



REPORT FOR THE HEARING
in Case E-3/01

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 Héraðsdómur Reykjavíkur (Reykjavík District Court) for an Advisory Opinion in the case pending before it between

Alda Viggósdóttir

and

Iceland Post Ltd (Íslandspóstur hf.)

on the interpretation of the Agreement on the European Economic Area (hereinafter the “EEA Agreement”), with particular reference to 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 (hereinafter the “Directive”), in particular Articles 1 and 3 thereof.¹

I. Introduction

1. By a reference dated 15 March 2001, registered at the Court on 22 March 2001, the Reykjavík District Court made a Request for an Advisory Opinion in a case brought before it by Alda Viggósdóttir (hereinafter, the “Plaintiff”) against the Iceland Post Ltd (Íslandspóstur hf., hereinafter, the “Defendant”).

¹ The Directive has, in the meantime, been amended by Council Directive 98/50/EC of 29 June 1998 amending 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 (OJ 1998 No L 201, p. 88). Reference to that act is made in point 24 of Annex XVIII to the EEA Agreement. Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 No L 82, p. 16) is a consolidated version of the various directives.

II. Legal background

EEA law

2. The Directive states *inter alia*:

“SECTION 1 Scope and definitions

Article 1

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

2. *This Directive shall apply where and in so far as the undertaking, business or part of the business to be transferred is situated within the territorial scope of the Treaty.*

3. *This Directive shall not apply to sea-going vessels.*

(...)

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 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 with 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 provision 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.”*

National law

3. The principal statutory provisions that must be examined in this case are set out in the following. The first is Icelandic Act No. 77/1993 on the Legal Status of Employees in the Event of the Transfer of Undertakings (*Lög um*

réttarstöðu starfsmanna við aðilaskipti að fyrirtækjum, hereinafter the “Act”), in particular sections 1 and 2. The first paragraph of section 2 reads as follows:

“As of the date of transfer within the meaning of the first paragraph of section 1, the transferee shall acquire the rights and obligations of the transferor as specified in the employment contract and respect the wage terms and terms of service that have been approved in general collective agreements, subject to the same conditions as applied to the transferor until such time as the contract is terminated or expires, or until another collective agreement takes effect or is applied.”

4. Next is Icelandic Act No. 103/1996 Establishing a Limited Company to Operate the Post and Telecommunications Administration (*Lög um stofnun hlutafélags um rekstur Póst- og símamálastofnunar*), particularly sections 1, 7 and 8. The first paragraph of section 8 reads as follows:

“Permanent employees of the Post and Telecommunications Administration shall have the right of employment with the new company, and shall be offered positions therein which are comparable to those in which they were employed in the Administration, provided that they retain in the company the rights that they have already earned in the Administration. Their right to severance pay, however, shall be subject to the Civil Servants’ Rights and Obligations Act in force at the time of commencement of this Act.”

5. Thirdly, section 4 of the previous Civil Servants’ Rights and Obligations Act, No. 38/1954 (*Lög um réttindi og skyldur starfsmanna ríkisins*) reads as follows:

“If a person is appointed to a position, the view shall then be taken that he will work in that position until one of the following occurs:

- 1. he commits an offence while at work, with the result that he has to be dismissed from the position;*
- 2. he does not meet the conditions of section 3 of this Act;*
- 3. he is released from the position at his own request;*
- 4. he attains the maximum age limit (cf. section 13);*
- 5. he is transferred to another position with the State;*
- 6. his period of appointment according to a letter of temporary appointment expires;*
- 7. the position is abolished (cf. section 14).”*

6. Lastly, there is the current Civil Servants’ Rights and Obligations Act, No. 70/1996 (*Lög um réttindi og skyldur starfsmanna ríkisins*).

III. Facts and procedure

7. The Plaintiff began working for the General Directorate for Post and Telecommunication (*Póst og símamálastjórnin - Póstur og sími*), which later

became the Post and Telecommunications Administration (*Póst- og símamálastofnunin*), in 1963. On 1 January 1997, the Administration was converted into a wholly State-owned limited company, see Act No. 103/1996 Establishing a Limited Company to Operate the Post and Telecommunications Administration (*Lög um stofnun hlutafélags um rekstur Póst og símamálastofnunar*). In connection with the take-over of operations by the limited company, an employment contract was concluded with the Plaintiff, covering her work for the new company. Subsequently, on 1 January 1998, the Defendant, Iceland Post Ltd, came into being as a result of the division of the Post and Telecommunications Administration Ltd into two limited companies, and the Plaintiff became an employee of the Defendant. The Defendant gave the Plaintiff notice of temporary termination of employment on 5 October 1999. The Defendant offered the Plaintiff a termination of employment agreement, which she rejected. Under that agreement, she was to have received her fixed monthly wages for 12 months, plus vacation pay and a December bonus. By a letter of dismissal dated 28 December 1999, the Defendant gave the Plaintiff notice of final termination of employment, with the contractually agreed three-month notice period. The reason stated for the dismissal was that the Plaintiff's dealings with the Defendant's employees and customers had not been satisfactory. The Plaintiff was asked not to work during the notice period. In addition to wages during the notice period, the Plaintiff received a further one month's wages.

