OPINION OF ADVOCATE GENERAL LÉGER
delivered on 13 June 2000 *

1. The Court has received a request for a preliminary ruling on the interpretation of Article 1(1) of 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. [1]

I — Legal background

A — *Community law*

3. As indicated in the second recital in its preamble, the Directive is intended to provide for 'the protection of employees in the event of change of employer, in particular, to ensure that their rights are safeguarded'.

2. The Conseil de Prud'hommes de Metz (Labour Tribunal, Metz) (France) is asking the Court, essentially, whether the substantive scope of the Directive is such as to cover the taking over, by a municipality, of the activities of publicity and information concerning the services offered by the municipality to its inhabitants, previously carried on, in the interests of that municipality, by a non-profit-making association.

4. To that end, the first subparagraph of Article 3(1) of the Directive provides for the transfer to the transferee of the transferor's rights and obligations arising from a contract of employment existing on the date of the transfer. Article 4(1), first subparagraph, adds that the transfer of an undertaking, business or part of a business is not in itself to constitute grounds for dismissal by the transferor or transferee. Article 4(2) further provides that: '[I]f the contract of employment or the employment relationship is terminated because the transfer within the meaning of Article 1(1)

* Original language: French.

1 — OJ 1977 L 61, p. 26, hereinafter 'Directive 77/187' or 'the Directive'.

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'.

5. Article 1 defines the scope of the Directive. Article 1(1) states: '[T]his 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.'

6. Article 2 defines the principal terms employed. Thus, according to point (b) of that article, 'transferee' means 'any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the business'.

B — *National law*

7. The provisions of the Directive were implemented in French law by Article L. 122-12 of the Code du Travail (Labour Code) which provides:

'Cessation of an undertaking shall not, except in cases of *force majeure*, release an employer from his obligation to give notice of dismissal and, where necessary, to pay the compensation prescribed in Article L. 122-9.[2]

If any change arises in the legal situation of the employer, in particular by reason of succession, sale, merger, transformation of business assets or incorporation, all contracts of employment in force at the date of that change shall continue to exist as between the new employer and the workforce of the undertaking'.

II — Facts and procedure

A — *Factual background*

8. Mr Mayeur was recruited by the Association Promotion de l'Information Messine ('APIM') as an employee, with effect from 1 September 1989, under a contract of unspecified duration.

2 — Redundancy payment.

9. Under Article 3 of its statutes, the object of APIM, a non-profit-making association, was to promote, propagate and make known by all possible means and in all areas the opportunities offered by the City of Metz and its 'Zone d'Attraction', in order to permit and encourage the development, establishment and creation of a range of activities. To that end, APIM, either directly or through others, published and distributed brochures, magazines and leaflets. As part of this activity, APIM produced a magazine entitled *Vivre à Metz* ('Living in Metz').

10. Mr Mayeur was responsible for the publicity activities of APIM, and in that capacity his duties were to canvass traders in the city and advertisers, to collect funds for the publishing of the magazine *Vivre à Metz*, to draw up contracts and invoices, and to draft a monthly account detailing the commitments entered into.

11. Following dissolution of APIM, he was informed, on 16 September 1997, that he had been dismissed for the following economic reason: cessation by APIM of its activities.

B — *Procedural background*

12. On 10 February 1998 Mr Mayeur brought proceedings against APIM before the Conseil de Prud'hommes de Metz seeking an order requiring it to pay him the sum of FRF 177 262, together with interest at the statutory rate and costs.

13. In support of his action, Mr Mayeur claimed to have been the only employee to be dismissed as a result of APIM being dissolved and its activities being taken over by the City of Metz.

14. He stated that, according to the case-law of the French Cour de Cassation (Court of Cassation), Article L. 122-12 of the French Labour Code does not apply where the activity carried out by a legal person governed by private law is transferred to a 'public institution of an administrative nature',[3] that is, to a legal person established under and governed by the rules of public law. By contrast, that provision, he contended, becomes applicable where the same activity carried out by a legal person governed by private law is transferred to a legal person established under public law which is subject to the rules of private law and regarded as a 'public institution of an industrial or commercial nature',[4] within the meaning of French law.

15. He submitted that that case-law runs contrary to both the letter and the objectives of the Directive, and requested that the national tribunal refer the matter to the Court of Justice for a preliminary ruling.

3 — Hereinafter [adopting the French acronym], an 'EPA' (*'établissement public administratif'*).

4 — Hereinafter [adopting the French acronym], an 'EPIC' (*'établissement public industriel et commercial'*).

16. The referring tribunal noted that Article L. 122-12 of the Labour Code covered the various situations in which a contract of employment is transferred from one private entity to another, but is silent as to the situation in which a contract of employment is transferred from a private entity to a public body.

17. The national tribunal approved the statement of the case-law of the Cour de Cassation as set out by the applicant in the main proceedings, and questioned whether the distinction made in that case-law was compatible with the provisions and objectives of the Directive. It states that, by reason of that distinction, only employees of undertakings transferred to EPICs are subject to the provisions of the Directive and wonders whether that interpretation does not have the effect of restricting the scope of Article 1 of the Directive, contrary to the provisions of the Directive, which is general in scope and does not contain this type of exclusion. It points out in this respect that the Court, by a non-literal application of Directive 77/187, gives it a much wider scope in requiring the safeguarding of contracts of employment where the transfer results neither from a merger nor from a legal transfer, and, indeed, where there is no legal connection between successive operators.

