REPORT FOR THE HEARING
in Case E-3/96

-- Revised --

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Gulating lagmannsrett (Gulating Court of Appeal) for an advisory opinion in the case pending before it between

Tor Angeir Ask and Others

and

ABB Offshore Technology AS and Aker Offshore Partner AS

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

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I. Introduction

1. By an order dated 21 May 1996, registered at the Court on 28 May 1996, Gulating lagmannsrett, a Norwegian Court of Appeal, made a request for an advisory opinion in a case brought before it by Mr Ask, Mr Hallem, Mr Hole, Mr Kattetvedt, Mr Knudsen, Mr Kristoffersen, Mr Laukeland, Mr Rognø, Mr Utland and Mr Weibell (the appellants) against the respondents, ABB Offshore Technology AS (ABB) and Aker Offshore Partner AS (Aker).

II. Legal background

2. The questions submitted 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. *Directive 77/187/EEC* states, *inter alia*:

> [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 .....
>
> ...
>
> *Article 4*
>
> 1. The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce.

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

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

III. Facts

4. In 1988 ABB was awarded a maintenance contract with Statoil, a Norwegian oil company responsible for the operation of, *inter alia*, the Statfjord oil field in the North Sea. Following prolongation of the contract pursuant to its own terms, the contract expired in February 1995. In the autumn of 1994, Statoil put out to tender certain maintenance and modification work on the Statfjord field and, in addition to the area covered by the contract with ABB, the Gullfaks field. ABB did not submit a tender. Aker was awarded the contract for Statfjord for maintenance and modification work.

5. Additional information sent to the Court at its request on behalf of both the respondents includes *inter alia* the following statement:

> "Aker Offshore Partner AS´s tasks according to the current contract with Statoil are related to preventive maintenance work, corrective maintenance work and modification work. The borderlines between these works are necessarily fluid.
>
> Under the contract, Aker Offshore Partner AS has overall responsibility for tasks the company is to perform. This implies that Aker Offshore Partner AS is responsible for planning where, when and how inspections and tests shall be performed, define the necessary works, inspect, plan, work out solutions, carry out those measures and reparations or alterations which are current, and control and document the tasks. Aker Offshore Partner AS thus has a thoroughgoing responsibility.
>
> In the contract between ABB Offshore Technology AS and Statoil, ABB Offshore Technology AS was, with its own supervisors, to perform only specific tasks as defined by Statoil.

The extent of the contracts is different, e.g., in that Aker Offshore Partner AS performs tasks such as engineering, NDT services (non-destructive testing) and modification works.

The principal model for payment in Aker Offshore Partner AS´s contract with Statoil implies that annual goal-budgets based on defined annual programmes, fixed net hourly rates, lease of machines, costs of materials, etc., are drawn up and agreed upon. Aker Offshore Partner AS acts freely within these agreed frameworks. Any "profit" or "deficit" in relation to the annual budget in accordance with the annual programme is shared by the parties 50/50. Product development thus becomes an important element in the completion of the contract.

In the contract between ABB Offshore Technology AS and Statoil, ABB Offshore Technology AS was paid according to used hours based on fixed hourly rates."

6. According to the description of the requesting court, the employment arrangements for the workers on the platforms in the North Sea are organised in different ways, the decisions in most cases being based on considerations of what is most profitable for the business: either to provide services using the company's employees or to have the services provided by an outside company. At Statoil the catering service workers on some of the oil drilling platforms are employed by Statoil, while on other Statoil platforms the workers are employees of a professional catering company. The same is true of maintenance workers. According to the request, some Statoil employees were dismissed from their positions following the new maintenance contract with Aker. In her written observations, counsel for Aker has stated that if this is true, Aker was not aware of it.

7. Counsel for ABB states that the company is a part of ABB, a global group of industrial companies and enterprises operating in several countries and employing about 210 000 people. The head office is in Switzerland, while the head office for activities in oil, gas and petrochemicals is in Norway. The respondent in this case was established in 1993 through a merger of several companies in order to cover the Norwegian market. Today it employs about 1000 persons. They are not hired for a specific project, contract or platform. Counsel states that if the contracts fail to appear under circumstances indicating a permanent situation, or the company decides that it will no longer offer or provide a specific service, parts of the business will be wound up and the employees will be dismissed. When ABB was not awarded the new contract in 1995 and no similar contracts regarding extensions and professions were out for tender, the company dismissed the persons who were then left without work.

