 3.

¹³ See footnote 1.

¹⁴ See footnote 3.

¹⁵ See footnote 2.

second company does not preclude the application of the directive, provided that there is a transfer of a stable economic entity which retains its identity.

36. Concerning the second issue, the Government of the United Kingdom, *inter alia*, refers to the formula established in *Spijkers v Benedik*¹⁶. It is submitted that the existing case law of the EC Court of Justice provides a clear indication that the individual elements identified by the requesting court are relevant factors in considering whether a transfer has taken place, but no single element by itself is a decisive factor. On the basis of this conclusion the Government of the United Kingdom submits that the requesting court should be invited to apply the detailed criteria formulated by the EC Court of Justice in *Spijkers v Benedik* to the facts of this case and determine whether there has been a transfer within the meaning of the directive.

¹⁶ See footnote 4 (paragraph 13).

37. The Government of the United Kingdom proposes the following answer:

“As regards question 1, Council Directive 77/187/EEC is not to be interpreted in such a way that the expression "transfer of an undertaking, business or part of a business" only covers situations where there is some form of contract between the transferor and the transferee.

As regards question 2,3 and 4, 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. In order to determine whether that is the case, the national court must consider all the facts characterizing 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. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation.”

The EFTA Surveillance Authority

38. The EFTA Surveillance Authority emphasises the prime objective of the directive by referring to its preamble. Even if the preamble, where the social objective is emphasised 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.

39. The EFTA Surveillance Authority maintains that the EC Court of Justice has systematically given a broad interpretation to the expression "legal transfer" (*Redmond Stichting*¹⁷, *Schmidt*¹⁸ and *Botzen*¹⁹). 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 as long as it takes place in the context of contractual relations.

40. 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 organisational 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 (*Watson Rask and Christensen*²⁰).

¹⁷ See footnote 3.

¹⁸ See footnote 5.

¹⁹ Case 186/83 *Botzen v Rotterdamsche Droogdok Maatschappij* [1985] ECR 519.

²⁰ Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755.

41. 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 resulted in a "transfer of an undertaking, business or part of a business to another employer". In general terms, the EC Court of Justice has found this to be the case where the economic unit in question retains its "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 (*Spijkers v Benedik*²¹ and *Bork International v Foreningen af Arbejdsledere i Danmark*²²).

42. With regard to the over-all assessment that must be made in order to determine whether a transferred business has retained its identity, the EFTA Surveillance Authority notes that the EC Court of Justice has recognised that identity may be maintained, and hence there may be a transfer for the purpose of the directive, even if no assets are taken over by the transferee. Furthermore while the continuation of a business with the same staff after a transfer may be a strong indication of the identity being preserved, it is also clear from the EC Court of Justice case law, that a transfer may well fall within the scope of the directive, even if the majority of the employees engaged in the business before the transfer are not re-employed by the transferee.

43. In considering the question of identity, the subject matter of the transaction must be seen as a whole, comprising of the employees, the organisational 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.

44. The EFTA Surveillance Authority recognises that it must be for the national court to establish the facts of the case. It notes, however, that in this case the ambulance service seems to have been continued without interruption, that some of the employees of the previous service provider were re-employed by the new one and that the change of service provider was brought about in the context of contractual relations. While these circumstances are obviously relevant, and could also be taken to indicate that the transaction may be such as to come within the scope of the directive, the EFTA Surveillance Authority notes that there are also facts that could be seen as indications to the contrary (e.g. the fact that no assets were taken over). Above all, there are a number of other important facts that need to be established before a conclusion as to retention of identity can be reached. Findings of fact such as the manner in which the services were in fact organised before and after the change of service provider and the extent to which, if any, equipment and/or personnel were used for other activities than the ambulance services concerned, in the EFTA Surveillance Authority's opinion, would clearly be of relevance to the issue of identity.

45. The EFTA Surveillance Authority then proceeds with analysing separately each of the questions put forward by the requesting court. On the basis of the case law of the EC Court of Justice the EFTA Surveillance Authority proposes an answer in the following terms:

²¹ See footnote 4.

²² See footnote 2.

