REPORT FOR THE HEARING
in Case E-3/95

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Stavanger byrett (the Stavanger City Court) for an Advisory Opinion in the case pending before it between

Torgeir Langeland

and

Norske Fabricom A/S

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

I. Introduction

1. By an order dated 27 November 1995, registered at the Court on 1 December 1995, the Stavanger byrett, a Norwegian city court, made a request for an Advisory Opinion in a case brought before it by Mr. Torgeir Langeland, plaintiff, against Norske Fabricom A/S, a Norwegian company, 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.* This directive is referred to in Point 23 of Annex XVIII to the Agreement on the European Economic Area.

3. The case before the Norwegian court concerns the plaintiff's claim to have certain insurance premiums paid by the defendant. The plaintiff's former employer had paid such premiums. The former employer's enterprise was transferred to the defendant and the plaintiff entered a new contract of employment with the defendant. The dispute concerns the refusal of the defendant to pay the premium necessary for a pension scheme which was provided by the previous employer, but which falls outside the obligatory state social system.

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

[Preamble / first and second recital]

" ... Whereas economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of businesses to other employers as a result of legal transfers or mergers;

Whereas it is necessary to provide for the protection of employers in the event of a change in employer, in particular, to ensure that their rights are safeguarded;

[Section I / Scope and definitions]

Article 1

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

[Section II / Safeguarding of employees' rights]

Article 3

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

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

2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under the agreement ....

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

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

III. Questions

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

"1. Does the exception clause contained in Article 3(3) of Council Directive 77/187/EEC cover the right of an employee to coverage of insurance premiums to non-statutory pension schemes or does the exception only apply to the right to pension insurance payments from such schemes?

2. Is Article 3(1) of Council Directive 77/187/EEC mandatory in the sense that an employee may not legally accept a disadvantageous amendment to his employment contract when the reason for the amendment is to be found in a transfer of an enterprise?"

IV. Facts

6. The Stavanger byrett describes the procedure before it as follows:

"Torgeir Langeland's claim consists of three points to the effect that Norske Fabricom AS be ordered to reimburse Langeland for the pension insurance premiums he has himself advanced prior to the delivery of the judgement, that Norske Fabricom AS be ordered to pay Langeland an annual amount corresponding to the premiums he has to pay in order to maintain his membership of the pension insurance scheme on an individual basis, and that Norske Fabricom be ordered to pay Langeland an annual amount corresponding to the difference between the premium GMC Offshore Partner AS paid and the premium Norske Fabricom AS pays for Langeland's membership of a personnel insurance scheme.

Norske Fabricom has claimed judgment in favour of the Defendant on all points."

7. It is clear from the case-file that the parties have based their submissions to the Stavanger byrett on Chapter XII A of the Norwegian Act relating to Worker Protection and Working Environment (arbeidsmiljøloven). This chapter was added to the act in 1992 as part of Norway's implementation of Directive 77/187/EEC.

8. The facts of the case before the Stavanger byrett, which are not in dispute, are summarised in the request for an Advisory Opinion as follows:

"Maritime GMC AS belongs to the GMC group of companies. The name of the parent company is GMC Holding & Management AS.

On 30 January 1987 Torgeir Langeland was employed as a plumber in the ship service department of Maritime GMC AS. In January 1991 Langeland became an employee of the offshore department of Maritime GMC AS. On 1 January 1994 the offshore part of Maritime GMC AS was reorganised as a separate joint stock company in the GMC group under the name of GMC Offshore Partner AS. As an employee of the offshore department of Maritime GMC AS Torgeir Langeland moved over to GMC Offshore Partner AS.

All the companies in the GMC group have signed collective pension insurance and personnel insurance agreements for their employees with the UNI Storebrand insurance company.

From the date of his appointment, 30 January 1987, Torgeir Langeland was enrolled in the collective personnel insurance scheme. The scheme comprises group insurance of occupational injury and disease in accordance with the Act relating to Industrial Injury Insurance (lov om yrkesskadeforsikring), group life insurance with disability capital, group accident insurance and group travel insurance. Compensation under this scheme is made in the form of a lump-sum payment.