8. In 1987 ABB was awarded the maintenance contract for the Statfjord installations which Aker had held for three years. During the starting-up phase and the contract period, ABB employed workers of different professions to perform the work required under the contract. At the time of the expiry of ABB's maintenance contract regarding the Statfjord field (1995), approximately 220 persons were employed. Of these, 200 worked on the installation offshore, and approximately 20 onshore.

9. It is further stated in the written observations that there was no direct contact between ABB and Aker regarding a possible transfer of employees. Neither was there anything in the Statfjord contract that obliged Aker to give preference to former ABB employees.On behalf of the respondents it is stated that the tender request issued by Statoil was not based on European directives on public procurement. However, it is stated that the contract between Aker Offshore Partner AS and Statoil falls within the scope of Council Directive 93/38/EEC.

10. According to the written observations submitted by counsel for Aker, the company has been involved in most of the oil and gas activities on the continental shelf off Norway since the early 1970s. It has 1400 employees who have a permanent appointment which is not limited to a specific project or a specific platform. In October 1996 about 330 employees were working under the contract dealt with in this case, about 245 on board the platforms and about 85 on shore. The number will be somewhat higher during 1997. To take over the activities dealt with in this case, the company needed 60 new employees, in particular scaffolding constructors and insulation workers. Aker did not take over any equipment from ABB in connection with its new activities. Nor did it, according to its counsel, take over any of ABB's employees. The request from Gulating lagmannsrett states that the appointments of the 60 new employees were effected following ordinary advertisements and in accordance with the general terms of contracts concluded by the company. Of the 60 new employees, 10 had been working for ABB. There were 400 applications for the 60 positions.

11. ABB dismissed 74 employees when its contract with Statoil expired. The ten appellants, all scaffolding constructors, brought cases before Stavanger byrett, together with six others, petitioning for the dismissals to be ruled invalid and, as an interim measure, for Aker to be ordered to re-employ the appellants. The second claim was, however, not made by one of the appellants, Mr Hole. Stavanger byrett came to the conclusion that there had not been a transfer of an undertaking or a part of an undertaking under the Norwegian legislation. Ten of the original sixteen plaintiffs appealed the case to Gulating lagmannsrett, which decided to stay the proceedings and refer the case to the EFTA Court.

IV. Questions

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

> **"1. Does Article 1(1) of the Council Directive 77/187/EEC cover a situation where a time-limited contract regarding maintenance and modification expires, and the principal concludes new time-limited contracts covering the same or other maintenance work with one or more other contractors?**
>
> **2. Is it of any significance to the answer to question 1 that the contract falls under Council Directive 90/531/EEC and 93/38/EEC?**
>
> **3. Is it of any significance if employees and/or equipment are taken over or transferred between companies holding maintenance contracts with Statoil?"**

V. Written observations

13. 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:

– The appellants, Tor Angeir Ask and others, represented by Counsel Bent Endresen;

– ABB Offshore Technology AS, represented by Counsel Einar ∅sterdahl Poulsson;

– Aker Offshore Partner AS, represented by Counsel Kristine Schei;

– The Government of the Federal Republic of Germany, represented by Dr Ernst Röder and Sabine Maass, Officials in the Federal Ministry of Economics, acting as Agents;

– The Government of the United Kingdom, represented by John E. Collins, Treasury Solicitor's Department, acting as Agent, and Clive Lewis, Barrister;

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

– The European Commission, represented by Hans Gerald Crossland and Maria Patakia, Members of its Legal Service, acting as Agents.

14. As the first and the third question of Gulating lagmannsrett both concern the material scope of the Directive, they will be dealt with together in the following summary.