8. The Plaintiff asks that the Defendant be ordered to pay damages and compensation for non-financial loss due to the dismissal, which the Plaintiff maintains was unlawful.

IV. Questions

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

1. Is Article 1(1) of Council Directive 77/187/EEC to be interpreted to the effect that the conversion of a State-owned entity into a wholly State-owned limited company constitutes a transfer within the meaning of that provision?

2. Is Article 3(1) of Council Directive 77/187/EEC to be interpreted as prohibiting the provision, in an employment contract which is concluded in connection with a transfer within the meaning of Article 1(1) of the Directive, of less advantageous terms regarding termination of employment as compared with those enjoyed by the employee prior to the date of the transfer?

V. Written Observations

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

- Ms. Alda Viggósdóttir, represented by Stefán Geir Þórisson, hæstaréttarlögmaður (Supreme Court Advocate) Reykjavík;
- Iceland Post Ltd (Íslandspóstur hf.), represented by Andri Árnason, hæstaréttarlögmaður (Supreme Court Advocate) Reykjavík;
- the Government of Iceland, represented by Anna Jóhannsdóttir, Legal Officer, External Trade Department, Ministry for Foreign Affairs, acting as Agent;
- the EFTA Surveillance Authority, represented by Dóra Sif Tynes, Legal Officer, Department of Legal & Executive Affairs of the EFTA Surveillance Authority, acting as Agent;
- the Commission of the European Communities, represented by John Forman and Jörn Sack, members of its Legal Service, acting as Agents.

The first question

Alda Viggósdóttir

11. The Plaintiff states that the conditions for the application of the Directive would appear to be clear to the effect that there is no requirement that there be a new owner of the undertaking or part thereof. Thus, the Directive is intended to cover all cases in which there is a change in the party operating the undertaking, regardless of whether a private or a public party is involved. Moreover, the new party is to be liable for the management and thus acts as the employer of the employees affected by the transfer.

12. The Plaintiff contends that, therefore, the most important consideration is whether the transferee acquires the position vis-à-vis the employees of the operation which the transferor held prior to the transfer. Reference is made to judgments of the Court of Justice of the European Communities in *Süzen*,² *Spijkers*³ and *Merckx and Neuhuys*.⁴ Following that case-law, the decisive criterion is the replacement of the employer “irrespective of any change of

² Case C-13/95 *Süzen v Zehnacker Gebäudereinigung* [1997] ECR I-1259 (hereinafter “*Süzen*”).

³ Case C-24/85 *Spijkers v Benedik* [1986] ECR 1119 (hereinafter “*Spijkers*”).

⁴ Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1267.

ownership”. The Directive places the emphasis on the employment relationship and the rights that may flow therefrom. For that reason, the emphasis is placed on the change of employer rather than the change of owner: it is a matter of key importance whether the employees find themselves facing a new legal person as their employer.

13. The Plaintiff refers to the rulings of the EFTA Court,⁵ where the conditions which must be met for a transfer to be covered by Article 1(1) of the Directive were examined. Particular reference is made to the *Eidesund* case, in which the conditions were discussed thoroughly in the light of the case-law of the Court of Justice of the European Communities up to that time.

14. The Plaintiff points out that Article 1(1) of the Directive applies to measures taken by the State in connection with privatisation or change to the form of ownership of a publicly-owned undertaking or institution. In this connection, it is irrelevant whether the share capital is still wholly-owned by the State if there has been a change of the party operating the undertaking. In the assessment of whether the privatisation of the Post and Telecommunications Administration comes within the definition of a transfer under Article 1(1) of the Directive, account should be taken of the fact that the employees of the institution received a new legal person, i.e. the limited company, as their employer. It is the limited company and its Board of Directors which determine the company’s human resources policy. It is the limited company which bears liability for claims made by the employees. Thus, it is the limited company which takes over the position previously held by the State. The fact that the State is still currently the sole owner of the share capital is simply of no significance, in the light of the case-law of the Court of Justice of the European Communities.

15. The Plaintiff maintains that the conclusion to be drawn from the aforementioned case-law is that a change of ownership is by no means a prerequisite for the application of the Directive.

16. In the *Spijkers* judgment, the Court of Justice of the European Communities set out some guidelines for determining whether there is a transfer within the meaning of the Directive.⁶ The Plaintiff maintains that those

⁵ Case E-2/95 *Eidesund v Stavanger Catering A/S* [1996] EFTA Court Report 3 (hereinafter “*Eidesund*”); Case E-2/96 *Ulstein and Røiseng* [1996] EFTA Court Report 65 (hereinafter “*Ulstein*”); Case E-3/96 *Ask and Others v ABB Offshore Technology and Aker Offshore Partner AS* [1997] EFTA Court Report 3.