On 1 July 1988 Torgeir Langeland was in addition accepted as a member of the group pension insurance scheme. The benefits under the pension insurance scheme are an old age pension, a spouse's pension, a children's pension, a disability pension and a waiver of premium in the event of incapacity for work. Under the pension insurance scheme the insured is entitled to regular payments in the future.

The companies in the GMC group have always paid the insurance premiums for their employees' membership of the above mentioned insurance schemes. In the case before Stavanger byrett it is a matter of dispute whether the payment of the premiums is a right under the employment contract. The EFTA Court should, however, base its opinion on the assumption that Torgeir Langeland was entitled to coverage of the insurance premiums under his employment contract with Maritime GMC AS and later GMC Offshore Partner AS.

Following negotiations that commenced in the course of the spring of 1994 the enterprise was transferred from GMC Offshore Partner AS to Norske Fabricom AS in June 1994. The date of transfer was set at 16 June 1994.

Prior to the date of transfer, on 6 June 1994, Norske Fabricom AS sent a letter to the employees of GMC Offshore Partner, enclosing two copies of an employment contract, one of which was to be signed and returned. Torgeir Langeland signed and returned one copy of the employment contract on 28 June 1994. In the case before Stavanger byrett it is a matter of dispute whether by the signing of the employment contract Langeland renounced the right to have the insurance premiums paid by his employer. The EFTA Court should, however, base its opinion on the assumption that a renunciation has taken place.

Norske Fabricom AS has not concluded an agreement with an insurance company on group pension insurance for its employees. The group personnel insurance policy that the company has taken out contains only those types of insurance which the employer is obliged to take out under the Act relating to Industrial Injury Insurance. Norske Fabricom AS has contested Torgeir Langeland's claim that he is entitled to coverage of the insurance premium to the same extent as with his former employer, GMC Offshore Partner AS.

Since 16 June 1994 Torgeir Langeland has continued the pension insurance agreement with UNI Storebrand on an individual basis. He pays the insurance premium himself. Langeland has not had the opportunity to continue his membership of the personnel insurance scheme, since this is only possible through a group insurance agreement."

V. Written observations

9. 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:

– Mr. Torgeir Langeland
– Norske Fabricom A/S
– The Government of Norway
– The Government of Sweden
– The Government of the United Kingdom
– The EFTA Surveillance Authority
– The Commission of the European Communities

A. Transferred rights

Mr. Torgeir Langeland

10. The plaintiff, Mr. Torgeir Langeland, submits that the wording of the directive in the languages of the various Member States (such as English, German, French, Danish, Swedish and Norwegian) speaks in favour of interpreting the exception clause so that it only covers payment from pension schemes, not payment of premiums. This is further, according to the plaintiff, supported by the *travaux préparatoires* to the directive (COM (75) 429 page 8).

11. In support of such an understanding the plaintiff also refers to COM (92) 857, which contains a further examination of the law of the Member States indicating that the majority excepts only benefits from pension schemes.

12. In Norway, Denmark and Sweden the preparatory work relating to the implementation of the directive states that the right to payment of insurance premiums does not come within the scope of the exception clause. The documents on this point are attached to the written observations of the plaintiff.

13. The commentaries attached to the Danish draft act (No L 151, dated 1 February 1979) in the Danish Folketing, state *inter alia* (page 6):

"The provision [art. 2, par. 3 of the draft legislation] aims to implement article 3, subparagraph 1 [of the directive] according to which the transferee of a business or a part thereof does not take over the obligations of the transferor as regards payments under pension schemes in connection with old age and invalidity, or to survivors. The provision, on the other hand, does not exempt obligations under paragraph 1, to pay contributions to pension schemes where, for example, the agreement taken over contains an obligation for the employer to provide such a payment."

14. The Swedish report on the implementation of the directive (SOU 1994: 83 page 57) states:

"It should perhaps be mentioned that the obligation based on a labour contract to pay, for example, premiums to an insurance company, is not covered by this exemption."

15. The third document on this particular point attached to the written observations of the plaintiff is a page from an unofficial Danish commentary on the Danish Act by Lars Svenning Andersen. Mr. Andersen expresses the same opinion found in the Danish and Swedish preparatory works.

