OPINION OF ADVOCATE GENERAL LENZ

delivered on 6 July 1995 *

A — Facts

1. Mr Merckx and Mr Neuhuys were employed by Anfo Motors SA as salesmen. Since 1985 that company had been the appointed dealer of Ford Motors Company Belgium SA (hereinafter 'Ford') for the sale of motor vehicles in a particular area of Brussels. Ford was also the principal shareholder in Anfo Motors.

2. On 8 October 1987 Anfo Motors informed Mr Merckx and Mr Neuhuys by letter that it intended to discontinue its activities as from 31 December 1987 and that as from 1 November 1987 Ford would be working with an independent dealer, Novarobel SA, in the sales area which Anfo Motors had previously served. [1]

In that letter Anfo Motors also stated as follows:

'In the course of our discussions, Novarobel has agreed to take responsibility for a number of clearly-defined duties. The provisions of *Convention Collective* (Collective Agreement) *No 32 bis* apply to workers performing those duties. In accordance with those provisions they will therefore be transferred to Novarobel as from 1 November 1987.

You will be transferred as from that date, retaining your duties, seniority and all other contractual rights.'

3. According to the court making the reference, *Convention Collective No 32 bis*, to which that letter refers, transposes 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 [2] into Belgian domestic law.

* Original language: German.

1 — According to the documents before the Court that sales area includes a number of communes in the Brussels conurbation ('agglomération bruxelloise').

2 — OJ 1977 L 61, p. 26.

4. By letters of 27 October 1987 Mr Merckx and Mr Neuhuys informed Anfo Motors that they did not consent to being employed by Novarobel. They stated that Anfo Motors could not require them 'to work for another company, in another place and under different working conditions, without the slightest guarantee as to whether the client base is to be retained or a sales figure achieved'. They maintained that Anfo Motors' conduct was a unilateral breach of their employment contracts and claimed compensation for breach of contract and other sums due.

5. In its letters of 30 October and 2 November 1987 Anfo Motors confirmed its view that Mr Merckx and Mr Neuhuys were obliged to work for Novarobel with effect from 1 November 1987 'with full retention of all rights and benefits acquired with Anfo Motors'. It stated that Novarobel guaranteed the observance of those obligations for a period of two years. Furthermore, it pointed out that the trade unions had signed a collective agreement on 30 October 1987 in which they had recognized the applicability of *Convention Collective No 32 bis* and thus the validity of the transfers.

6. Mr Merckx and Mr Neuhuys refused to work for Novarobel and brought an action before the Tribunal du Travail de Bruxelles (Labour Court, Brussels) in which they claimed, *inter alia*, damages. The claim was made initially against Anfo Motors and subsequently against Ford, which took the place of Anfo Motors during the course of the proceedings, the latter company having in the meantime been wound up. That action was dismissed by judgment of 20 July 1990 and the plaintiffs appealed against that judgment to the Cour du Travail de Bruxelles (Higher Labour Court, Brussels).

7. The Cour du Travail de Bruxelles took the view that in order to decide the dispute it was necessary to refer a question to the Court of Justice for a preliminary ruling. In its order for reference the Cour du Travail refers to the fact that the right to sell Ford Motor vehicles in the area in question was transferred to Novarobel with effect from 15 October 1987. According to that court, Anfo Motors dismissed more than three-quarters of its staff and at the end of October 1987 there were only three mechanics, a chief sales manager, five salesmen, a store manager, two storemen, one employee in 'planning' and one delivery man left in its employment. Those remaining employees (which included Mr Merckx and Mr Neuhuys) had been called on to work for Novarobel with effect from the beginning of November 1987.

8. The national court also refers to an agreement of 15 October 1987 between Ford and Novarobel, described as a 'Convention et Garantie' (Agreement and Guarantee), which was produced to it by Ford. In that agreement it is stated, *inter alia*: 'Ford has decided to discontinue the activities of its subsidiary Anfo Motors ... and to entrust that company's dealership to Novarobel with effect from 15 October 1987; Novarobel is willing

to assume certain obligations of Anfo Motors in the context of *Convention Collective No 32 bis* in return for guarantees from Ford ...'. However, according to the findings of the national court, the decision to cease trading was taken by Anfo Motors itself.