⁶ See paragraph 13 of the reasons in the *Spijkers* judgment, which reads as follows: “In order to determine whether those conditions are met, it is necessary to 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 moveable 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.”

guidelines make it clear that the Directive is to be interpreted in such a way that the privatisation of the Post and Telecommunications Administration comes within the scope of the Directive.

17. The Plaintiff states that the new company took over all of the employees of the post offices and all of the tangible assets and moveable property of the Post and Telecommunications Administration. The activities were the same before and after the change in the form of ownership, and all of the commercial goodwill and customers were taken over by the new company. According to the case-law⁷ of the Court of Justice of the European Communities, the Directive is to be interpreted in such a way that the privatisation of the Post and Telecommunications Administration comes within the scope of the Directive.

18. A similar question was answered in the affirmative by the Court of Justice of the European Communities in the case *Collino and Chiappero*.⁸

19. According to the Plaintiff, the central issue is that, when a public body is privatised, a new legal person which takes over the operations comes into being. When such a measure is taken, there is also a change in the person responsible for operating the undertaking, which alone is sufficient to constitute a transfer within the meaning of Article 1(1) of the Directive. This conclusion follows from the fact that the Directive is intended to be comprehensive in scope, and the general rule is that transfers will be covered by the Directive unless they are specifically excluded from its scope. The fact that a transfer takes place in several stages, i.e. with the business being assigned by the original transferee to another transferee,⁹ does not affect the above conclusion. The employees are in need of the same protection, irrespective of the technical nature of the transfer.

20. The Plaintiff proposes that the first question should be answered as follows:

“Article 1(1) of Council Directive 77/187/EEC is to be interpreted to the effect that the conversion of a State-owned entity into a wholly State-owned limited company constitutes a transfer within the meaning of that provision.”

Iceland Post Ltd

21. The Defendant submits that the Directive does not unequivocally cover the transfer of the rights and obligations of a State-owned entity to a limited company owned by the relevant State (a change of form), unless it is

⁷ See footnote 3, *Spijkers*.

⁸ Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659 (hereinafter “*Collino and Chiappero*”).

⁹ Cases 324/86 *Tellerup v Daddy’s Dance Hall* [1988] ECR 739, at paragraph 9 (hereinafter “*Daddy’s Dance Hall*”).

accompanied by some sort of transfer of ownership. According to Article 1(1) of the Directive, the Directive applies to the “transfer” of an undertaking, business or part of a business as a result of “a legal transfer or merger”.

22. In the present case, it has been established that neither a legal transfer nor a merger took place when a limited company was established to operate the Post and Telecommunications Administration in 1996. The change, therefore, consisted solely of a change in operational form, with the owner, i.e. the Icelandic State, remaining unchanged.

23. The main part of the activities of Iceland Post Ltd consists of activities which were transferred to the company through the change, whilst the administrative part of the postal operations of the Post and Telecommunications Administration was transferred to a special public institution, the Post and Telecom Administration, which was founded at the same time.

24. The Defendant maintains that the judgment of the Court of Justice of the European Communities in *Collino and Chiappero*¹⁰ cannot be regarded as stating unequivocally that a change in the operational form of a public entity constitutes a transfer, with the result that assets undergo a change of ownership.

25. According to the Defendant, the first question from the Héraðsdómur Reykjavíkur concerns only whether Article 1(1) of the Directive is to be interpreted to the effect that the conversion of a State-owned entity into a wholly State-owned limited company constitutes a transfer within the meaning of the provision. This question must be regarded as misleading to some extent, since it must be understood as meaning that the Directive applies to all employees in the event of a transfer, irrespective of their legal position in other respects.

26. The Defendant submits that the Directive must be interpreted narrowly, and as not necessarily applying to all employees in the event of a transfer; in other words, differences in legal position must be taken into account in the assessment of the scope of the Directive.

27. In *Collino and Chiappero*, the Court of Justice of the European Communities specifically discussed the issue which has also been raised by the Héraðsdómur Reykjavíkur in its first question to the EFTA Court. In its conclusion in *Collino and Chiappero*, the Court of Justice of the European Communities stressed that the employees of ASST had been civil servants up to the time they were transferred to Iritel, and that they were therefore subject to public law provisions. Only citizens of Member States to whom national labour legislation (in the private sector) applies are able to base their rights on the Directive. Thus, it was argued, the Directive did not apply to those who were not subject to such labour law, irrespective of their field of work. The Court of Justice of the European Communities took the view that, at the time of the

¹⁰ See footnote 8, *Collino and Chiappero*.

transfer of rights in the case then under examination, the employees of the State-owned entity, ASST, were civil servants and were therefore subject to public law, and not to national labour legislation applying to the private sector, but that a final assessment of this point was up to the relevant court. From this it followed that the provisions of Article 1(1) of the Directive applied only to citizens who were subject to labour law applicable to the private sector.