18. According to the Conseil de Prud'hommes de Metz, the activity carried on by Mr Mayeur was 'a commercial and profit-making activity which contributed directly to the funding of the municipal magazine'. [5] It further states that the activities of APIM were wholly taken over and continued by the City of Metz, which continues to publish and distribute the magazine *Vivre à Metz* in the same form. [6]

19. Since it considered it necessary, in order to decide the case before it, to obtain clarification as to the meaning of the term 'transfer of an undertaking' within the meaning of the Directive, the Conseil de Prud'hommes de Metz, by judgment of 14 April 1999, referred to the Court, pursuant to Article 177 of the EC Treaty (now Article 234 EC), the following questions:

'Is 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 applicable where the activity of a legal person governed by private law is transferred to a legal person governed by public law? Must application of that directive be excluded where the activity is transferred to a public service of an administrative nature?'

5 — Third paragraph of the order for reference.
6 — Fifth paragraph of the order for reference.

III — Assessment

A — *Preliminary observations*

20. The questions as formulated in the operative part of the order for reference concern two distinct and complementary problems. By the first question, the Court is asked to say whether the substantive scope of the Directive covers the transfer of the activity of an entity governed by private law to an entity governed by public law. By the second, the Court is asked whether the transfer of an undertaking envisaged in Article 1 of the Directive is excluded where the activity carried on by a legal person governed by private law is transferred to a 'public service of an administrative nature'. [7]

21. The terms 'SPA', 'public service of an industrial or commercial nature', [8] 'EPA' and 'EPIC' correspond to precise situations in French administrative law. [9] The inferences which the ordinary and the administrative courts in France draw from these designations are also quite specific. [10]

22. It is apparent from the grounds of the order for reference that the national tribunal is uncertain as to the compatibility of the French case-law with the provisions of the Directive and the Court's interpretation of those provisions. However, in this case, the national tribunal has not specified the criteria adopted by the national courts and tribunals for distinguishing between the entities designated in French law as EPAs or EPICs, nor what a SPIC or a SPA is to be understood as meaning in French law.

23. Two observations are called for. First, it should be pointed out to the national tribunal that this Court has consistently held that, within the framework of its jurisdiction under Article 177 of the Treaty, it is not entitled either to interpret provisions of national law [11] or to determine their compatibility with Community law, [12] but solely to rule on the interpretation or validity of provisions of Community law on the basis of the factual and legal elements which the national court puts before it. [13]

7 — Hereinafter [adopting the French acronym], an 'SPA' ('*service public administratif*').

8 — Hereinafter [adopting the French acronym], a 'SPIC' ('*service public industriel et commercial*').

9 — See, in particular, *Juris-Classeur Administratif*, fascicule 150, Éditions techniques; Chapus, R., *Droit Administratif Général*; Lombart, M., *Droit Administratif*, Éditions Dalloz; Long, M., Weil, P., Braibant, G., Devolvé, P., and Genevois, B., *Les Grands Arrêts de la Jurisprudence Administrative* (and especially the commentaries on the judgment of the French Conseil d'État of 22 January 1921, *Société Commerciale de l'Ouest Africain*).

10 — See, in particular, the article of Saint-Jours, Y., 'De l'application de l'article L. 122-12, alinéa 2, du Code du travail en cas de modification du mode de gestion publique ou privée d'un service public', *JCP*, 1986, p. 159; the Opinion of Y. Chauvy, Advocate General at the Cour de Cassation, concerning the judgment of the Chambre Sociale, of 1 December 1993, n° 3865, PBBS, *Spriet, ès qualité de mandataire liquidateur de l'association Opéra de Lille/AGS-Assedic de Lille et autres*, *RJS*, 94/1.

11 — Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 7.

12 — Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 13.

13 — Case C-30/93 *AC-ATEL Electronics Vertriebs* [1994] ECR I-2305, paragraph 16.

24. I therefore consider that I cannot examine *in abstracto* the question whether the Directive applies to a situation such as that of the SPA, as defined by French law.

25. Second, by reason of the task of cooperation between the national courts and the Court of Justice under the procedure laid down by Article 177 of the Treaty, [14] it should further be pointed out to the national tribunal that the Court has accorded to itself the right to extract from the wording of the questions asked, having regard to the information set out in the order for reference, the matters calling for an interpretation of Community law. [15] In other words, from the factual and legal matters set out in the order for reference, the Court considers itself under a duty, in the context of its task as defined in Article 177 of the Treaty, to determine the real nature of the dispute in the main proceedings in order to provide the national court with an interpretation of Community law which will be useful to it in deciding the case before it. Consequently, if it proves to be necessary, the Court will reformulate the questions put to it.

26. In the light of this second observation, the wording of the questions and the grounds of the order for reference, I propose that the questions be reformulated as follows:

By the questions which it asks the Court, and which it is appropriate to consider together, the national tribunal is seeking to ascertain whether, and, if so, in what circumstances, the Directive applies to the situation of a non-profit-making association, a legal person governed by private law, which transfers its activity of obtaining publicity for and information on the services offered by a municipality to its inhabitants, previously carried out in the interests of the municipality, to a legal person governed by public law, in this case the municipality of Metz.