16. The judgment of the EC Court of Justice in *Commission* v *Italy*[1] clearly indicates that Article 3(3) of the directive is not directed at an employer's current liabilities. The obligation to cover insurance premiums falls by its nature into the category of current liabilities.

[1] Case 235/84 *Commission* v *Italy* [1986] ECR 2291, seen in conjunction with the opinion of the Advocate-General on pages 2293-2294.

17. The provisions of the directive should be interpreted in the light of the objective of the directive and exceptions to the general protection offered by it should be given a narrow interpretation. Reference is made to the judgments of the EC Court of Justice in *Abels* v *Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie,*[2] paragraph 18, *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar,*[3] *Landsorganisationen i Danmark for Tjenerforbundet i Danmark* v *Ny Mølle Kro*[4] and *Tellerup* v *Daddy's Dance Hall,*[5] in particular paragraph 9. Reference is also made to the judgment of the EFTA Court in *Ulf Samuelsson* v *Svenska staten,*[6] paragraph 31.

18. Torgeir Langeland further refers to judgments on the interpretation of the expression "pay" found in Article 119 EC. The EC Court of Justice has in a number of cases found that both the right to coverage of pension insurance premiums and the right to benefits from pension schemes are covered by this expression, see for example, *Beune,*[7] where references to other judgments are found. These judgments speak in favour of giving the main rule in Article 3(1) priority with regard to an employee's core rights, such as pay. In this light, Article 3(3) must be interpreted narrowly.

19. The first sub-paragraph of Article 3(3) should moreover be read in connection with the second sub-paragraph of that provision. The second sub-paragraph undoubtedly only applies to payments from a pension insurance scheme. It would constitute a logical inconsistency to give the first sub-paragraph a wider interpretation as this would cause a gap in the protection of rights as the right to coverage of insurance premiums would be quite unprotected. This weakens the inter-relationship of the provisions in Article 3 and conforms poorly with the purpose of the directive.

20. Finally, with reference to COM (75) 429 final, page 8, Torgeir Langeland submits that the reason behind the exception clause, which has to do with the differences in the organisation of pension insurance schemes, does not provide a basis for excepting the right to coverage of insurance premiums from the main rule in Article 3(1).

21. Torgeir Langeland proposes the following answer to the first question:

"The exception clause in first subparagraph of Article 3(3) of Council Directive 77/187/EEC does not include an employee's right to coverage of insurance premium payments to non-statutory pension schemes."

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2 Case 135/83 *Abels* v *Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 469.

3 Case 105/84 *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar* [1985] ECR 2639.

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

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

6 Case E-1/95 *Ulf Samuelsson* v *Svenska staten* 1994/95 EFTArep 145.

7 Case C-7/93 *Beune* [1994] ECR I-4471.

Norske Fabricom A/S

22. The defendant, Norske Fabricom A/S, submits that the exception clause contained in Article 3(3) of the directive covers all the rights of an employee in connection with a non-statutory pension scheme. The expression "benefits" used in the English language version of the directive, and corresponding expressions used in the other language versions, is a general expression that may be comprised of both premiums paid to, and benefits received from, non-statutory pension schemes.

23. Statements on the interpretation of the directive made by Norwegian and Swedish authorities in implementing the directive are of limited interest as they have no basis in either the text of the directive or in its preparatory documents.

24. If the directive is interpreted so that a right to coverage of insurance premiums is transferred to the transferee, the transferee would in effect take over the transferor's obligation to provide payments under the non-statutory pension scheme. Such an interpretation is contrary to the express purpose of the provision.

25. Material considerations also lead to the conclusion that payments of premiums are covered by Article 3(3). Such payments will in fact result in the same obligation that should be exempted according to Article 3(3).

26. The non-statutory pension scheme Langeland was provided as an employee of the transferor qualifies as a "private company pension scheme" under the Norwegian Taxation Act; such a scheme may only be established if it is provided for all employees. As the transferee does not have such a pension scheme for its own employees, a transfer of the obligation would mean that the transferee would have to establish a pension scheme for all its staff members. The annual premiums would thus amount to approximately NOK 5.5 million and in all likelihood resulting in the transferee decreasing activities and dismissing employees.