9. The national court cannot see what assets Anfo Motors could have transferred to Novarobel. It states that it is not even clear whether Anfo Motors transferred its client list.

10. In both of the present cases the Cour du Travail, Brussels, has therefore referred the following question to the Court of Justice for a preliminary ruling:

'Is there a transfer of an undertaking within the meaning of Directive 77/187/EEC of 14 February 1977 if an undertaking which has decided to discontinue its activities on 31 December 1987 dismisses most of its staff, keeping only 14 persons out of a total of over 60, and decides that those 14 persons, while retaining their acquired rights, must work from 1 November 1987 for an undertaking with which the first undertaking has no formal agreement, but which has since 15 October 1987 held the dealership previously held by the first undertaking, and if the first undertaking has not transferred any of its assets to the second?'

B — Analysis

11. The national court is seeking an answer to the question whether, in view of the circumstances referred to in the above question, there is a transfer of an undertaking or business within the meaning of Directive 77/187. Article 1(1) of Directive 77/187 provides that it is to 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'. Article 3(1) of the directive provides that in such a case the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of the transfer are to be transferred to the transferee. It is apparent from the order making the reference that the national court doubts the applicability of the directive for two reasons in particular. First, it wonders whether it is a case of a *transfer of an undertaking* at all. Secondly, the parties disagree whether such a transfer was the result of a *legal transfer* within the meaning of the directive.

Transfer of an undertaking

12. The plaintiffs in the main proceedings are of the opinion that no transfer of an undertaking, business or part of a business has occurred in the present case. They claim that it is a precondition of such a transfer that at least part of the structure or the organization of the undertaking concerned be preserved. However, Anfo Motors ceased

trading and dismissed the majority of its employees, with the remainder of the undertaking being wound up. It was a case of a liquidation and not of the transfer of an undertaking. That liquidation was carried out independently of the dealership agreement concluded between Ford and Novarobel. The fact that Novarobel is performing the same activities as Anfo Motors previously did is irrelevant in that respect, because it is obvious that all Ford dealers perform similar activities. Moreover, not even the firm's business name was transferred to the new dealer.

13. All the other parties that have taken part in the proceedings before the Court of Justice — Ford, the United Kingdom and the Commission — take a different view. They claim that notwithstanding the circumstances set out by the national court there is, or at least could be, a transfer within the meaning of the directive. I share that view.

14. The provisions of Directive 77/187 should be interpreted by reference to their purpose. As is shown by the recitals in the preamble to the directive, it is intended 'to provide for the protection of employees in the event of a change of employer' and to approximate the relevant laws of the Member States 'while maintaining the improvement described in Article 117 of the Treaty', the aim of which is to improve the standard of living and working conditions of workers. [3] As the Court of Justice has held, the purpose of the directive is 'to ensure, *so far as possible*, that the rights of employees are safeguarded in the event of a change of employer by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor'. [4]

15. In order to protect workers the notion of 'transfer of an undertaking, business or part of a business' should therefore be interpreted widely. That applies in the present case too. Admittedly, the circumstances being considered here are special in so far as the employees concerned are not in fact raising any claims — which would have required there to have been a transfer within the meaning of the directive — but they dispute that such a transfer has taken place. However, the interpretation of the rules cannot depend upon the particular intention of the employee actually concerned, but must follow principles of general validity.

16. That approach is wholly compatible with the interests of those employees who do not wish to work for the person who has acquired the undertaking in which they previously worked. As the Court of Justice has already held, the directive 'does not preclude an employee from deciding to object to the transfer of his contract of employment or employment relationship and hence deciding not to take advantage of the protection afforded to him by the directive'. To hold otherwise would jeopardize the fundamental rights of the employee, 'who must be free to

3 — Second and fifth recitals in the preamble to Directive 77/187.