B — *Reply to the question as reformulated*

27. The Directive, as stated in Article 1(1), applies to transfers of undertakings, businesses or parts of businesses to *another employer*, resulting from a *legal transfer* or from a merger. On the basis of the provisions of that article, the Court has consistently held that the transfer of an undertaking within the meaning of the Directive assumes, first, the transfer of an economic activity between two distinct entities as the result of a legal transfer. This condition is necessary, but not sufficient. For there to be a transfer, the transferred entity must, secondly, continue the activity after the transfer. In order to answer the question it is therefore necessary to consider whether

14 — This essentially requires the Court to provide the national court with an answer which assists in the resolution of the dispute before it (see, for example, Case 35/85 *Tissier* [1986] ECR 1207, paragraph 10).

15 — Case 54/85 *Mirepoix* [1986] ECR 1067, paragraph 6.

these requirements, unfailingly stressed by the Court, are satisfied.

1. Transfer of economic activity between two distinct entities as the result of a legal transfer

(a) The opposing arguments

28. The French Government submitted at the hearing that Directive 77/187 only applies if the *undertaking transferred carried out an economic activity*, and the transferor and the transferee were two distinct entities. Those conditions, it argued, are not satisfied in this case.

29. First, according to the French Government, there do not exist in this case two distinct entities, constituted by the transferor, APIM, and the transferee, the municipality of Metz.

30. Examination of the facts shows that:

— APIM was created by the mayor of the city;

— it was run by elected representatives or officials of the municipality;

— its resources were derived in the main from municipal grants and not from receipts obtained in return for services provided.

31. The French Government concludes from this that APIM is not an entity distinct from that which took over its activity, but merely an 'emanation' of the municipality of Metz.

32. Second, the French Government submits that the activity carried out by APIM, on behalf of the municipality of Metz, was not an economic activity.

33. It is thus apparent, in the submission of the French Government, from the documents in the case that the activity of APIM consisted essentially in promoting the City of Metz and attracting economic activities to its territory. That activity, carried out on behalf of a local authority and in the general interest, and thus in the public interest, cannot be regarded as an economic activity, but is akin to a task performed in the general interest.

34. The French Government states that APIM was therefore a sort of 'public service' responsible for operating a service in the general interest subject to the rules of private law.

35. Lastly, according to the French Government, it is apparent from the facts of the case in the main proceedings that the City of Metz decided to take over again the activity previously carried out by APIM.

36. To the extent that APIM must be regarded as an emanation of the City of Metz and that it was not carrying on an economic activity, such a situation falls to be considered, according to the French Government, as a reorganisation of the structures of the public administration, and, as such, according to the Court's decision in *Henke*, [16] falls outside the scope of Directive 77/187.

37. The French Government therefore invites the Court to hold that a situation such as that in point in the main proceedings does not constitute a transfer of an undertaking within the meaning of Article 1(1) of the Directive, but an administrative reorganisation or the transfer of administrative functions from one administrative authority to another.

38. The Commission is not persuaded by the French Government's contention that what is concerned is the reorganisation of the structures of administrative activities between public entities responsible for a task in the general interest. It contends that APIM was administered in accordance with the rules of private law and that the activity carried out must be characterised as an economic activity.

(b) Assessment

(i) Transfer resulting from a legal transfer or merger

39. Under Article 1(1) of the Directive, a transfer of an undertaking results from a legal transfer or merger.

40. The referring tribunal states that APIM's activity was wholly taken over by the municipality of Metz, but it provides no particulars concerning the legal nature of the act which enabled the municipality to do so.

41. The concept 'legal transfer' is not defined by the Directive, but by the case-law of the Court. Given the differences between the language versions of the Directive and the differences between the

16 — Case C-298/94 *Henke* [1996] ECR I-4989.

national laws on the concept, the Court has held that the concept does not necessarily imply a contractual link between the transferor and the transferee. According to the Court, the concept must be interpreted in a *sufficiently flexible way* in keeping with the objective of the Directive, which is to safeguard employees in the event of a transfer of an undertaking. [17]

42. The Court therefore held that 'the directive is applicable *wherever*, in the context of contractual relations, *there is a change* in the natural or legal person who is *responsible for carrying on the business* and who incurs the obligations of an employer towards employees of the undertaking', [18] 'regardless of whether or not ownership of the undertaking is transferred'. [19] Having regard to the objective of the Directive, the Court held that 'employees of an undertaking which changes manager, without there being a transfer of ownership, are in a situation comparable to that of employees of an undertaking which is sold, and require equivalent protection'. [20]

43. This is why in its judgment in *Ny Mølle Kro*, cited above, the Court held that 'where the owner of a leased undertaking takes over its operation following a breach of the lease by the lessee, such a takeover on the basis of the lease... must also be regarded as a transfer of the undertaking to another employer as a result of a legal transfer within the meaning of Article 1(1) of the directive'. [21]

44. Furthermore, again on the basis of the purpose of the Directive, the Court held that it can apply in the absence of direct contractual relations between the transferor and the transferee. [22]

45. In its judgment in *Redmond Stichting*, [23] the Court held that a situation such as that constituted by the pursuit, by the Sigma foundation, of the activity of providing assistance for drug addicts, previously carried out by the Redmond foundation thanks to grants accorded for that purpose by a municipality, were such as to constitute a transfer of undertaking within the meaning of Article 1(1) of the Directive, to the extent that the Sigma foundation had taken on most of the employees of the Redmond foundation. Thus, the situation in which the transferor, the Redmond foundation, and the transferee, the Sigma foundation, were not contractually linked, but contractual relations did exist between the municipality, the authority which allocated grants to finance the work of assistance to drug addicts, and the Sigma foundation, the entity which carried on the activity of the Redmond foundation,

17 — Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253, paragraph 28.