28. In the present case, it is not disputed that, as an employee of the Post and Telecommunications Administration, the Plaintiff was a civil servant and was therefore subject to public law, in particular the Civil Servants' Rights and Obligations Act, No. 70/1996, which applies to civil servants, nor that the Plaintiff's legal position was subject to Act No. 70/1996 when the Post and Telecommunications Administration was converted into a limited company under Act No. 103/1996. The Plaintiff did not work in the private sector prior to her transfer to Iceland Post Ltd, and therefore did not come under the labour legislation normally applying to employees under private law. The Plaintiff argues that, from this, it is clear that the Directive does not apply to the former employees of the Post and Telecommunications Administration.

The Government of Iceland

29. Referring to *Collino and Chiappero*, the Government of Iceland submits that the Defendant operates a public postal service for a fee. Consequently, the Directive may apply to the circumstances in the main proceedings, even though the Defendant is a State-owned entity, because a unilateral decision by a public authority to transfer a public undertaking to another legal person falls within the material scope of the Directive.¹¹

30. Therefore, the Government of Iceland suggests that the first question be answered mostly in the affirmative, in keeping with the judgment of the European Court of Justice of the European Communities in *Collino and Chiappero*.

The EFTA Surveillance Authority

31. The EFTA Surveillance Authority refers to the purpose of the Directive, which is to ensure that the restructuring of undertakings within the common market does not adversely affect the workers in the undertakings concerned.¹²

¹¹ See footnote 8, *Collino and Chiappero*, at paragraphs 34, 35 and 41.

¹² Case 135/83 *Abels v Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 479, at paragraph 18.

32. The EFTA Surveillance Authority refers to the case-law of the Court of Justice of the European Communities, according to which the Directive applies to all transfers of entities which are engaged in economic activities, whether or not they operate with a view to profit.¹³ However, it has not been held to be applicable in instances where there is a mere reorganisation of the structure of public administration, as the transfer then concerns activities involving the exercise of public authority.¹⁴

33. The EFTA Surveillance Authority states that it is unimportant whether the transfer in question results from unilateral decisions of a public authority or from an agreement between the transferor and transferee.¹⁵ What has to be assessed are the facts characterising the transfer, such as whether buildings and moveable property are transferred, whether or not the majority of employees are taken over by the transferee and the degree of similarity between the activities carried out before and after the transfer.¹⁶

34. Reference is made to a judgment of the Court of Justice of the European Communities in which it has held, in the context of competition law, that an undertaking which has been granted an exclusive right to carry out postal services performs a task in the general economic interest.¹⁷ The referring court in the present case has not submitted any information on whether Iceland Post Ltd has been granted such an exclusive right. However, for the purposes of assessing whether the change of the Postal Administration into a limited company constitutes a transfer of undertaking within the meaning of the Act, it may be assumed that the administration, and later the company into which it evolved, is engaged in economic activities which render the Act applicable in the case at hand.

35. Furthermore, the Court of Justice of the European Communities has held that the Directive may apply to a situation in which an entity operating telecommunications services for public use and managed by a public body within the State administration is, following a decision of the public authorities, the subject of a transfer for value to a private-law company established by another public body which holds its entire capital.¹⁸

36. The EFTA Surveillance Authority submits that the same interpretation should apply to an entity which operates postal services for public use and which

¹³ Case C-382/92 *Commission v United Kingdom* [1994] ECR I-2435, at paragraphs 44 to 46 (hereinafter “*Commission v United Kingdom*”).

¹⁴ Case C-298/94 *Henke v Gemeinde Schierke und Verwaltungsgemeinschaft ‘Brocken’* [1996] ECR I-4989, at paragraphs 14 and 17 (hereinafter “*Henke*”).

¹⁵ Case C-29/91 *Redmond Stichting v Bartol* [1992] ECR I-3189, at paragraphs 15 to 17 (hereinafter “*Redmond Stichting*”).

¹⁶ See footnote 5, *Eidesund*, at paragraph 32; see also footnote 2, *Süzen*, at paragraph 14.

¹⁷ Case 320/91 *Corbeau* [1993] ECR I-2533, at paragraph 15.

¹⁸ See footnote 8, *Collino and Chiappero*, at paragraph 41.

is part of the public administration, which is subsequently subject to a transfer for value to a private-law company wholly owned by the State.

37. The EFTA Surveillance Authority submits that it is for the national court to determine whether the change of a postal administration into a limited company fulfils the criteria of transfer.¹⁹ Consequently, it is for the national court to determine whether the company in the present case performs an economic activity and whether the facts characterising the transfer point towards there being a transfer within the meaning of Article 1(1) of the Directive.

38. The EFTA Surveillance Authority proposes that the first question be answered as follows:

“Transfer for value of an entity operating postal services for public use which is a part of the public administration to a wholly State-owned limited company, which carries out the same task as the administrative entity and has for those purposes taken over its tangible and intangible assets, constitutes a transfer of undertakings within the meaning of Article 1(1) of Directive 77/187/EEC. The persons concerned by such a transfer must, however, originally have been protected under national employment law.”