A. The first and the third question

15. The appellants propose that the reply to the first question should be in the affirmative. The Government of the United Kingdom, the EFTA Surveillance Authority and the Commission of the European Communities all propose a qualified answer to the first question, to the effect that a situation like the one in the case at hand may be covered by the Directive provided that the relevant criteria are met. The respondents and the German Government propose that the first question should be answered in the negative.

16. The appellants and the respondents propose a negative answer to the third question, both respondents stating that it is of a hypothetical nature in the present case, as they claim neither equipment nor employees were transferred. The German Government is of the view that it is appropriate to distinguish between equipment and employees. The Government of the United Kingdom, the EFTA Surveillance Authority and the Commission of the European Communities all argue that these factors are relevant but not conclusive in determining whether there has been a transfer within the meaning of the Directive.

The appellants

17. Counsel for the *appellants* states that the oil platforms are different but that they all need continuous maintenance. The type of the work does not depend on the employer of the workers carrying it out. The appellants are scaffolding constructors. Their work is of a special kind as approved by Norwegian authorities, who organise and approve training in the field. It is carried out under the supervision of a foreman (supervisor). In this case the contract between Statoil and Aker covered all the tasks previously placed with ABB. Counsel for the appellants further states that, under the contract, Aker is obliged to establish a dedicated organisation for maintenance and modification, called V & M. According to him, this has been done and Aker has established a separate unit to service the V & M contract. Certain internal qualification requirements have to be fulfilled by the Aker personnel in this field. It is further stated that the scaffolding constructors employed by Aker on the Statfjord contract work permanently there.

18. The appellants refer to the objective of the Directive, which is to safeguard employees' rights in the event of a transfer of undertaking. The necessity to protect employees does not lessen by there being several changes of owner or employer. Nor should employees' rights be dependent on how the employer organises the work. The appellants submit that the purpose of the Directive would be undermined if protection was afforded when parts of the business are contracted out (*Watson Rask and Christensen v ISS Kantineservice*[1], *Schmidt*[2]) but not when the principal transfers the work from one contractor to another. The appellants submit that case law from the ECJ also affords protection in the latter situation (*Redmond Stichting*[3], *Merckx and Neuhuys*[4]).

19. The fact that the transfer takes place in a triangle operation between Statoil and the respondents, ABB and Aker, does not preclude the application of the Directive. Nor can it be decisive for the employees' protection that the transaction is labelled as a "tender competition", rather than as representing another type of contractual transaction. Further, it cannot be decisive that the principal is also the receiver of the service.

20. The appellants maintain that the business ABB previously had which Aker has taken over at the Statfjord field was organised as an economic unit, carried out in a specific place, with a permanent crew, and constituted an identifiable income item in ABB's accounts. Specific maintenance work was and is carried out continuously. They maintain that the maintenance work fulfils the requirements laid down in the case law of the ECJ for an identifiable economic unit. It is the submission of the appellants that it is the maintenance work which is the core of the business.

21. The fact that not all of ABB's employees continued working for Aker is not decisive; nor is the fact that Aker has not taken over the activity's moveables in connection with the take-over of the business.

ABB Offshore Technology AS

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

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

3 Case C-29/91 *Redmond Stichting* v *Hendrikus Bartol* [1992] ECR I-3189.

4 Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* v *Ford Motors Company Belgium SA* [1996] ECR I-1253.

22. *ABB* proposes that the first question should be answered in the negative, and that the third question if it is to be answered despite its hypothetical interest in the case, should also be answered in the negative.

23. ABB draws attention to the fact that this case concerns the interpretation of a Norwegian statute, the relevant sections of which were enacted as Norway's implementation of Council Directive 77/187/EEC. With respect to the question of what constitutes a transfer of an undertaking within the meaning of the Directive, ABB maintains that there is a clear distinction to be made between a transfer of an undertaking and a replacement of a contractor.