18 — *Ibidem*, emphasis added.

19 — Case 287/86 *Ny Mølle Kro* [1987] ECR 5465, paragraph 12.

20 — *Ibidem*.

21 — Paragraph 14.

22 — *Merckx and Neuhuys*, cited above, paragraph 30.

23 — Case C-29/91 *Redmond Stichting* [1992] ECR I-3189.

fell within the scope of a 'legal transfer' as contemplated in Article 1(1) of the Directive.

46. Similarly, in its judgment in *Tellerup*, a case known as '*Daddy's Dance Hall*',[24] the Court held that the Directive applied to the situation where the owner of an undertaking transferred it to a new lessee who carried on the business without interruption and with the same staff as that previously laid off on the expiry of the first lease, even though the *lease was non-transferable* under the applicable national law.

47. The decisive test for determining whether the requirement of a 'legal transfer' within the meaning of the Directive is satisfied is not therefore the existence of a direct contractual link between the transferor and the transferee, but the change of the person — legal or natural — responsible for operating the undertaking and who assumes the obligations of employer *vis-à-vis* the employees of the undertaking.

48. The situation described in the orders for reference is that of a non-profit-making association, APIM, which was dissolved and the activity of which was wholly taken over by the municipality of Metz, which continues to produce and distribute, in the same form and with the majority of the employees previously working for APIM, the magazine *Vivre à Metz*.

49. From information thus supplied by the referring tribunal, it follows that, by taking over in full the activity of APIM and in continuing its work, the municipality of Metz became responsible for that undertaking. For this reason, the municipality must be regarded as having assumed the obligations of the former employer *vis-à-vis* the employees of the entity transferred. In accordance with the Court's definition of 'legal transfer', it must therefore be concluded that a situation such as that in point in the main proceedings falls within that concept as it appears in Article 1(1) of the Directive.

(ii) Two distinct entities

50. The Court has already replied to the argument of the French Government to the effect that the requirement that there be two distinct entities is not satisfied in this case owing to the very close links, as from the creation of APIM, between that association and the municipality of Metz. In its judgment in *Allen and Others*[25] the Court was asked to rule on the question whether the Directive applied to a transfer between two companies within the same group, which had the same owners, the same

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

25 — Case C-234/98 *Allen and Others* [1999] ECR I-8643.

management, the same premises, which engaged in the same works, and which had no real independence in determining their market positioning. In order to avoid application of the Directive, the argument had been advanced that, in the context of competition law, two companies with such characteristics would be considered to be a single undertaking. [26] The transferee had therefore submitted that proper consideration of the economic reality of the case would, in the same way, dictate that the two subsidiary companies be regarded as a single employer for the purposes of Directive 77/187. As a result of this and in the absence of a transfer of an undertaking, it was argued that the Directive would not apply to that type of situation.

51. The Court did not accept that argument [27] and held, in particular, that 'the Directive is intended to cover any legal change in the person of the employer if the other conditions it lays down are also met and that it can, therefore, apply to a transfer between two subsidiary companies in the same group, which are distinct legal persons each with specific employment relationships with their employees. The fact that the companies in question not only have the same ownership but also the same management and the same premises and that they are engaged in the same works makes no difference in this regard'. [28]

26 — Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457.

27 — See, for the grounds of that decision, *Allen and Others*, paragraphs 19 and 20, cited above.

28 — *Ibidem*, paragraph 17.

52. In the case in the main proceedings it is not in dispute that APIM has a legal personality distinct from that of the municipality of Metz, that it was dissolved, and that its activity was taken over by that municipality, a legal person governed by public law. This situation is similar to that considered by the Court in *Allen*, in that what is concerned is the transfer of an activity between two distinct legal persons, each with specific employment relationships with their employees. The creation of APIM by the mayor of the city, the fact that its management was composed of elected representatives or municipal officials and that its resources were in the main derived from municipal grants and not from receipts obtained in return for services it provided, are immaterial, and insufficient to avoid application of the Directive.

53. I conclude from this that APIM is an entity distinct from that which took over its activities, and that the Directive is applicable to a situation such as that in point in the main proceedings provided that the other conditions laid down by the Directive are satisfied.

(iii) Transfer of an economic activity

54. The Court has consistently held that, 'in order for Directive 77/187 to be applicable,... the transfer must relate to *a stable economic entity* whose activity is not limited to performing one specific works

contract... The term "entity" thus refers to an organised grouping of persons and assets facilitating the *exercise of an economic activity* which pursues a specific objective'. [29]

55. In the submission of the French Government, the activity carried on by APIM on behalf of the municipality of Metz cannot be characterised as an economic activity. The documents in the case, it maintains, show that the primary activity of APIM consisted in promoting the City of Metz and in attracting economic activities to its territory. That activity, carried out on behalf of a local authority and in the general interest, and thus in the public interest, is more akin to a task carried out in the general interest.