Commission of the European Communities

39. The Commission of the European Communities refers to the case-law of the Court of Justice of the European Communities, according to which Directive 77/187 is applicable to the transfer of all undertakings, public or private, which are engaged in economic activities and whether or not they operate with a view to profit.²⁰

40. The Commission of the European Communities notes that Iceland Post and Telecommunications Administration has been engaged mainly in economic activities, although it may well have also exercised regulatory powers. The two kinds of activities must have been separated at the latest when the Administration was privatised, with the economic activities then being transferred to the private companies, whilst regulatory matters remained with the State.

41. The Commission is of the view that the transfer of the activities of the Administration may not, therefore, be considered to constitute a “reorganisation

¹⁹ Cases 105/84 *Foreningen af Arbejdsledere i Danmark v Danmols Inventar* [1985] ECR 2639, at paragraphs 27 and 28 (hereinafter “*Danmols Inventar*”); see footnote 16, *Redmond Stichting*, at paragraph 18 and Joined Cases C-173/96 and C-247/96 *Sánchez Hidalgo and Others* [1998] ECR I-8237, at paragraph 24.

²⁰ See footnote 15, *Redmond Stichting*; footnote 13, *Commission v United Kingdom*, at paragraphs 44 to 46; footnote 8, *Collino and Chiappero*, at paragraph 30; and Case C-175/99 *Mayeur* [2000] ECR I-7780, at paragraph 32. See also Article 1(1)(c) of Directive 98/50.

of structures of the public administration or the transfer of administrative functions between public administrative authorities”.²¹

42. Reference is made to a ruling of the Court of Justice of the European Communities, which held that the Directive is applicable, not only when an undertaking is transferred by virtue of an agreement, but in all cases where a change in ownership occurs.²² Therefore, it is irrelevant that, in many cases of privatisation, the State transfers its economic activities by means of a law or by a unilateral decision of the public authority to a private company which it wholly owns; as there is a change in the ownership of the undertaking, the Directive would apply.

43. The Commission of the European Communities proposes that the first question be answered as follows:

“The conversion of a State-owned economic entity into a wholly State-owned limited company constitutes a transfer within the meaning 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 undertakings or businesses.”

The second question

Alda Viggósdóttir

44. The Plaintiff argues that this question concerns the principal aim of the Directive, which is to protect employees’ accrued rights in the context of the frequent changes and reversals which occur in the business sector: changes in companies’ operations, mergers, privatisation, etc. The Directive is intended *inter alia* to prevent employees’ having to accept positions with wages and terms that are different from, and less advantageous than, those they held with their former employer, and also to prevent the loss of accrued rights in the event of a transfer. The Directive is designed to prevent such consequences of frequent changes.

45. The Plaintiff contends that the general rule is that the transferor’s rights and obligations towards the employees are transferred automatically to the transferee. There is no need for any special declaration by the transferor or the transferee. In order to ensure that the objective of the Directive is achieved, the transferor and the transferee are also forbidden from making an agreement amongst themselves to the effect that the transferor will dismiss its employees

²¹ See footnote 14, *Henke*, at paragraphs 14 and 17; and footnote 8, *Collino and Chiappero*, at paragraph 31. See also Article (1)(1)(c) of Directive 98/50.

²² See footnote 9, *Daddy’s Dance Hall*; and footnote 15, *Redmond Stichting*, at paragraphs 15-17.

before the transfer takes place or change their employment relationship in any way, for example, by means of a new employment contract, since such measures could be attributed to the transfer and would therefore be contrary to the Directive. New employment contracts or other agreements concluded with employees in connection with a proposed transfer may not affect their rights, because the rules of the Directive are compulsory. The rationale for the compulsory nature of the rules of the Directive is that, if this were not so, achievement of the objectives of the Directive would hardly be feasible. This rationale is also based on the traditional protective assumption in labour law: that employees generally are in a weaker bargaining position than the employer. Thus, in many cases, the employer is able to exploit the freedom of negotiation and his strong bargaining position to his own advantage.

46. The Plaintiff goes on to argue that any employment contract concluded by a committee appointed to prepare for privatisation must necessarily be made in connection with the proposed transfer. If it emerges that such a contract gives an employee less advantageous terms of employment than he previously enjoyed, this must be deemed to be a violation of Article 3 of the Directive, as the transferee must continue to observe the terms and conditions enjoyed by the employees prior to the transfer, on the same terms as were applicable prior to the transfer.

47. The Plaintiff argues that the protection given under Article 3(1) of the Directive entails the strict observation of the employee's rights exactly as they are defined. In *Daddy's Dance Hall*, the Court of Justice of the European Communities held that an employee may not waive his rights, even if an overall evaluation reveals that the changes do not place him in a worse position. The EFTA Court came to the same conclusion in its ruling in *Langeland*.²³ Consequently, every detail in the pay arrangements and working conditions must be retained. If, in the event of a transfer, the transferor or the transferee could curtail the rights regarding termination which the employee enjoyed prior to the transfer, then this would obviously open the door to making a substantial curtailment of the employee's terms of employment, since rights in connection with termination constitute part of his rights. But such a curtailment of rights could never be compatible with the aim and objectives of the Directive, which are to ensure that transfers are not used as an opportunity to encroach on employees' rights.