27. Reference is further made to the English Transfer of Undertakings (Protection of Employment) Regulations of 1981 and a judgment of the English Employment Appeal Tribunal of 30 July 1993, Industrial Relation Law Reports (IRLR) 1993.

28. Finally, it is submitted that Langeland's acquired rights are fully protected under the rules set out in the insurance conditions governing the system to which the transferor contributed.

29. Norske Fabricom A/S proposes the following answer to the first question:

"Norske Fabricom A/S has no obligation to establish and pay premiums to a non-statutory pension scheme for Langeland."

The Government of Norway

30. The Government of Norway points out that its interpretation of Article 3(3) is to be found in the *travaux préparatoires* to the bill submitted to the Storting in 1992. The Norwegian government submits that the exception contained in Article 3(3) of the directive should be interpreted as applying only to the obligation to pay the type of benefits specified, not to an employer's contractual obligation to pay premiums for such pension schemes. As a general rule, the employer's obligation to pay premiums for various types of voluntary pension schemes is part of the contract of employment, on par with salary, holiday payments, etc. By considering the payment of premiums to pension schemes to be part of a contract of employment or the employment relationship, a new employer will assume responsibility for all benefits the employee cannot claim elsewhere and which normally derive from the written contract between the employee and the previous employer. Claims concerning payments from various pension schemes are not, according to the directive, transferred to a new employer. It would be difficult for a new employer to have a full overview of such claims at the time of transfer. Employees may on the other hand file such claims against the legal persons that previously received the premiums, e.g. insurance companies and private pension funds.

31. According to the Government of Norway, Norway, Sweden and Denmark based implementation of the directive on the said interpretation.

32. The Government of Norway proposes the following answer to the first question:

"The exception clause contained in Article 3(3) of Council Directive 77/187/EEC does not cover the right of an employee to coverage of insurance premiums to non-statutory pension schemes. It applies only to the right to pension insurance payments from such schemes."

The Government of Sweden

33. The Government of Sweden submits that the exception in Article 3(3) shall not cover the responsibility to pay contributions (insurance premiums) to pension schemes flowing from a contract of employment. It would be unreasonable for Member States to be required to take measures to protect the payment of future insurance premiums. That obligation must be a part of the contract safeguarded by Article 3(1) and 3(2).

34. The Government of Sweden proposes the following answer to the first question:

"The exception clause contained in Article 3(3) of the Council Directive 77/187/EEC does not cover the right of an employee to coverage of insurance premiums to pension schemes."

The Government of the United Kingdom

35. The Government of the United Kingdom submits that the first sub-paragraph of Article 3(3) of the directive applies both to the payment of insurance premiums for non-statutory schemes and to the right to payment of pension insurance benefits under such schemes. Although the only judgment of the EC Court of Justice in which Article 3(3) is addressed, *Abels* v *Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie*,[8] provides limited guidance on the subject-matter, sufficient assistance may be found in judgments which consider the relationship between pension schemes and the right to equal pay guaranteed by Article 119 EC, and which define the concept of benefit very widely. Reference is made to *Worringham and Humphrey's* v *Lloyd's Bank*,[9] where contributions paid by an employer to an occupational pension scheme are held to be "pay" within the meaning of Article 119 EC. Reference is further made to *Bilka* v *Weber von Hartz*,[10] in which the EC Court of Justice finds that Article 119 EC applies to the right to membership in a private company pension scheme (from which the right to benefits payable under such a scheme flowed), an approach later confirmed in *Vroege.*[11]

36. The Government of the United Kingdom proposes the following answer to the first question:

"Article 3(3), first indent, of Directive 77/187/EEC has the effect of excluding from the general protection of rights conferred by Articles 3(1) and 3(2) the transfer of any rights or obligations that relate to supplementary company or intercompany pension schemes outside the statutory social security schemes in the Member States. Such rights include the payment by the employer of premiums for a supplementary company pension scheme."