56. That, however, is not how the Court has defined 'economic activity'.

57. According to settled case-law of the Court, [30] any activity involving the offer of goods and services in a given market constitutes an economic activity. The Court has thus characterised as an 'economic activity' an activity in the form of placement of workers, the fact that such activities were normally entrusted to public offices in no way affecting their economic nature. [31]

58. That definition, laid down in the context of the law of competition and of the free movement of services, has been transposed to the context of Directive 77/187. Thus, the Court has held that the following constitute an 'economic activity' within the meaning of Directive 77/187:

— an activity consisting in the provision of assistance to drug addicts, carried on by a non-profit-making foundation, a legal person governed by private law; [32]

— an activity consisting in the provision of home help to disadvantaged persons, assigned by a body governed by public law to a legal person governed by private law. [33]

59. Furthermore, the transfer of non-profit-making bodies has been held to fall within the material scope of Article 1(1) of Directive 77/187. [34]

29 — Joined Cases C-173/96 and C-247/96 *Hidalgo and Others* [1998] ECR I-8237, paragraph 25, emphasis added.

30 — Case 118/85 *Commission* v *Italy* [1987] ECR 2599 and Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851.

31 — Case C-55/96 *Job Centre* [1997] ECR I-7119.

32 — *Redmond Stichting*, cited above.

33 — *Hidalgo*, cited above.

34 — Case C-382/92 *Commission* v *United Kingdom* [1994] ECR I-2435, paragraph 44, or, again, *Redmond Stichting*, cited above.

60. On the other hand, a structure of the public administration which carries out, primarily, tasks involving the exercise of public authority cannot constitute an economic entity, even if, to a marginal extent, certain activities carried on within it are economic in nature. [35]

61. Furthermore, posts including functions which, although performed within a structure which could be classified as an economic entity, are linked to the exercise of public authority, do not constitute economic activities. [36]

The Court has however given a strict definition to that type of post. It only covers posts which involve a genuine participation, directly or indirectly, in the exercise of public authority and in the functions intended to safeguard the general interests of the State or other public bodies. [37] This definition encompasses posts which contribute to particular tasks of the public administration — for example, national defence, internal security, public finances, the judicial system and home affairs, posts in ministries and central banks — provided that the activities in question are specifically centred on a political or judicial power.

35 — *Henke*, cited above, paragraph 17.

36 — *Ibidem*. See also *Hidalgo*, cited above, paragraph 24.

37 — Case C-290/94 *Commission* v *Greece* [1996] ECR I-3285; Case C-173/94 *Commission* v *Belgium* [1996] ECR I-3265; and Case C-473/93 *Commission* v *Luxembourg* [1996] ECR I-3207.

62. As far as APIM is concerned, it apparent, from the order for reference that its object was the provision of publicity and information on the services offered by the municipality of Metz to its inhabitants. Those activities, which are clearly services, do not fall within the exercise of public authority since they do not contribute, directly or indirectly, to the exercise of public authority. It follows that, even if those activities were conducted in the interests of the municipality, by a non-profit-making association, they fall squarely within the definition of economic activity as given by the Court.

63. Furthermore, as regards Mr Mayeur's post within APIM, it is apparent from the order for reference that he was responsible for the publicity activities of APIM and, to this end, he had to canvass traders and advertisers and collect funds for advertisements placed in the magazine *Vivre à Metz*, to draft contracts, to draw invoices and to prepare monthly accounts showing the commitments entered into. Those tasks are also economic activities.

64. It follows from the foregoing that, in the circumstances in point in the case in the main proceedings, APIM — the transferring entity — and the municipality of Metz — the transferee — are indeed two distinct entities, and that the activities transferred by APIM do not fall within the prerogatives of the public authority and are economic activities. Accordingly, the French Government's argument founded on the administrative reorganisation or trans-

fer of administrative functions between administrative authorities cannot succeed.

2. Preservation of the identity of the transferred entity after the transfer

(a) The opposing arguments

65. All of the parties which have submitted written observations agree that the transfer of an economic entity governed by private law to an economic entity governed by public law in principle falls within the substantive scope of the Directive. [38] They differ, however, as to the inferences to be drawn, as far as the application of the Directive is concerned, from the situation in which the transferee, a legal person governed by public law, carries on the transferred activity in conformity with the rules of public law.

66. In their written observations, the French Government and APIM point out that, according to the settled case-law of the Court, Directive 77/187 can apply only if the *transferred entity retains its identity*. That situation presupposes not only that the activity carried out by the transferee is identical to that previously carried out by the transferor, but also that the entity itself remains unchanged notwithstanding the transfer.

67. In this case, the French Government and APIM do not dispute that the activity of APIM has been continued by the municipality of Metz in a manner identical to that in which it had been carried out by that association before it was dissolved. However, they submit that the identity of the entity continuing those activities gives rise to a number of difficulties. They point out in this respect that French public law requires legal persons governed by public law, who take over, in the form of an SPA, an activity previously carried on by a person — legal or natural — governed by private law, to comply with the specific rules of public law as regards its management, operation and functioning. The significant differences in structure and nature separating the entities successively responsible for the same activity compel the conclusion that the identity test is not satisfied. According to the French Government and APIM, the transfer of APIM's activity to the municipality of Metz, in the form of an SPA, entailed significant changes in the method of management and operation of the transferred entity, namely APIM, and in the conditions under which it functions. This entailed in any event the disappearance of the transferring undertaking and the cessation of its activity.