24. The replacement of a contractor (service provider) has a number of special features. First, it is based on a business contract, made for a fixed term, which does not itself affect the means of production. Second, unlike the transfer of an undertaking, the replacement of a contracting party is not final; it is normally understood to be of limited duration and thus open for re-evaluation. Third, when an undertaking is transferred, the transferor withdraws from the activity. Under a service contract, by contrast, the recipient of the service continues to be the same and retains certain rights of control and instruction as well as the possibility of terminating the contract. Determining that the replacement of a contractor comes under the provisions of the Directive would, in ABB's view, have a very restrictive effect on competition in bidding situations. The only party which has full knowledge of the rights of the employees that may continue with a new contractor is the party already holding a contract.

25. In his written observations, counsel for the respondent ABB analyses four judgments of the ECJ (*Watson Rask and Christensen*[5], *Schmidt*[6], *Rygaard* v *Strø Mølle Akustik*[7] and *Merckx and Neuhuys*[8]) which he states support his conclusions. He also refers to judgments delivered by courts in Denmark, Sweden and France as well as a reply given by ESA.

Aker Offshore Partner AS

26. According to the respondent *Aker*, the answer to the first question should be in the negative. The third question is said to have no bearing on the case. If it is to be answered, the answer must be in the negative. The main argument of Aker is that time-limited service contracts for maintenance and modification are not

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5 See footnote 1.

6 See footnote 2.

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

8 See footnote 4.

covered by the Directive. When they expire and the principal concludes a new contract with another contractor, even covering the same or partly the same work, this is a new contractual relationship unconnected with the former one from a labour law perspective. According to Aker, an analysis of the case law of the ECJ does not support the appellants' point of view. Nor can support be found in the wording of the Directive or its purpose. Counsel for the respondent Aker also sets out the conclusions of several judgments from France, Denmark and Sweden, which in her opinion support her conclusion. Aker's position on the third question is based on the assertion that neither equipment nor employees were taken over in the case at hand.

27. The consequences of accepting the arguments of the appellants are, in the respondent's view, that employees would have to be engaged each time a new contract was obtained, and lost at the expiry of the contract. Employers would have no incentive to take care of or develop their employees or allocate resources to education and development. Nor would there, in the respondent's view, be any true competition, as the company holding the earlier contract has completely different premises for technical solutions and price-setting than its competitors, which do not know the employees in question.

28. The respondent Aker emphasises that it is common business practice for a principal to conclude a contract for the supply of goods or services with a new provider upon expiry or termination of a contract. There exists a *bona fide* contractual relationship between the principal and the contractor as an independent business entity. It is, in Aker's view, very much a part of the activities of businesses in the industry to compete for contracts. The better a business, the more contracts it obtains and the more successful it is financially. A new contract does not mean, however, that a business takes over a part of another's business: the new contract is obtained on the strength of that business' own activities.

The Government of the Federal Republic of Germany

29 The *German Government* is of the opinion that the first question should be answered in the negative. It argues that the transfer of a part of a business can take place only when a body of assets endowed with operating resources is transferred. A mere activity cannot be considered a transferable part of a business. The fact that the same or similar activities are resumed, as stated in ECJ's judgment in *Schmidt*[9] is therefore not sufficient, in the opinion of the German Government, which submits that *Schmidt* merits review, in particular because of its potentially dangerous consequences for competition. The case at hand is distinguishable from Schmidt. Contracting-out of activities hitherto carried out by the company itself

[9] See footnote 2.

allows for the contractor to request information from the principal regarding organisational and staffing structures, whereas this type of exchange of information will not occur when a service provider is changed. The German Government outlines, in general, the decisive criterion for distinguishing between contracting-out of an activity and the transfer of a business. In the case of a contract, the contractor does not acquire anything from the principal and thus does not make any payment to the principal in return for the contract. The principal is obliged to render payment for the services.

30. The German Government refers to *Spijkers*[10], according to which the transfer of part of a business presupposes the existence of a corporate unit which is then transferred to a new owner whilst retaining its identity. The particular characteristics of a corporate unit are listed in paragraph 13 of the judgment. The German Government also refers to *Botzen*[11] regarding the necessity of an organisational connection of an employee to the relevant part of the business. In the view of the German Government, the performance of a maintenance contract entails no such organisational connection; otherwise a maintenance firm doing work for several clients would consist of several parts, the number of which would correspond to the number of its contracts. This would blur the concept of a "part of a business".