The EFTA Surveillance Authority

37. The EFTA Surveillance Authority is of the opinion that Articles 3(1) and 3(2) of the directive must include an obligation on an employer to maintain and pay premiums for an insurance or pension scheme for the benefit of an employee. This interpretation is also consistent with the purpose of the directive and finds general support in the case law of the EC Court of Justice (*Wendelboe* v *L.J. Music*;[12] *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar*[13]).

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

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8 See footnote 2.

9 Case 69/80 *Worringham and Humphrey's* v *Lloyd's Bank* [1981] ECR 767, at paragraphs 13-17.

10 Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607, at paragraphs 20-22.

11 Case C-57/93 *Vroege* [1994] ECR I-4541, at paragraphs 11-15 and 18.

12 Case 19/83 *Wendelboe* v *L.J. Music* [1985] ECR 457.

13 See footnote 3.

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

40. The EFTA Surveillance Authority proposes the following answer to the first question:

"Article 3 of the Act referred to in point 23 of Annex XVIII to the EEA Agreement (Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses) is to be interpreted so as to mean that, in the case of a transfer within the meaning of Article 1(1) of the Act, an obligation of the transferor to maintain and pay the premiums for an insurance scheme for the benefit of an employee, such as a pension scheme, is automatically transferred to the transferee."

The Commission of the European Communities

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

42. The Commission of the European Communities proposes the following answer to the first question:

"The exception contained in the first subparagraph of Article 3(3) of Directive 77/187/EEC, which excludes from the scope of the protection provided by the Directive employees' rights to old-age, invalidity or survivor's benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States, must be interpreted as meaning that benefits due to an employee under such schemes do not fall within the scope of the protection provided by Article 3(1) of the Directive, whereby the transferor's rights and obligations arising from a contract of employment or from an employment relationship are transferred to the transferee in the event of a transfer within the meaning of the Directive. However Member states are required by virtue of the second subparagraph of Article 3(3) to adopt the measures necessary to protect the interests of employees and former employees of the transferor in respect of rights conferring upon them immediate or prospective entitlement to old-age benefits, including survivor's benefits, under supplementary schemes referred to in the first subparagraph."

B. Mandatory nature of Article 3

Mr. Torgeir Langeland

43. Mr. Torgeir Langeland submits that Article 3(1) of the directive is mandatory in the sense that an employee may not accept a disadvantageous amendment to his employment contract in the case of a transfer. This view is supported by the wording of Article 3(1) (the word "shall" in connection with the transfer of rights and obligations), the fact that the directive sets out minimum requirements, the objective of the directive and the case law of the EC Court of Justice. This view is also necessary if the level of protection is to be effective. Reference is made to the judgments of the EC Court of Justice in *Tellerup* v *Daddy's Dance Hall*,[14] in particular paragraphs 14-18, *Katsikas and others*[15] and *Watson Rask and Christensen*.[16] Reference is further made to COM (75) 429 final, page 6, and the draft for a new directive, COM (94) 300, Explanatory Memorandum, in which the case law of the EC Court of Justice is summarised at paragraph 13.

44. Mr. Torgeir Langeland proposes the following answer to the second question:

"Article 3(1) of Council Directive 77/187/EEC is mandatory in the sense that an employee may not legally accept a disadvantageous amendment to his employment contract when the reason for the amendment is to be found in a transfer of an enterprise."

Norske Fabricom A/S

45. With reference to the judgment of the EC Court of Justice in *Tellerup* v *Daddy's Dance Hall*,[17] in particular paragraph 16, Norske Fabricom A/S submits that an employee, vis-à-vis the transferee, may waive the rights conferred on him by his employment contract with the transferor, as long as national law imposes no restrictions on the right to enter into such agreements with the transferor or with the transferee.

46. Norske Fabricom A/S proposes the following answer to the second question:

"Article 3(1) of the directive is not mandatory in a situation where an employee concludes an agreement {either ("enten")} with the transferee regarding amendments in his employment contract in connection with the transfer of an enterprise, as long as such an amendment is permitted under national law."

The Government of Norway

47. The Government of Norway submits that the question must be answered in the affirmative. The wording of Article 3(1) (the word "shall" in connection with the transfer of rights

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14 See footnote 5.