“1. Article 1(1) of the Act referred to in point 23 of Annex XVIII to the Agreement on the European Economic Area (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 a transfer may come within the scope of the Act even if it does not take place directly between the previous employer and the new one, but through a third person, without there being any contractual relations between the two employers;

2. Article 1(1) of the Act is to be interpreted so as to mean that, although the taking over or not of assets is relevant in determining whether or not a transaction constitutes a transfer for the purpose of the Act, the fact that no assets are taken over does not in itself preclude the Act from applying;

3. Article 1(1) of the Act is to be interpreted so as to mean that the significance for the application of the Act in any given case of employees of the transferor being re-employed by the transferee is to be assessed in the light of all circumstances characterizing the transaction in question and that the fact that only some of the former employees are in fact re-employed does not preclude the Act from applying;

4. Article 1(1) of the Act is to be interpreted so as to mean that, in the case of the transfer of a contract for the provision of services, the facts that the transfer is preceded by a tender procedure and that the contract is for a limited period of time do not preclude the transfer from coming within the scope of the Act.”

The Commission of the European Communities

46. 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 judgement in *Spijkers v Benedik*²³. In the Commission's opinion, it follows from this judgement that two conditions must be met. First, the undertaking 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.

47. 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 if there has been a transfer within the meaning of the directive. The Commission refers to the following cases: *Watson Rask and Christensen*²⁴, *Redmond Stichting*²⁵ and *Rygaard v Strø Mølle Akustik*²⁶.

²³ See footnote 4.

²⁴ See footnote 20.

²⁵ See footnote 3.

²⁶ See footnote 10.

48. 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".

49. According to the Commission, there is usually no difficulty in determining the existence of a business with its own identity in 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 organisational 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, organisational structure etc., a business with its own identity can be 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* against *Rygaard v Strø Mølle Akustik*. 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.

50. Thereafter, the written observations of the Commission deal with the questions posed by the Norwegian court. The Commission mentions, in connection with the first question, that if the situation is merely that the first company provides the service in question and subsequently another does so, there cannot be a transfer of the business in the absence of a disposal from one to another of the structure of the activity or in the absence of equipment or staff being taken over. The existence of a contract between the companies is a factor to be taken into account in determining whether or not there is a business with its own identity which has been transferred to the new company whilst retaining its identity. The existence of such a contract is not, however, conclusive, and must be considered in the light of the business arrangement as a whole. With regard to the second question, the Commission submits that neither taking over property nor taking over moveables, nor the fact that property and/or moveables are not taken over, is conclusive by itself. With regard to the third question, the Commission states that Article 4(1) of the directive provides that the transfer of an undertaking, business or part of a business does not itself constitute grounds for dismissal. Nevertheless, that provision is not to stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce. The dismissal of staff may therefore be in compliance with the directive, and even if it is not, non-compliance cannot affect the existence of a transfer for the purposes of the directive. In response to the fourth question, the Commission concludes that the fact that a contract is awarded in accordance with the rules governing tenders can have no bearing on the applicability or interpretation of the directive. The text of the directive gives no room for believing that a particular type of contract falls outside its applicability. The purpose of the directive leads to the same conclusion. The fact that the contract for provision of services is limited in time has no bearing on the applicability or interpretation of the directive. The Commission points out that fixed-term contracts such as leases have been held to fall within the

scope of the directive (*Ny Mølle Kro*)²⁷, and that in *Rygaard* the situation was held not to be a transfer, not because of the limited duration of the task, but because no economic entity with its own identity passed from one employer to another. The Commission concludes that the factors relevant in determining whether or not there is a transfer within the meaning of the directive do not include the formal length of one or more of the contracts involved.

51. The Commission proposes the following answers to the questions:

“1. The expression “transfer of an undertaking, business or part of a business” in Directive 77/187/EEC is not restricted to situations where there is a direct contractual relationship between the transferor and the transferee.

2. The expression referred to in point 1 is similarly not restricted to situations where the transferee takes over property and/or moveables from the transferor. The taking over of property and/or moveables, is one of the factors to be taken into account in determining whether or not there is a transfer within the meaning of the Directive, but it is not a conclusive factor.

3. The fact that some but not all employees of the transferor are employed by the transferee is also one of the factors to be taken into account in determining whether or not there is a transfer within the meaning of the Directive. Once again it is not a conclusive factor.

4. The fact that a contract is awarded in accordance with the rules governing tenders and the fact that a contract for the provision of services is of limited duration have no bearing on the interpretation of the Directive.”

Thór Vilhjálmsson
Judge-Rapporteur

²⁷ *Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro* [1987] ECR 5465.