31. The German Government submits that the transfer of part of a business presupposes the transfer of a body of assets (*Rygaard*[12]). It further submits that this requirement is indispensable and that it is appropriate to apply the criterion of operating resources in the form of tangible or intangible assets. Whether the work is done on a permanent or a temporary basis is of no consequence for the definition of "part of a business" within the meaning of the Directive. The decisive point in *Rygaard* was whether a body of assets existed and not whether the work was on a temporary basis or was permanently repeated work.

32. The fact that a contract for maintenance and modification work does not imply the existence of a part of a business becomes clear through comparison with *Redmond Stichting*[13]. The contractual transfer in that case was based on a transferable unit. Such a unit does not exist when the termination or expiry of a maintenance contract removes the sole decisive asset of the "part of the business", i.e., the relationship with the client. The German Government further

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

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

12 See footnote 7.

13 See footnote 3.

distinguishes *Merckx and Neuhuys* [14] from the present case, as that case involved a large number of client relationships for which a sum of money usually has to be paid.

33. As regards the third question, the German Government finds it necessary to differentiate between equipment and employees. It is inherent in the requirement that a corporate unit, i.e., a body of assets, must be transferred, that tangible or intangible operating resources be transferred. When, in the case of an organisational unit being transferred, the operating resources are of essential significance for the operations in question, the transfer of equipment will constitute the transfer of (part of) a business.

34. By contrast, the re-employment of employees with the new contractor cannot be used to substantiate the transfer. The German Government submits that if the re-employment of employees was a criterion of transfer, the new contractor could block the application of Council Directive 77/187/EEC by refusing to take the workers on. This would run counter to the aim of the Directive: to safeguard the rights of employees. In the view of the German Government, that aim can only be achieved if the existance of a transfer can be established on the basis of objective criteria which are not placed at the discretion of the company taking over the contract.

The Government of the United Kingdom

35. In light of consistent case law from the ECJ (*Watson Rask and Christensen*[15], *Spijkers*[16], *Redmond Stichting*[17]), the *Government of the United Kingdom* observes that the Directive may be applicable to a situation where a time-limited contract for services expires and a new contract is entered into with another undertaking provided that the services in question constitute a stable economic entity which retains its identity after the transfer.

36. A distinction must be drawn between situations where contracting out of services constitutes transfer of a part of a business and where it involves only a business opportunity for a contractor to provide services. The guidelines drawn up by the Government of the United Kingdom are: that there must be some combination of assets, premises or employees involved with some degree of separate organisational identity from the main undertaking, so that the activity can

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14 See footnote 4.

15 See footnote 1.

16 See footnote 10.

17 See footnote 3.

be said to constitute a stable economic entity capable of retaining its identity. Moreover, the Government of the United Kingdom addresses the question whether it is of relevance that the new contract is broader in scope than the previous contract with a different distribution of responsibility. It is pointed out that this question is a part of the first question submitted to the Court, even if Gulating lagmannsrett does not identify in detail the extent of the differences. It is submitted that the Norwegian Court should assess the facts of the case before it in order to decide whether there exists an entity that has retained its identity. One of the relevant factors is whether the operation "is actually continued or resumed by the new employer with the same or similar economic activities" (*Rygaard*[18]).

37. The Government of the United Kingdom submits the following answer to the first question:

> *"Article 1(1) of the Council Directive 77/187/EEC may cover a situation where a time-limited contract regarding maintenance and modification expires and the principal concludes new time-limited contracts provided that the services covered by the contact constitute a stable economic entity which retains its identity after the change in the person responsible for providing the services. In order to determine whether that is the case, the national court must consider whether the operation of the entity in question is actually continued or resumed by the new employer, with the same or similar economic activities, and 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."*

38. The individual elements singled out in the third question of Gulating lagmannsrett (equipment/ employees) are relevant factors in considering whether there was a transfer, although none of them is, by itself, decisive. It is for the national court to determine, on the facts of the case as a whole, whether the expiry of one contract and the entry into another does or does not constitute a transfer of an undertaking, business or part of a business.

