OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 28 October 1987 *

Mr President,
Members of the Court,

1. Arbejdsretten (Labour Court), Copenhagen, has requested the Court to interpret Council Directive 77/187 of 14 February 1977 on the safeguarding of employees' rights in the event of transfers of undertakings (Official Journal 1977, L 61, p. 26) in order to determine whether the directive protects employees who are not employed by the undertaking at the time of its transfer. The dispute before Arbejdsretten contains two unusual elements: the subject-matter of the transfer to which it relates is a tavern which is open for only a few months each year and the transfer was made following the rescission of a lease of the undertaking on the ground of a breach of the lessee's obligations.

In 1980 Ella Marie Hannibalsen let the Ny Mølle Kro, which she owned, to Inger Larsen. A few months later Mrs Larsen concluded an agreement with the Hotel- og Restaurationspersonalets Samvirke (Association of Hotel and Restaurant Employees) whereby she undertook to comply with the terms of the collective agreements concluded by the association and Arbejdsgiverforeningen af Hoteller og Restauranter (Federation of Hotel and Restaurant Employers) in respect of those of her employees who were members of the association. At the beginning of 1981 Mrs Larsen committed a breach of the lease; Mrs Hannibalsen rescinded the lease and took over the operation of the restaurant, which she opened, as a general rule, during the summer season. In May 1983 Mrs Hannibalsen engaged Ketty Hansen as a waitress at a wage of DKR 195 per day plus a percentage of the takings. The employment relationship was to run until 1 September 1983, and was renewable, but on 19 August Mrs Hansen failed to report for work and thus terminated the relationship.

Subsequently, Landsorganisationen i Danmark (Danish Trades Union Congress) ascertained that the wage paid to Mrs Hansen did not correspond to the amount due under the collective agreement and so it brought an action against Mrs Hannibalsen for the difference before Arbejdsretten, Copenhagen. Landsorganisationen i Danmark maintained that under the Danish legislation concerning the transfer of undertakings the agreement concluded in 1980 between Mrs Larsen and the Hotel- og Restaurationspersonalets Samvirke was binding on the owner and present operator of the Ny Mølle tavern, so that the provisions of that collective agreement were applicable. Mrs Hannibalsen denied that the agreement, of which she was unaware, could be pleaded against her.

Arbejdsretten took the view that an interpretation of Directive 77/187 was needed in order for it to give judgment; consequently, on 12 November 1986, it referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the words "transfer . . . to another employer as a result of a legal transfer

* Translated from the Italian.

or merger" in Article 1 (1) of Directive 77/187/EEC cover the situation in which the owner of a leased undertaking rescinds the lease on the ground of breach by the lessee and carries on the business himself?

(2) Does the directive apply where the transferred undertaking was temporarily closed at the time of the transfer and consequently employed no staff?

(3) Is it material to the answer to question (2) that the undertaking transferred is regularly closed for part of the year, as in the csae of a hotel, a boarding house or a restaurant which is open only during the summer?

(4) Must Article 3 (2) of the directive be interpreted as meaning that the transferee must continue to observe the terms of a collective agreement binding the transferor regarding pay and working conditions, even if at the time of the transfer the undertaking had no employees?'

Written submissions were made to the Court in this case by Landsorganisationen i Danmark, Dansk Arbejdsgiverforening (Danish Employers' Association), the Commission of the European Communities and the United Kingdom. The first three also made submissions at the hearing.

2. I shall begin with a brief reference to the provisions referred to in the course of the main proceedings and in the questions referred to the Court. Law No 111 of 21 March 1979, by which Denmark gave effect to Directive 77/187, defines its own scope by indirect reference to the relevant provisions of the directive, that is to say to Article 3 (1) and to Article 1 (1). Article 3 (1) provides that the transferor's rights and obligations 'arising from a contract of employment or from an employment relationship existing on the date of a transfer . . . shall, by reason of such transfer, be transferred to the transferee'. Article 1 (1) provides that the 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'.

Finally, Article 3 (2) provides as follows: 'Following the transfer . . . , the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement'.

3. With the sole exception of Dansk Arbejdsgiverforening, the interveners in the case state that the first question should be answered in the affirmative. I am also of that opinion; however, unlike the Commission and the United Kingdom, I do not draw that conclusion from the wording of Article 1 (1).

As the Court stated in paragraph 11 of its judgment of 7 February 1985 in Case 135/83 *Abels* v *Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 469, the wording is not decisive because whilst some language versions of the provision use the expression 'cessione contrattuale' others — the English and Danish versions — use more general

terms ('legal transfer' and 'overdragelse'). In the case before the Court it would appear that the lessor repossessed the tavern on the basis of a clause of the lease providing for rescission; consequently, the Community rules must be considered as applicable even on the basis of the more narrow wording. I take the view, however, that such an approach disregards the wide interpretation given to the provision by the Court, which has interpreted it so widely that no significance is to be attached to the nature of the transaction, be it a contract or a deed taking effect on death, an administrative measure or a judicial decision, as a result of which one businessman succeeds another.

Such an interpretation — which in fact puts the emphasis of the provision on the non-technical term 'transfer' and regards the case of a legal transfer and that of a merger as examples — is completely consistent with the spirit and purpose of the directive. In a recent decision (judgment of 18 March 1986 in Case 24/85 *Spijkers* v *Gebroeders Benedik Abatoir CV and Alfred Benedik en Zonen BV* [1986] ECR 1119, at paragraph 15) the Court stated that the purpose of the Community legislation was 'to ensure the continuity of employment relationships existing within a business, irrespective of any change of ownership'. The Court added that it follows that 'the decisive criterion for establishing whether there is a transfer . . . is whether the business in question retains its identity'.