4 — Judgment in Case 287/86 *Ny Mølle Kro* [1987] ECR 5465, paragraph 12 (my emphasis).

choose his employer and cannot be obliged to work for an employer whom he has not freely chosen.' [5]

The United Kingdom has correctly pointed out that in the present case Mr Merckx and Mr Neuhuys may actually have made use of that right to object. That could be indicated in particular by the wording of the letters sent by them on 27 October 1987 to Anfo Motors. [6] It is of course for the national court to decide that question. When examining the question it will have to have regard to the fact that Directive 77/187 does not oblige Member States to provide that if an employee decides not to continue his contract of employment or employment relationship with the transferee, the contract of employment or employment relationship with the transferor is to continue. The Member States may provide that in such cases the contract of employment or the employment relationship with the transferor is to continue. However, they may also provide that in such a case the contract of employment or employment relationship must be regarded as having been terminated either by the employee or by the employer. [7]

17. According to the case-law of the Court of Justice the essential criterion for answering the question whether there is a transfer within the meaning of the directive is 'whether the business in question retains its identity' which 'may be indicated in particular by the fact that its operation is actually continued or resumed by the new employer, with the same or similar activities'. [8] The Court of Justice has consistently held that in order to determine whether those conditions are met:

'It is necessary to 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 moveable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be

5 — Judgment in Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others* v *Konstandinidis* [1992] ECR I-6577, paragraphs 32 and 33.

6 — See point 4 above.

7 — Judgment in the *Katsikas* case, cited above (footnote 5), paragraphs 35 and 36. At the hearing the Commission explained which approach Belgian law adopted in such cases. For the sake of completeness, it is pointed out that the Court of Justice made statements in its judgment in Joined Cases 144/87 and 145/87 *Berg* v *Besselen* [1988] ECR 2559 that seemed to indicate that Directive 77/187 did *not* give employees the right to object to the transfer of their contract of employment or employment relationship (at paragraph 14). That such an interpretation was not wholly aberrant is shown by the attitude of the Commission in the proceedings in *Katsikas*, as reproduced in the Report for the Hearing ([1992] ECR I-6582 et seq.). Whether consequences for a decision on the present case are to be drawn from the uncertainty which may therefore have existed regarding the legal position, an uncertainty which was in any event removed by the *Katsikas* judgment, is a matter for the national court.

8 — Judgment in Case 24/85 *Spijkers* v *Benedik* [1986] ECR 1119, paragraphs 11 and 13. Also judgments in Case 287/86 *Ny Mølle Kro*, cited above (footnote 4), paragraph 18; Case 101/87 *Bork International* v *Foreningen af Arbejdsledere i Danmark* [1988] ECR 3057, paragraph 14; Case C-29/91 *Redmond Stichting* v *Hendrikus Bartol* [1992] ECR I-3189, paragraph 23; Case C-209/91 *Watson Rask* [1992] ECR I-5755, paragraph 19; Case C-392/92 *Schmidt* [1994] ECR I-1311, paragraph 17. In the proposal for a directive submitted by the Commission on 8 September 1994, which is intended to replace Directive 77/187 (OJ 1994 C 274, p. 10), a transfer for the purposes of that directive is therefore defined in the second paragraph of Article 1(1) as 'transfer of an economic entity which retains its identity'.

made and cannot therefore be considered in isolation.' [9]

18. Furthermore, according to that case-law, it is for the national court to appraise the facts in the light of the abovementioned interpretative criteria in order to establish whether or not there is a transfer in the above sense. [10] That is appropriate, because the national court is in the best position to appraise the significance of the facts before it. [11] The Court of Justice seems to have departed from that line in its judgment in the *Schmidt* case, in which it held that 'a situation such as that outlined in the order for reference' fell within the scope of the directive. [12] However, in my view the Court may only make such a finding in exceptional cases and normally it must be for the national court to assess all the factors in the actual case before it. [13] That applies in particular where the national court (as in the present case) has not yet had an opportunity or cause to take a view of all the factual circumstances of the actual case.

19. For that reason the Court of Justice should restrict itself in the present case to answering the more general question of whether there *may* be a transfer at all in the circumstances outlined by the national court. In my opinion that question should be answered in the affirmative. None of the circumstances mentioned by the national court seems to be of such a nature as to exclude the applicability of the directive.

20. The fact that Anfo Motors ceased trading on 31 December 1987 and was then put into liquidation is of little significance. If there is a transfer within the meaning of the directive, the previous operator of the undertaking, business or part of a business is, of course, at liberty to decide to cease trading completely. It is obvious that such a decision can also be made before the transfer and in view of it. That appears to have been the case here, as is demonstrated by the abovementioned letters from Anfo Motors to Mr Merckx and Mr Neuhuys. [14] The Court of Justice has held that the directive does not apply if the case involves the transfer of an undertaking that has gone into liquidation. [15] However, that has not occurred in the present case.