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[18] See footnote 7.

The EFTA Surveillance Authority

39. The *EFTA Surveillance Authority* maintains that the ECJ has consistently emphasised the social objective of the Directive and systematically given a broad interpretation to the expression "legal transfer" in keeping with the Directive's objective (*Redmond Stichting*[19]*)*. The transfer must take place in the context of contractual relations (*Bork*[20]) but it is not necessary that there be a direct contractual relationship between the transferor and the transferee. The emphasis has been on the final outcome of the transaction in question, whether a business comes into the hands of a transferee that continues to run it. The employment relationship has been seen to be essentially characterised by the link between the employee and the part of the undertaking or business to which he or she is assigned (*Botzen*[21]).

40. The EFTA Surveillance Authority submits that Article 1(1) of the Directive, as referred to in the EEA Agreement, is to be interpreted so as to mean that, where maintenance services for an undertaking have by a time-limited contract been entrusted to a company, the termination of that contract and the conclusion of a new time-limited contract for the same or similar services with another company do not as such fall within the scope of the Directive. However, where the subject matter of the transaction is arranged so as to form an organisational unit with its own identity, the transaction may come within the scope of the Directive, provided that the identity of the unit is retained.

41. According to the case law of ECJ, 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 (*Schmidt*[22], *Merckx and Neuhuys*[23]). 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 ECJ 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 (*Merckx and Neuhuys*).

42. When the question of identity is being considered, the subject-matter of the transaction must be seen as a whole. When considering the relative importance of

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19 See footnote 3.

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

21 See footnote 11.

22 See footnote 2.

23 See footnote 4.

the various elements, including employees, the organisational structure, the tangible and/or intangible assets, the EFTA Surveillance Authority emphasises the significance of these elements for the identity of the business which may or may not relate directly to an economic value. The re-employment of staff is one relevant factor in determining whether a transaction is a transfer for the purpose of the Directive. The more important the employees are for the identity of the business, the more decisive factor this becomes.

43. In the written observations, it is stated that the facts presented to this Court do not suffice for a final answer to the questions concerning identity. It will be for the Norwegian Court to establish the further facts needed.

The Commission of the European Communities

44. 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 ECJ was put forth in its judgment in *Spijkers* v *Benedik*[24]. In the Commission's opinion, it follows from this judgment 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.

45. In order to assess whether these conditions are met, the ECJ 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.

46. 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".

47. 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

[24] See footnote 10.

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* [25] against *Rygaard* v *Strø Mølle Akustik*[26]. In the former case there was a distinct permanent activity transferred from one company to another, whereas in the latter there was no distinct permanent activity carried out by an identifiable workforce but merely the assignment of a specific limited task, which had no identity as an economic entity.

48. Thereafter, the written observations of the Commission deal with the questions posed by the Norwegian court. It mentions, in connection with the first question, that the fact that a disposal is carried out in two stages does not prevent the Directive from being applied. The Directive may be applied if first one company and subsequently another provide a given service. A factor of relevance is the subject matter of the two contracts and the degree to which they are identical or differ. The greater their differences, the more there is an indication of a lack of identity.

49. Even if the subject-matter of the contracts is the same or similar, the continuation of the activities is merely one of many factors to be taken into account and is not conclusive. If the situation is merely that first one undertaking provides the services in question and subsequently another does so, it is difficult to see how there can be a transfer of the business within the meaning of the Directive, in the absence of a disposal from one to another of the organisational structure of the activity. Such a situation would merely be a case of succeeding companies executing a particular function. However, if equipment and/or staff are disposed of by one company to another, this is a factor indicating that the disposal is covered by the Directive.

50. Such an approach accords with the purpose of the Directive, which is to provide certain protection to employees. It is not, however, its purpose that when such a business changes hands by virtue of the fact that one provider of a service loses the contract to a competitor, that competitor acquires not only a new customer but also a new workforce.

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25 See footnote 1.