48. The Plaintiff recalls that the conclusion reached by the Court of Justice of the European Communities in *Daddy's Dance Hall* and by the EFTA Court in *Langeland* was that an employee may not waive the rights he has under the compulsory provisions of the Directive, even if the disadvantages arising from such a waiver were to be compensated for in such a way that, on an overall evaluation, the employee was not placed in a less advantageous position.

²³ Case E-3/95 *Langeland v Norske Fabricom* [1996] EFTA Court Report 36 (hereinafter "*Langeland*").

Nonetheless, the Directive does not exclude the possibility of an agreement between the employee and the new employer involving a change in the employment relationship, provided that such a change is permitted under national law in circumstances other than those involving a transfer. The assessment of whether such circumstances apply involves the interpretation of Icelandic law, which does not come within the role of the EFTA Court. Nevertheless, it should be stated here that such circumstances did not apply under Icelandic law at the time of the transfer which is at the centre of the present case.²⁴

49. The Plaintiff proposes that the second question be answered as follows:

“Article 3(1) of Council Directive 77/187/EEC is to be interpreted as prohibiting the provision, in an employment contract concluded in connection with a transfer within the meaning of Article 1(1) of the Directive, of less advantageous terms regarding termination of employment as compared with those enjoyed by the employee prior to the date of the transfer.”

Iceland Post Ltd

50. The Defendant argues that the Plaintiff made a new employment contract concerning her work with the prospective limited company which was to take over the operations of the Post and Telecommunications Administration, in which she agreed to different wage terms.

51. The Defendant points out that no provision is to be found, either in Icelandic law or in the Directive, which limits the right of employees themselves to change their terms of employment by means of an agreement with their employer; such a provision would be an attack on the principle of freedom of bargaining. Restrictions on the unilateral amendment of terms of employment do not exclude the right of employees and employers to negotiate amendments to terms of employment, even at the time of a transfer.

52. The Defendant refers to Article 3(1) of the Directive. As it is worded, that paragraph defines the obligations of the transferee in the event of a transfer and according to the employment contract in effect at that time. However, the paragraph makes no mention of the nature of the rights and obligations to be transferred, or whether they are subject to negotiation between the employee and the transferor prior to the transfer. The logical inference of this is, therefore, that it is not possible to deduce from Article 3(1) of the Directive that terms of employment are non-negotiable if such negotiations are carried out with the consent of both the employee and the employer, as was done in the present case.

²⁴ See footnote 9, *Daddy’s Dance Hall*, at paragraph 17; and footnote 23, *Langeland*, at paragraph 46.

53. The Defendant refers to *Daddy's Dance Hall*, in which the Court of Justice of the European Communities held that amendments which are to the disadvantage of the employee may be made to an employment relationship, even if a transfer is effected at the same time, if the law of the Member State does not prohibit such amendments.

54. The Defendant refers to the judgment of the Court of Justice of the European Communities in *Danmols Inventar*, and contends that the view must be taken that an employee is permitted to enter into an agreement with the employer on amended terms regarding termination of employment.

55. The Defendant further argues that Article 3 of the Directive must be understood as meaning that the employee's right to negotiate amended terms of employment, including terms of termination of employment, either independently or on the basis of a general collective agreement, is not subject to the restrictions applying to agreements between the parties carrying out the transfer, i.e. the transferor and the transferee. The view must be taken that the main aim of the Directive is to prevent a transfer agreement between a transferor and a transferee from resulting in a curtailment of the rights of the employees affected by the transfer. By contrast, the Directive cannot be aimed at restricting the right of employees or trade unions to negotiate amendments to their terms in the event of a transfer.

56. The Plaintiff draws particular attention to the fact that the Plaintiff has not argued that the terms of the employment agreement signed by the parties in 1996 are invalid or non-binding as such. The agreement was concluded in full consultation with her, and she signed it of her own free will.

The Government of Iceland

57. The Government of Iceland refers to the case-law of the Court of Justice of the European Communities, according to which the Directive has as its aim only to achieve partial harmonisation, by extending the protection of workers, guaranteed in the event of transfers of undertakings under the laws of several Member States.²⁵

58. In *Danmols Inventar*, the Court of Justice of the European Communities stated that “the expression employee within the meaning of Directive No. 77/187/EEC must be interpreted as covering any person who, in the Member State concerned, is protected as an employee under national employment law.” This has been repeated by that Court in later cases, such as in *Collino and Chiappero*, where it was held that the nature of tasks performed by the persons

²⁵ See Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755 (hereinafter “*Watson Rask*”); and footnote 8, *Collino and Chiappero*, at paragraph 37.

was of no relevance, and that only the relevant issue was whether or not the persons were protected under national employment law. That Court also referred to Council Directive 98/50/EC of 29 June 1998, with which the Member States are to have complied by 17 July 2001 at the latest.²⁶ That Directive defines the term “employee” in accordance with established case-law.²⁷

59. In *Collino and Chiappero*, the Court of Justice of the European Communities stated clearly that, if the employees of State-owned entity were subject to a public-law status, as opposed to employment law, the Directive was not applicable to them. Protection under national employment law is, therefore, a necessary condition for the Directive to apply, and for the transfer of rights and obligations to be possible. This is logical, since some of the rights and obligations conferred by public law status are not transferable at all.