15 Joined cases C-132/91, C-138/91 and C-139/91 *Katsikas and others* [1992] ECR I-6577.

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

17 See footnote 5.

and obligations), the objective of the directive and the case law of the EC Court of Justice all support the view that employees cannot contract out of the rights accorded to them by the directive as implemented through national law. Reference is made to the judgment of the EC Court of Justice in *Tellerup* v *Daddy's Dance Hall.*[18] Reference is further made to the draft for a new directive, COM (94) 300, Explanatory Memorandum, in which the case law of the EC Court of Justice is summarised at paragraph 13.

48. The Government of Norway proposes the following answer to the first question:

"Article 3(1) of Council Directive 77/187/EEC is mandatory in the sense that an employee may not legally accept a disadvantageous amendment to his employment contract when the reason for the amendment is to be found in a transfer of an enterprise."

The Government of the United Kingdom

49. The Government of the United Kingdom submits that Article 3(1) is not a mandatory provision in the sense that once a right comes within its scope an employee may never expressly renounce the protection of that right given to him by the directive. Rather, the United Kingdom submits that the employee remains able to waive an employment right, vis-à-vis the transferee, if he could have done so in the context of his previous employment relation with the transferor. Reference is made to the judgment of the EC Court of Justice in *Tellerup* v *Daddy's Dance Hall*,[19] in particular to paragraphs 16 and 17.

50. The Government of the United Kingdom further states that if its submissions under the first question are accepted by the EFTA Court, there is in any event no right within the meaning of Article 3(1). In the alternative, the Government of the United Kingdom proposes the following answer to the second question:

"Article 3(1) of Directive 77/187/EEC does not prevent an employee making an express agreement with the new employer to alter the employment relationship, in so far as such an alteration is permitted by the applicable national law in cases other than the transfer of an undertaking."

The EFTA Surveillance Authority

51. The EFTA Surveillance Authority submits that an explicit answer to the second question is to be found in the judgment of the EC Court of Justice in *Tellerup* v *Daddy's Dance Hall*,[20] at paragraphs 14-17. In this judgment the court finds Article 3(1) to be mandatory in the sense that employees may not waive their rights, even when they are given new benefits to compensate for the disadvantageous amendment such that their overall situation is no less favourable than before the transfer. However, since the directive does not aim at ensuring a uniform level of protection of employees within the Community, it can only be relied upon to ensure the protection of an employee in his relations with the transferee to the same extent as he is protected in his relations

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[18] See footnote 5.

[19] See footnote 5.

[20] See footnote 5.

with the transferor under the national law concerned. Thus, in so far as an amendment to the disadvantage of an employee is allowed under national law, such an amendment is not precluded merely because of the transfer, subject to the condition that the transfer itself may never constitute the reason for the amendment.

52. The EFTA Surveillance Authority proposes the following answer to the second question:

"Article 3(1) of the Act is to be interpreted so as to preclude that a term of an employment contract transferred in accordance with that provision be, by reasons of the transfer, amended to the disadvantage of the employee, even if the amendment has been agreed to by him."

The Commission of the European Communities

53. With reference to the judgment of the EC Court of Justice in *Tellerup* v *Daddy's Dance Hall*,[21] paragraphs 14-17, the Commission of the European Communities submits that in the event of a transfer within the meaning of the directive, the contract of employment with the employee is automatically continued with the transferee. The implementation of the rights conferred on employees by the directive cannot be made subject to consent of the transferor or the transferee or even of the employee himself, except that the employee is at liberty, following a decision freely taken by him, not to continue the employment relationship with the transferee in his capacity as the new employer. On the last point, reference is made to *D'Urso and others*.[22]

54. The Commission of the European Communities proposes the following answer to the second question:

"Article 3(1) of Directive 77/187/EEC is mandatory in the sense that an employee cannot accept a disadvantageous amendment to his contract of employment where that amendment arises from a transfer of an undertaking, business or part of a business within the meaning of the Directive."

Thór Vilhjálmsson
Judge-Rapporteur

[21] See footnote 5.

[22] Case C-362/89 *D'Urso and others* [1991] ECR I-4105, at paragraphs 11 and 12.