26 See footnote 7.

51. Finally, the Commission states that the Directive is to be applied regardless of the duration of the contracts.

52. In the light of this, the Commission proposes the following answer to the first question:

> *"Council Directive 77/187/EEC, properly construed, envisages the disposal of a business with its own identity and the retention of that identity after it has changed hands. In order to ascertain whether or not this is the case, account must be taken of all the factual circumstances surrounding the transaction in question, including the extent to which the tasks to be performed under the contract with the first provider of the services are the same or similar to those to be performed under the contract with the second provider of the services."*

53. The significance of the transfer of equipment and employees has been considered by the ECJ in *Spijkers*[27], paragraph 13. Both factors are significant but neither one conclusive. The Commission submits that, in *Merckx and Neuhuys*[28], the ECJ went further than in *Spijkers* by stating that the fact that the majority of the employees was dismissed when the transfer took place is not sufficient to preclude the application of the Directive.

B. The second question

54. In question 2, Gulating lagmannsrett seeks the opinion of this Court on whether it is of any significance to the answer to question 1 that the contract in question is covered by Council Directive 90/531/EEC on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors and Council Directive 93/38/EEC co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

The appellants

55. The *appellants* find no grounds in the texts of the Directives or in the case law to argue that Directive 77/187/EEC shall not apply in these circumstances. The appellants point out that, as much as the Directive applies to a purchase/sale of a company carrying on activities in the oil business in Norway, it must also be

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[27] See footnote 10.

[28] See footnote 4.

applicable in the case at hand, given that its conditions are otherwise fulfilled. Discrimination toward employees on those grounds is not justifiable.

ABB and Aker

56. The *respondents* both submit that it is not decisive for the answer to question 1 that the contracts in question are covered by Council Directives 90/531/EEC and 93/38/EEC. However, they both submit that when these Directives apply, this confirms that Council Directive 77/187/EEC is not applicable to such situations. The respondent *Aker* submits, that Directive 93/38/EEC contains specific provisions aimed at fostering real competition, and thereby movement of goods and services. The Directive applies to contracts such as in the case at hand, which means that competition for contracts of this type and scope is seen as a normal business activity. Aker concludes that if the purpose of Directive 93/38/EEC is to be achieved, it is not possible to argue at the same time that a change of contractor is a transfer of a part of a business.

The Governments of the Federal Republic of Germany and of the United Kingdom; The EFTA Surveillance Authority and the Commission of the European Communities

57. The *Government of the Federal Republic of Germany*, the *Government of the United Kingdom*, the *EFTA Surveillance Authority* and the *Commission of the European Communities* all submit that it is of no significance to the answer to question 1 that the contract in question falls under Council Directive 93/38/EEC.[29]

58. The Government of the United Kingdom particularly points out that the Directives lay down criteria for advertising and awarding of contracts. They are therefore not relevant to the question of whether a transaction constitutes a transfer in the context of Directive 77/187/EEC, aimed at the protection of employees.

59. The EFTA Surveillance Authority submits that there is no direct conflict between the interests pursued by the two Directives which prevents them from being applied simultaneously. Excluding transfers from the scope of Directive 77/187/EEC because of the applicability of public procurement directives would, in the opinion of the EFTA Surveillance Authority, lead to disparity between similar contracts depending on their value and thereby affect employees in different ways depending on the value of the contract in question. There is no apparent justification for sacrificing the protection of employees altogether in

[29] As pointed out by the EFTA Surveillance Authority, Directive 93/38/EEC co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors replaces Directive 90/531.

situations falling under the public procurement directives. Furthermore, such a conclusion would imply a deviation from the apparently broad interpretation given by the ECJ to the concept "legal transfer".

60. Similarly, the Commission of the European Communities submits that the purpose of the Directive is to make it possible for the worker to continue to work for the transferee under the same conditions as before the transfer of the undertaking or business. In order to provide the protection intended, these terms must be interpreted broadly and must not exclude public supplies contracts from its scope of application. Accordingly, the Commission submits that once the conditions for the application of Directive 77/187/EEC are met, it is irrelevant that the contract in question is also subject to the provisions of other directives.

Thór Vilhjálmsson
Judge-Rapporteur