21. On the other hand, the fact that Anfo Motors dismissed the majority of its staff

9 — Judgment in Case 24/85 *Spijkers*, cited above (footnote 8), paragraph 13. Also judgments in Case C-29/91 *Redmond*, paragraph 24, and in Case C-209/91 *Watson Rask*, paragraph 20. Cf. also the judgments in Case 287/86 *Ny Mølle Kro*, cited above, paragraph 19, and in Case 101/87 *Bork*, cited above, paragraph 15.

10 — Judgment in Case 24/85 *Spijkers*, cited above (footnote 8), paragraph 14. Also judgments in Case 287/86 *Ny Mølle Kro*, paragraph 21, Case 101/87 *Bork*, paragraph 19 and in Case C-29/91 *Redmond*, paragraph 25.

11 — As Advocate General Van Gerven correctly stated in his Opinion in Case C-209/91 *Watson Rask* [1992] ECR I-5766, at p. I-5769.

12 — Case C-329/92 *Schmidt*, cited above (footnote 8), paragraph 20.

13 — Advocate General Van Gerven expressed himself to that effect in his Opinion in the *Schmidt* case [1994] ECR I-1313, at p. I-1319.

14 — See points 2 and 5 above.

15 — Judgment in Case 186/83 *Botzen* v *Rotterdamsche Droogdok Mattschappij* [1985] ECR 519.

and retained only 14 from more than 60 persons, who were then requested to work for Novarobel, is important. Although only approximately one-quarter of the staff of Anfo Motors was therefore to be taken over by the new dealer, that in no way precludes there being a transfer within the meaning of the directive. Several of the parties taking part in the proceedings before the Court of Justice have, in that context, correctly drawn attention to Article 4(1) of the directive. According to that provision, a transfer is not in itself to constitute grounds for dismissal by the transferor or the transferee. However, it is also provided that this does not stand in the way of 'dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce'.

The decisive question is therefore whether consideration of all the circumstances of the individual case as a whole shows that the business in question retained its identity. The fact that the previous operator of the undertaking has dismissed a large part of its staff and only the remaining employees are to be taken over by the new dealer is therefore an important factor in that context, but it is not solely decisive.

22. The same applies to the fact (as is to be assumed from the order for reference) that Anfo Motors did not transfer any assets to Novarobel. Even that does not preclude the possibility of there being a transfer within the meaning of the directive. In that respect the Court of Justice rightly stated in the *Schmidt* case:

It should be recalled that in the *Bork* case the Court of Justice had to consider a situation which was similar in some respects to the situation in the present case. In *Bork* the previous operator of an undertaking had dismissed all his employees. The business was ultimately continued by a third party who re-engaged more than half of the staff previously employed. [16] The Court of Justice held that there was a transfer within the meaning of the directive, provided that the undertaking in question had retained its identity. [17]

'The fact that in its case-law the Court includes the transfer of such assets among the various factors to be taken into account by a national court to enable it, when assessing a complex transaction as a whole, to decide whether an undertaking has in fact been transferred does not support the conclusion that the absence of these factors precludes the existence of a transfer.' [18]

16 — Case 101/87 *Bork*, cited above (footnote 8), paragraphs 3 and 4.

17 — Case 101/87 *Bork*, cited above (footnote 8), paragraph 20.

18 — Case C-392/92 *Schmidt*, cited above (footnote 8), paragraph 16.

23. One of the factors to be taken into account is, of course, the fact that Novarobel now holds the Ford sales concession previously held by Anfo Motors, and is now active in the area which Anfo Motors previously served as dealer. Mr Merckx and Mr Neuhuys are correct in pointing out that all dealers of a given manufacturer perform similar activities. It would therefore indeed be absurd to conclude that there is a transfer within the meaning of the directive simply from the fact that a manufacturer has ceased to do business with one dealer and has transferred the sales concession for its vehicles in that area to another dealer. However, that is not the case here. The question is, rather, whether that fact may be taken into account when examining whether such a transfer has taken place. That must be answered in the affirmative, since the 'similarity between the activities carried on before and after the transfer' is one of the factors to be considered when deciding that question. [19]

24. In summary, it must therefore be found that a transfer within the meaning of the directive may also exist in the circumstances described by the national court. It is a precondition of such a transfer that the business in question has retained its identity. Whether or not that is the case must be established by the national court on the basis of the criteria laid down by the Court of Justice.