60. The Government of Iceland points out that the Plaintiff was appointed to her position as a civil servant under the provisions of the Civil Servants’ Rights and Obligations Act of 1954. The special rules regarding civil servants in Iceland who had taken up employment prior to 1 July 1996, when the new legislation came into effect, entail *inter alia* that civil servants have a special obligation of loyalty and discretion. They are not allowed to hold other jobs unless a special exemption is given, and termination of their employment is only possible in accordance with various special provisions which are very different from laws relating to the private labour sector and employment law. Additionally, if their position is abolished, civil servants hired before the abovementioned date are entitled to severance pay for six to twelve months, depending on length of service.²⁸

61. The Government of Iceland points out that a special Act is also in force governing collective agreements for civil servants.²⁹ Collective agreements are concluded respecting wages, vacation time and other financial terms between the State and unions of civil servants, but the foundation of the rights and obligations is based on special legal provisions, which neither the employer nor the employee can change or amend.

62. The Government of Iceland is, accordingly, of the view that it appears that the Plaintiff’s status must have been largely subject to public law and, consequently, only partly governed by collective agreements, which could be

²⁶ See footnote 1.

²⁷ See footnote 1, Art. 2(1) d) of Directive 9850/EC, and the sixth recital of the preamble.

²⁸ Act 70/1996 Temporary provision, paragraph 5: “If a job is eliminated, an employee who has been appointed or hired into government service before the entry into force of this Act and to which Act no. 38/1954 has applied, and is not regarded as a civil servant according to Article 22 of this Act, shall have the right to receive severance pay for a period of six months, if he has been employed by the government for less than 15 years, otherwise for twelve months. ...” (unofficial translation from the Ministry of Finance’s homepage).

²⁹ Act No. 94/1986 on Collective Agreements for Civil Servants (*Lög um kjarasamninga opinberra starfsmanna*).

defined as contracts of employment or employment relationships within the meaning of Article 3(1) of the Directive. The status of a civil servant in relation to termination of employment is certainly based on the legislation.³⁰

63. The Government of Iceland points out that, in *Collino and Chiappero*, the decision on whether the Plaintiff had public law status was left to the national court to decide, although the Court of Justice of the European Communities held that the case-file suggested public law status.³¹ That Court has also left it to the national courts to decide whether a person is protected under national employment law.³² The meaning of the term “employee” may differ between different legal systems of the Member States, as it has not been harmonised.

64. Furthermore, the Government of Iceland submits that the Directive is not aimed at enhancing the special privileges and rights enjoyed by civil servants in domestic legislation, when their position is changed, abolished or their employment terminated. These rights and privileges are not harmonised by EEA law and are within the sole competence of the national legislator.

65. If, however, the Plaintiff in the main proceedings is found not to have had a public law status regarding termination of employment and other relevant provisions, then the Government of Iceland submits that her rights and obligations are determined by national employment law. Such terms can be altered by individual agreements, upon termination of contract and after a collective agreement has expired. In *Daddy’s Dance Hall*,³³ the Court of Justice of the European Communities stated that, if national law allows such an employment relationship to be altered in a manner unfavourable to the employee during the course of the employment relationship with the transferor, such an alteration is not precluded merely because of the transfer of the undertaking to the transferee.³⁴ However, the transfer of an undertaking must not constitute the reason for the amendment.

66. In the main proceedings, the terms of employment were agreed between parties to an individual contract between the new limited company and the employer, at the time of transfer. Special reference was made to rights acquired under the previous employment relationship, and the employees were offered comparable positions with the new company. The Government of Iceland emphasises, however, that the special rights and obligations attached to civil servants cannot simply be carried over to the private employment sector.

³⁰ Section 4 of the Civil Servants’ Rights and Obligations Act.

³¹ See footnote 8, *Collino and Chiappero*, at paragraph 40.

³² See footnote 19, *Danmols Inventar*, at paragraph 3; and footnote 8 *Collino and Chiappero*, at paragraph 41.

³³ See footnote 9, *Daddy’s Dance Hall*, at paragraph 17.

³⁴ See footnote 8, *Collino and Chiappero*, paragraph 52.

67. Employees leaving the public service to work for a limited company are entitled to severance pay, if they believe that they cannot acquire comparable positions in terms of employment conditions elsewhere. They cannot, however, take with them the special rights and obligations of the public service to the limited company, be it State-owned or privately owned.

68. The Government of Iceland submits that the EFTA Court base its answers on the following:

“Council Directive 77/187/EEC may apply to the situation in the main proceedings, provided that the Plaintiff was originally protected as an employee under national employment law. It is, however, for the national court to decide whether the Plaintiff enjoyed, wholly or partly, public law status under Icelandic law, as the case file suggests.”