68. The French Government and APIM submit that that interpretation has been upheld by the French Cour de Cassation. That court has unfailing held that Article L. 122-12 of the Labour Code must be construed as meaning that the method by which the activity carried out by the transferor, a legal or natural person governed by private law, is taken over by the transferee, a legal person governed by

38 — This position is supported by the positive law of the various Member States.

public law, determines whether or not the Directive is applicable.

69. According to the judgment of that national court, Article L. 122-12 of the Labour Code applies only if the public entity which takes over the activity previously carried out by the transferor, a legal person governed by private law, behaves as if it is a private undertaking and complies with the rules of private law.[39] On the other hand, they do not apply when the entity carries on the transferred activity taken over in the form of an SPA and, therefore, in compliance with the rules of public law.[40] In such a case, the French Cour de Cassation considers that there is no transfer of an undertaking within the meaning of Directive 77/187, and that the taking over of the activity by an EPA results in the cessation of the undertaking.

70. Furthermore, the French Government points out that the continuation of an activity by a public entity in the form of an SPA prevents it from maintaining or converting employment contracts governed by private law, since officers of public administrative departments can only be officers governed by public law and subject to administrative law.

71. The French Government therefore proposes that the answer to the question referred for preliminary ruling should be that Directive 77/187 applies to the case of the transfer of an activity from a legal person governed by private law to a legal person governed by public law if the latter continues the activity in the form of a service which, by virtue of its object, the source of its funds and the manner in which it functions, is akin to a private undertaking and is recognised as a SPIC. By contrast, application of Directive 77/187 is excluded where a public entity decides to take over the activity by a method of organisation and functioning which is subject to the rules of public law.

72. The Commission stated at the hearing that it had adopted a very cautious position in its written observations pending certain clarification of the case-law of the French Cour de Cassation. In particular it wished to understand the reasons for which that court has held that Directive 77/187 may be applied where an economic activity is taken over by a public-sector entity characterised as an EPIC, but not where such an activity is taken over by a public-sector entity characterised as an EPA. It observed that no such clarification had been supplied, either by the national tribunal or in the written observations or oral argument submitted to the Court. Furthermore, it

39 — The French Government thus cites the judgment of the Chambre Sociale of the Cour de Cassation of 7 October 1992, *Compagnie des Eaux et de l'Ozone* v *M. Elie e.a.* (*Bulletin* 1992, n° 500, p. 317), in which it was held that '[T]he provisions of Article L. 122-12, second subparagraph, of the Labour Code apply to the taking over by a municipality of an autonomous economic entity preserving its identity, in the form of a public service of an industrial or commercial nature...'.

40 — The French Government thus cites, in an annex to its written observations, the judgment of the Chambre Sociale of the Cour de Cassation of 24 October 1989, *Société clinique de Nouméa e.a.* v *M. Rousseau* (*Bulletin*, 1989, n° 609), in which it was held that 'the liquidation of the company Clinique de Nouméa at the time when its activity was taken over by a public institution of an administrative nature entailed the cessation of the undertaking...', or again, judgment n° 1389 of the Chambre Sociale of the Cour de Cassation, of 30 June 1983, in which it was held that 'the town of Vandœuvre, in taking over the day nursery, assumed the management of a public service of an administrative nature;... consequently the party concerned was assumed a public-law status, which excluded the application of Article L. 122-12 of the Labour Code'.

pointed out that there was also a lack of any information on the criteria for distinguishing between the two concepts, which exist only in French law.

73. Lastly, the Commission explained that, if the source of the distinction made by French case-law is to be found in the obligation, for the public entity continuing the activity transferred by a legal person governed by private law, to comply with the rules of public law, in particular as regards the employment relationship with its employees, Article 4(2) of the Directive must apply. According to the Commission, a situation in which the transferee, a legal person governed by public law, who is denied the possibility, merely because of the transfer, of maintaining the employment contracts entered into in accordance with the rules of private law or of converting them into public-law contracts, must be regarded as constituting a termination of the contract of employment or of the employment relationship for which the employer is responsible, in the sense contemplated in Article 4(2) of the Directive.

74. Mr Mayeur maintains that the purpose of Directive 77/187 is to ensure the continuity of employment relationships existing within the framework of an economic entity, irrespective of any change of ownership.

75. He submits that neither the wording of Article 1 of Directive 77/187 nor the Court's case-law allow the status of the transferor or the transferee of the economic entity to be employed as a criterion for determining the application of that directive.

76. In those circumstances, he contends that the case of the transfer of a private-law entity to a public-law entity is not excluded outright from the scope of Directive 77/187 even if, as a result of that transfer, the employee acquires public-law status.

77. Mr Mayeur concludes that Directive 77/187 must be applied once the national court finds that there has been a transfer of an economic entity, irrespective of the status or legal form of the person taking over the activity. In other words, application of the Directive is not to be excluded solely on the basis that the economic entity has been taken over by an SPA.

(b) Assessment

78. According to the settled case-law of the Court, '*the decisive criterion for establishing whether there is a transfer for the purposes of the Directive is whether the business in question retains its identity*'. [41]

41 — Case C-48/94 *Rygaard* [1995] ECR I-2745, paragraph 15, emphasis added, and the judgment cited therein.