19 — See the reasoning of the Court of Justice cited in paragraph 17 above.

25. Although the conclusive appraisal of the circumstances in the present case is therefore a matter for the national court, I would like to supplement the above remarks, which from the nature of the matter are rather abstract, by adding some more concrete remarks which may be of use to the Cour du Travail.

26. In my opinion, it is indeed likely that there was a transfer in the present case. Ford has stated in the proceedings before the Court of Justice that its new dealer continued the activities of Anfo Motors in the area in question, engaged the remaining staff of Anfo Motors and took over its customers. It argues that, accordingly, the undertaking acquired has retained its identity, as required by the case-law of the Court of Justice. That seems plausible. As I have already stated, the national court does have some doubts as to whether Anfo Motors transferred its list of customers. However, in that context, Ford and the Commission refer to a letter which they claim Anfo Motors sent to its customers on 5 October 1987. In that letter Anfo Motors announces that Novarobel is replacing it as dealer, recommends Novarobel to its customers and also points out that they would see 'many well-known faces' working for its successor. That letter would indeed be important evidence indicating a transfer. However, findings to that effect could, of course, only be made by the national court.

Moreover, if the nature of the activities of the undertakings concerned are taken into account, it is apparent that the fact that no assets have been transferred is not likely to be of particular importance in the present case. The activity of a dealer is not shaped by and dependent on its capital to the same extent as, for example, that of an industrial undertaking. As a rule, the experience and skill of its staff constitute a particularly important factor for the success of such a dealer. The acquisition of an — albeit small — part of those employees by another undertaking, and the criteria according to which those staff members have been selected, are therefore of particular relevance to the question whether there has been a transfer within the meaning of the directive. The fact that Novarobel acquired not only part of the staff of Anfo Motors, but also its sales concession, is another factor which seems to me to be particularly important. As a result of those acquisitions the new dealer is now pursuing the same activity in the same area as Anfo Motors previously did. When taken as a whole, those factors militate most clearly in favour of there being continuity in the sense required by the directive.

27. However, I would like to add that I share the view expressed by Advocate General Van Gerven in his Opinion in the *Schmidt* case, in which he points out that there is a common denominator underlying the three concepts of 'undertaking', 'business' and 'part of a business' used in the directive, terms which 'refer to a unit with a minimum level of *organizational independence*'. [20] However, that requirement may still be fully satisfied in the present case. As I have already mentioned, Novarobel has taken on certain tasks of Anfo Motors and is now selling Ford vehicles in the area previously served by Anfo Motors. In so doing, it is making use of the concession which Anfo Motors previously held and is employing part of the staff of Anfo Motors. The facts in this case are not as unusual as those in the *Schmidt* case. [21]

28. In the hearing before the Court the representative of Mr Merckx and Mr Neuhuys referred to further factual circumstances which, in his opinion, showed that there had not been a transfer within the meaning of the directive. He pointed out, in particular, that to a certain extent Novarobel's places of business were located in different parts of Brussels from those of Anfo Motors. It will be for the national court, if necessary, to investigate those factors more closely and to appraise them in the course of the overall examination which it must carry out.

29. Merely for the sake of completeness, I would point out that the fact that the unions concerned stated that they considered that the present case involved a transfer for the

20 — ECR [1994] I-1313, at p. 1319. Advocate General Cosmas expresses a similar view in his Opinion of 10 May 1995 in Case C-48/94 *Rygaard* [1995] ECR I-2745, paragraph 16 ('a certain autonomy of organization').

21 — As is generally known, that case involved a cleaner who was employed to clean the premises of a branch of a bank. The bank then had the cleaning work carried out by a firm of cleaners.

purposes of national law (which is based on the directive) does not seem to me to have any importance by itself in deciding the question which is relevant in this case. However, it does show that the unions concerned take a view of the facts which is similar to that expressed here. The fact that Novarobel has not taken over the trading name of Anfo Motors is of no importance, because that is not a precondition for a transfer within the meaning of the directive.