The EFTA Surveillance Authority

69. The EFTA Surveillance Authority points out that, according to the case-law of the Court of Justice of the European Communities, the Directive can only be relied upon by persons who are protected as workers under national labour law. This was confirmed by the adoption of Council Directive 98/50/EC which amended Directive 77/187/EC, defining “employee” as any person who is protected as an employee under national employment law.³⁵ In order to determine the applicability of Article 1(1) in the present case, it must be established whether the Plaintiff may be regarded as an employee under national employment law.

70. The EFTA Surveillance Authority submits that such an assessment should be carried out by the national court on the basis of the relevant national provisions.

71. Reference is made to Article 3(1) of the Directive. This provision stipulates that, in the event of transfer within the meaning of Article 1(1), the transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing on the date of transfer are to be taken over by the transferee. The Directive is thus intended to safeguard the rights of workers in the event of a change of employer, by making it possible for them to work for the new employer under the same conditions as with their former employer.³⁶

72. The EFTA Surveillance Authority argues that an employment relationship may only be altered in a manner unfavourable to employees in so far as national

³⁵ Article 2 of Directive 98/50/EC.

³⁶ Joined Cases 144/87 and 145/87 *Berg v Besselsen* [1988] ECR 2559, at paragraph 12; and Case 362/89 *D’Urso and Others* [1991] ECR I-4105, at paragraph 9.

law allows such changes in situations other than those related to the transfer of undertakings. Thus, once the transfer has taken place, changes to employment contracts are only allowed if they might have been introduced before the transfer in situations other than those related to the transfer of undertakings. In any event, the transfer itself may never be the reason for the alteration of the employment relationship between the transferee and the employee.³⁷

73. The EFTA Surveillance Authority states that the EFTA Court has held that, due to the mandatory nature of the rules of the Directive, employees are not entitled to waive the rights conferred on them by the Directive. Moreover, those rights cannot be restricted, even with the consent of the employees.³⁸ This applies even if the disadvantages resulting from an amendment to the contract of employment have been offset by benefits which, on the whole, do not place the employee in a worse position.³⁹

74. The EFTA Surveillance Authority thus submits that Article 3(1) of the Directive prohibits provisions in an employment contract concluded in connection with a transfer of an undertaking which provide for less advantageous terms regarding termination than those enjoyed by the employee prior to the date of transfer, unless such alteration is permissible in situations other than the transfer of undertakings.

75. The EFTA Surveillance Authority suggests that the second question be answered as follows:

“Article 3(1) of the Directive is to be interpreted as prohibiting a provision in an employment contract, concluded in the connection with a transfer within the meaning of Article 1(1), which provides for less advantageous terms regarding termination of employment than those enjoyed by the employee prior to the date of transfer.”

The Commission of the European Communities

76. The Commission of the European Communities begins by pointing out that the transfer of rights and obligations arising from a contract of employment, or an employment relationship, from the transferor to the transferee is, according to Article 3(1) of Directive 77/187, unconditional, and that the principal rules of the Directive are mandatory. The Court of Justice of the European Communities

³⁷ See footnote 9, *Daddy’s Dance Hall*, at paragraph 17; and footnote 25, *Watson Rask* [1992] ECR I-5755, at paragraph 28.

³⁸ See footnote 23, *Langeland*, at paragraph 43.

³⁹ See footnote 23, *Langeland*, at paragraph 46.

and the EFTA Court have held that the transfer of the employee's rights cannot be restricted, even with his consent.⁴⁰

77. The Commission states that the objective of the Directive is not to improve the situation of an employee following a transfer; its purpose is merely to preserve his acquired rights. The new employer may, therefore, agree with the employee to change the terms of the latter's employment in the same way as this could have been done during the previous contractual relationship.⁴¹ However, the transfer of the undertaking may not itself constitute the reason for the amendment of the terms of employment as, otherwise, the mandatory provisions of the Directive could be easily circumvented.⁴²

78. The Commission of the European Communities contends that, in the case at hand, it appears that the transfer of the undertaking did constitute the reason for the amendment of the conditions for dismissal. The conclusion of the relevant contract coincided with the transfer of the undertaking which, albeit in two stages, took the form of a change from public to private ownership, the latter entailing new private law contracts with employees formerly employed according to the rules applicable to civil servants.

79. The Commission of the European Communities proposes that the second question be answered as follows:

“An employee cannot waive those rights which are conferred upon him by the mandatory provisions of Directive 77/187/EEC. The Directive does not, however, preclude an agreement with the new employer to modify the employment relationship to the extent that such modification is permitted by the applicable national law in situations other than those involving the transfer of an undertaking.”

Carl Baudenbacher
Judge-Rapporteur

⁴⁰ See footnote 9, *Daddy's Dance Hall*, at paragraph 15; and footnote 23, *Langeland*, at paragraph 43.

⁴¹ See footnote 8, *Collino and Chiappero*, at paragraph 52.

⁴² See footnote 9, *Daddy's Dance Hall*, at paragraph 17.