In other words, the purpose of the directive is to render irrelevant any changes in ownership of (or, more generally, title to) an undertaking as regards employment relationships existing within it. Whatever the nature of the transaction, the transfer must be neutral (or, if it is preferred, must have no prejudicial effects): the employees must not be affected by it, that is to say, they cannot be dismissed or subjected to less favourable treatment. The sole requirement to which the Court makes such protection subject is the capacity of the business transferred to retain its 'identity', that is to say to remain in operation as a going concern; it is therefore natural that the Court should have ruled that that requirement was not satisfied in the case of an insolvent undertaking or an undertaking in liquidation, in its judgment in *Abels*, cited above, at paragraph 23, its judgment of 7 February 1985 in Case 19/83 *Wendelboe* v *L. J. Music* [1985] ECR 457, at paragraph 10, and its judgment in *Spijkers*, cited above, at paragraph 11.

4. The second and third questions, which seek to ascertain whether the directive applies to an undertaking which is transferred at a time when it is closed and therefore has no employees and whether it is material that the business is of a seasonal nature, may be dealt with together.

Once again Dansk Arbejdsgiverforening takes a more restrictive position. In its opinion the closure of the business and the resulting absence of employees at the time of the transfer are sufficient to preclude the operation of the principle laid down in Article 3 (1), and although there is some risk that such a conclusion might permit evasion of the protection provided for by the directive (for example, if the closure is of brief duration and the undertaking reopens with the same staff), such a danger does not exist in the case of seasonal undertakings which take on staff only for the months in which they are open. The other interveners take the opposite view. They all

maintain, whether firmly or with qualifications, that the decisive factor is not the absence of employees but the continuity or transience of their employment relationship, and that the fact that the undertaking is regularly closed for part of the year does not automatically imply the termination of relationships existing when it was open.

In my opinion the clear wording of Article 3 (1) requires regard to be had to one factor alone: the existence *in law* of employment relationships at the time when the business is transferred (for an examination of the various language versions of the provision, see the Court's judgment in the *Wendelboe* case, cited above, at paragraphs 13 and 14). In other words, the directive applies to workers who, on the date of the transfer, are employed by the transferor. If there are such workers the obligations owed to them by the transferor are transferred to the transferee and may be relied upon against him; if there are none the transferee is free of any obligation whatsoever. The fact that the undertaking was closed and consequently *no* employees were *actually working*, that is to say physically present, may therefore constitute a factor to be taken into account in determining whether the business was a going concern or was on the point of disappearing from the market. However, unless the latter is in fact the case this factor is irrelevant for the purpose of determining whether the directive is applicable.

Nor, in my view, can greater weight be attributed, as a matter of principle, to the seasonal nature of the business. There are undertakings in the business world which guarantee their employees continuity of employment even though they are employed only during the period in which the business is carried on and there are undertakings which satisfy their operational requirements by engaging employees for a specific period. It is clear that the protection provided by Community law does not extend to the latter. In my opinion that is so even if those employees expect, on the basis of past experience, that they will be re-engaged at the beginning of each season. However, it is for the national court to clarify this and the other problems to which I have referred in each individual case. It is for the national court to determine in law and in fact whether an employment relationship which continues from year to year but solely in the summer or winter must be regarded in law as subsisting during the period of closure, that is to say between the periods when the business is being carried on. Similarly, it is for that court to determine whether the creation of a series of employment relationships of specific duration separated by short intervals constitutes evasion of the law and whether the closure of the undertaking is, in the first place, seasonal or exceptional and, secondly, a normal thing or a symptom of an irreversible crisis.

5. At this point the reply to the final question is clear. As we have seen, the scope of the directive is defined by Article 1 (1) in conjunction with Article 3 (1). Inasmuch as it provides that 'following the transfer . . . the transferee shall continue to observe the terms and conditions agreed in any collective agreement . . . until the date of termination or expiry of the collective agreement', Article 3 (2) does not extend the range of persons to whom the directive is applicable but merely confirms the continuity *solely* of employment relationships *existing* at the time of the transfer, with regard to the rights which workers derive from agreements concluded by trade unions.

It follows that an employee who is engaged after the transfer is not entitled to enjoy the

benefits resulting from collective agreements which are binding on the transferor but are incapable of binding the transferee. However, the provision is not mandatory in relation to a national legislature, which may lay down more favourable conditions in respect of workers who are not employed by the transferor (Article 7).

6. On the basis of the foregoing considerations I propose that the reply to the questions referred to the Court by Arbejdsretten, Copenhagen, by decision of 12 November 1986 in proceedings pending before it between Landsorganisationen i Danmark and the undertaking Ny Mølle Kro, represented by its owner, Mrs Ella Marie Hannibalsen, should be as follows:

'(1) The words "transfer . . . to another employer as a result of a legal transfer or merger" in Article 1 (1) of Council Directive 77/187/EEC of 14 February 1977 must be interpreted as meaning that they cover a situation in which the owner of a leased undertaking rescinds the lease following a breach by the lessee and carries on the business himself.

(2) and (3) Directive 77/187 does not apply to an undertaking which at the time of the transfer has no employees; that is so regardless of the fact that it is closed at the time and whether the closure is of a seasonal nature or is due to other factors.

(4) Article 3 (2) of Directive 77/187 must be interpreted as meaning that the transferee must continue to observe the terms of a collective agreement binding on the transferor regarding working conditions and pay only with regard to workers in the employ of the transferor at the time when the undertaking was transferred.'