Legal transfer

30. Mr Merckx and Mr Neuhuys argue that there has been no legal transfer within the meaning of the directive, because no contract has been concluded between Anfo Motors and Novarobel. On the other hand, Ford, the Commission and the United Kingdom correctly argue that that fact does not preclude the applicability of the directive.

31. As the Court of Justice stated in the *Redmond* case, the concept of a legal transfer has been given a 'flexible interpretation' by the Court in keeping with the objective of the directive and it is therefore sufficient for the transfer to take place 'in the context of contractual relations'. [22] For example, in *Ny Mølle Kro* it held that the directive was applicable where the owner of a leased undertaking took over its operation again after termination of the lease. [23] The *Daddy's Dance Hall* case also concerned an undertaking which had been leased by its owner. After the termination of the leasing agreement the undertaking was transferred to a third party with which the owner had concluded a new lease. The Court of Justice held that that could be a transfer within the meaning of the directive: 'The fact that in such a case the transfer is effected in two stages, in that the undertaking is first retransferred from the original lessee to the owner and the latter then transfers it to the new lessee, does not prevent the directive from applying, provided that the economic unit in question retains its identity'. [24] In its judgment in *Bork* [25] and in *Redmond* [26] the Court of Justice confirmed that view. The judgment in *Bork* is particularly interesting in that respect. That case also concerned an undertaking that had been leased by its owner. After termination of the lease the owner sold the undertaking to a third party. The question arose whether the obligations on the previous lessee arising under the contracts of employment with its employees had been transferred to the new owner. Of course, that presupposed that there had been a transfer within the meaning of the directive. The new owner claimed that the applicability of the directive presupposed the conclusion of a transfer agreement between the previous employer and the new employer. [27]

22 — Judgment in Case C-29/91 *Redmond*, cited above (footnote 8), paragraph 11.

23 — Judgment in Case 287/86 *Ny Mølle Kro*, cited above (footnote 8), paragraph 14. The Court of Justice also held to the same effect in Joined Cases 144/87 and 145/87 *Berg* v *Besselen*, cited above, which concerned the termination of a lease-purchase agreement (at paragraph 19 of the judgment).

24 — Case 324/86 *Tellerup* v *Daddy's Dance Hall* [1988] ECR 739, paragraph 10.

25 — Cited above (footnote 8), paragraph 14.

26 — Cited above (footnote 8), paragraph 14.

27 — Judgment in Case 101/87 *Bork*, cited above (footnote 8), paragraph 11.

The Court of Justice did not adopt that view. [28]

32. In view of that case-law, there seems to me to be hardly any doubt that the present case involves a 'legal transfer' within the meaning of the directive. That is all the more so, because in the present case it is clear that there was not only an agreement between Ford and Novarobel, but both Anfo Motors and Novarobel had also agreed to the transfer, even if that was not recorded in a written agreement between those two firms. As regards Novarobel, that is shown by the very agreements made with Ford, in which Novarobel declared that it was willing to take over the employees concerned. The letter sent by Anfo Motors to its customers, [29] (the appraisal of which is, of course, ultimately a matter for the national court), indicates that Anfo Motors agreed that the new dealer should take on its remaining employees and continue its activities. That is made even clearer in the letter sent by Anfo Motors on 8 October 1987 to Mr Merckx and Mr Neuhuys. [30] It is therefore evident that Anfo Motors agreed at least implicitly to the change. That is sufficient for a legal transfer within the meaning of the directive.

C — Conclusion

33. I therefore propose that the Court should answer the question from the Cour du Travail, Brussels, 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 must be interpreted as meaning that the directive is applicable, if an undertaking which has decided to discontinue its activities dismisses most of its staff and keeps only 14 persons out of a total of more than 60 and decides that

28 — Ibid., paragraph 14.

29 — See point 26 above.

30 — See point 2 above. That letter even refers to discussions with Novarobel.

those 14 persons, while retaining their acquired rights, must work in an undertaking with which the first undertaking has not concluded an agreement but which holds the dealership previously held by the first undertaking, even if the first undertaking has not transferred any part of its assets to the second undertaking. However, that applies only if the undertaking in question has retained its identity. The national court must establish whether that is the case, applying the criteria laid down by the Court of Justice.