79. In order to determine whether that condition is satisfied, the Court recommends that the national court first 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*'. [42]

80. However, the fact that the activities carried on by the old and new employer are similar does not in itself justify the conclusion that there has been a transfer of an economic entity. An entity cannot be reduced to the activity entrusted to it. [43]

81. This is why the Court has held that the transfer of an entity, within the meaning of Article 1(1) of the Directive, is subordinate, secondly, to the transfer of the means necessary for its operation. In other words, the transfer of an economic entity, within the meaning of the Directive, implies not only that the transferee continues the same activity as that previously carried on by the transferor — or a similar activity —, but also that all of the means necessary for the pursuit of that activity — or the means indispensable for carrying it out —, having regard to the specific nature of the transferred entity in question, [44] are transferred.

42 — *Ibidem*, paragraph 16.

43 — Case C-13/95 *Süzen* [1997] ECR I-1259, paragraph 15.

44 — See, in particular, *Hidalgo*, cited above, paragraph 29.

(i) The identity of the activity carried on by the two entities

82. It is clear from the order for reference that the activity carried out by APIM was wholly taken over and continued by the City of Metz which continues, in the same form, to produce and distribute the magazine *Vivre à Metz*.

83. I must therefore conclude that the condition as to the identity of the activity carried on by the former and new entity is satisfied. [45]

(ii) Identity of the two entities

84. The national tribunal is faced with two types of difficulty in so far as this condition is concerned. First, it is for it to decide whether the fact that the transferor and transferee do not have the same legal personality prevents it from finding that the condition of identity required by the Court is satisfied. Second, having regard to the argument presented to the Court, the national tribunal might have to decide whether the fact that the transferee entity must carry on the activity transferred by changing the rules of management, financing and organisation, or the rules of law previously applicable to the transferring

45 — This is not disputed in any case.

entity, is also such as to prevent application of the Directive.

88. It should be observed that 'transferee', within the meaning of Article 2(b) of the Directive, is defined as 'a natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the business'.

— Change in the legal nature or in the status of the transferee

85. The national tribunal wishes to know if the Directive falls to be applied in a situation where the transferee is a legal person governed by public law.

89. There is nothing in the wording of that article which allows the taking over by a legal person governed by public law of an economic activity carried out by a natural or legal person governed by private law to be excluded from the scope of the Directive.

86. All of the participants in the proceedings before the Court consider that the Directive is applicable to the transfer of an economic entity, a legal person governed by private law, to another entity, a legal person governed by public law, which continues the economic activity transferred. In other words, the legal nature of the transferee matters little if the identity of the entity is retained after the transfer. [46]

90. That reading is confirmed by the purpose of the Directive, which is 'to ensure, so far as possible, that the rights of employees are safeguarded in the event of a change of employer by allowing them to remain in employment with the new employer on the terms and conditions agreed with the transferor'. [47]

87. I share that view for reasons relating to the wording of the provisions of the directive and its purpose, and to the case-law of the Court.

91. In other words, the essential factor determining the existence of a transfer within the meaning of Article 1(1) of the Directive is not the legal nature or status of the person responsible for operating the business, but the taking over of the activity

46 — It should moreover be noted that the national laws of the various Member States do not a priori exclude the application of the Directive merely because the entity which continues the activity is a legal person governed by public law.

47 — See, in particular, *Daddy's Dance Hall*, cited above, paragraph 9.

and of the means necessary for carrying on that activity.

92. The Court adopted an identical approach in defining the concept of 'undertaking' in the context of competition law. This Court has held that 'the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed...'. [48]

93. Furthermore, in *Hidalgo*, cited above, the Court stated that 'the fact that the service or contract in question has been *contracted out or awarded by a public body* cannot exclude application of Directive 77/187 if neither the activity of providing a home-help service to persons in need nor the activity of providing surveillance involves the exercise of public authority'. [49] The Court further held that the fact that the transferor, within the meaning of Article 2(a), is a legal person governed by public law had no bearing on the application of the Directive.

94. I am at a loss to find the reasons which should lead me to a different conclusion if the transferee is a legal person governed by public law.

95. That position has been confirmed by the Community legislature which, in Directive 98/50/EC, [50] the period for the transposition of which expires on 17 July 2001, has amended Article 1(1) of Directive 77/187. That provision now states that '[T]his Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive'. [51]

96. It follows from the foregoing that the Directive falls to be applied where the transferee is a legal person governed by public law.

— Change in the method of management, financing and organisation of, or in the rules of law applicable to, the transferred entity

97. As we have seen, according to the Court, the decisive criterion for determin-

48 — Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Case C-244/94 *Fédération Française des Sociétés d'Assurance and Others* [1995] ECR I-4013, paragraph 14, and *Job Centre*, cited above, paragraph 21.

49 — Paragraph 24.

50 — Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187 (OJ 1998 L 201, p. 88).

51 — Subparagraph (c).

ing a transfer within the meaning of the Directive is whether the transferee continues the activity of the transferred entity, or a similar activity, and whether the means necessary for the functioning of the undertaking — personnel, tangible assets (premises, stock, tools, machines...) and intangible assets (goodwill...) — have been transferred to the entity which continues the activity. [52]

98. It is therefore for the national tribunal to determine, in the light of that definition, whether the conditions for the transfer of an economic entity are satisfied.

99. In order to do this, it will have to 'consider all the facts characterising the transaction in question, including in particular the type of undertaking or business, whether or not its 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 essential staff are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities are suspended. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation'. [53]

100. Furthermore, the Court has also pointed out that, in carrying out that task, the national court or tribunal will have to assess the degree of importance to be attached to the various factors involved, having regard to all the circumstances [54], and to the particular circumstances of the transferred entity [55], having regard, in particular, to the sector of activity in which it operates.

101. Thus, although, in general, an organised economic entity presupposes the existence of a workforce and significant assets — both tangible and intangible —, such an entity may exist even though the former undertaking had no assets. [56] This was held to be so in the case of cleaning and security undertakings. [57]

102. Factors such as the organisation, operation financing and the management

52 — See paragraphs 78 to 81 of this Opinion.

53 — *Allen*, cited above, paragraph 26.

54 — *Ibidem*, paragraph 28.

55 — See, in particular, *Hidalgo*, cited above, paragraph 29.

56 — See *Süzen*, already cited (paragraph 18, emphasis added), which states that: 'the national court, in assessing the facts characterising the transaction in question, must take into account among other things the type of undertaking or business concerned. It follows that *the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of the directive will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business*. Where in particular an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, *the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets*'.

57 — See, in particular, *Hidalgo*, cited above, paragraph 26.

of, and the rules of law applicable to, the transferred entity could specifically characterise an economic entity. I am thinking in particular of an undertaking operated in a specific way,[58] the transferee of which, following the transfer of the undertaking, only takes over a tiny part of the structures, as regards both staff and material. In such a case the national court might in fact be led to hold that there was no transfer, on the ground that the two entities are not identical.

103. I do not consider that to be the case here, even less so given that, at the hearing, the French Government argued that, given the similarity between the activities carried on by the old and the new entity, and the fact that the City of Metz continued to carry on those activities, applying the same operational and financing methods, with the same personnel, the same structure, and on the same premises, APIM was therefore only an 'emanation' of the City of Metz. If the national tribunal accepted that argument, it would necessarily have to find that not only the activity, but also the means necessary for the operation of APIM, were transferred to the City of Metz, a legal person governed by public law. Such a situation would unquestionably fall within the Court's definition of 'transfer of an undertaking' within the meaning of Article 1(1) of the Directive.

104. In any event, it is for the national tribunal, in the light of the Court's definition of 'identity of entity', to determine such matters, and to decide whether, in a situation such as that in point in the main proceedings, having regard to the specific circumstances of the economic entity concerned, and in particular to the sector of activity in which it operates, the transferred entity has retained its identity after the transfer.

105. Assuming that the national tribunal comes to the conclusion that the conditions for there to be a transfer of an undertaking are in fact satisfied, it would then have to determine whether, under the applicable national law, the transferee, in this case the municipality of Metz, is obliged to terminate the private-law contracts of employment because of the transfer of the entity to a legal person governed by public law.

106. If that is the case, it should be pointed out to the national tribunal that the Directive is not intended to amend the national laws in force[59] by bringing about full

58 — For example, an undertaking operating on different sites, but which forms a single, unified structure, functioning with a single workforce, in particular at the level of the management, running and administration of those sites.

59 — See, in particular, Case 105/84 *Danmols Inventar* [1985] ECR 2639, paragraph 26, or, again, *Daddy's Dance Hall*, cited above, paragraph 16.

harmonisation of the rights of Community workers in the event of a change of employer following a transfer of an undertaking, but only to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee. The purpose of the Directive is, therefore, to prevent employees affected by a transfer of an undertaking from being placed in a less favourable position solely by reason of the transfer. Consequently, the Directive could not be interpreted as meaning that it requires the Member States to amend their national law in order to enable an entity governed by public law to maintain in force contracts of employment governed by private law, contrary to the applicable national rules.

107. In this situation, however, Article 4(2) of the Directive applies.

108. It seems to me to be evident that an obligation imposed on an employer, a legal person governed by public law, by a provision of national law, to terminate contracts of employment governed by private law entered into by the transferor, in circumstances in which, moreover, all the conditions for the application of Article 1(1) of the Directive are satisfied, would have to be regarded, to say the least, as a substantial change in working conditions to the detriment of the employee, brought about solely by the transfer. [60] Accordingly, in accordance with Article 1(1), read in conjunction with Article 4(2), of the Directive, a situation such as that thus described would fall within the scope of the Directive. As a result, there would indeed be a transfer of an undertaking and it would be incumbent on the new employer, the transferee of the activity previously carried on by the former entity, to assume responsibility for the dismissal brought about by reason of his act. [61]

109. It follows from the foregoing that the Directive falls to be applied in a situation where the transferee is a legal person governed by public law. In accordance with settled case-law of the Court, in determining whether there has been a transfer of an entity, it will be for the national tribunal to determine whether the transferred entity has retained its identity after the transfer, having regard to the circumstances of the case and the specific circumstances of the transferred entity in question.

60 — For examples of the application of this provision, see, in particular, Case C-399/96 *Europièces* [1998] ECR I-6965, or, again, *Merckx and Neuhuys*, cited above.

61 — That dismissal could be regarded, in accordance with the applicable national law, as a dismissal for which the employer has been responsible, giving rise to a right to the compensation prescribed for the purpose.

Conclusion

110. In those circumstances, I propose that the Court reply to the question put by the Conseil de Prud'hommes de Metz as follows:

Article 1(1) of 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 as applying to a situation such as the taking over by a municipality — a legal person governed by public law — of the activities of providing publicity and information concerning the services offered by it to its inhabitants, activities previously carried on, in the interests of that municipality, by a non-profit-making association — a legal person governed by private law —, if the other conditions laid down by the said directive are also satisfied.