1. Article 1 (1) of Directive 77/187 on the safeguarding of employees' rights in the event of transfers of undertakings is applicable where the owner of a leased undertaking takes over its operation following a breach of the lease by the lessee.

2. Article 1 (1) of Directive 77/187 envisages the transfer of a business as a going concern. In order to ascertain whether this is the case, account must be taken of all the factual circumstances surrounding the transaction in question, including, where appropriate, the temporary closure of the undertaking and the fact that there were no employees at the time of the transfer, although these facts alone do not preclude the applicability of the directive, especially in the case of a seasonal business.

3. Article 3 (2) of Directive 77/187 does not oblige the transferee to continue to observe the terms and conditions agreed in any collective agreement in respect of workers who were not employed by the undertaking at the time of the transfer.

# REPORT FOR THE HEARING
## delivered in Case 287/86 *

### I — Facts and written procedure

1. Council Directive 77/187 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 (Official Journal 1977, L 61, p. 26) is intended to 'provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded' (second recital in the preamble).

Article 1 (1) provides that the directive 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) 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 within the meaning of Article 1 (1) shall, by reason of such transfer, be transferred to the transferee'.

Article 3 (2) ensures the continued application of the terms and conditions of employment as follows: 'Following the transfer within the meaning of Article 1 (1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement'.

* Language of the Case: Danish.

2. The provisions of Directive 77/187 were given effect in Denmark by Law No 111 of 21 March 1979 on the Rights of Employees on the Transfer of Undertakings. Article 2 (1) thereof provides as follows:

'Where an undertaking or a part thereof is transferred the transferee shall immediately succeed to the rights and obligations existing on the date of the transfer by virtue of:

(1) collective agreements,

(2) provisions concerning the terms and conditions of pay and work which are laid down or approved by the public authorities, and

(3) individual agreements concerning the terms and conditions of pay and work.'

3. In 1980 Ella Marie Hannibalsen leased the Ny Mølle tavern to Inger Larsen, who on 1 October 1980 concluded an agreement with the Hotel- og Restaurationspersonalets Samvirke (Association of Hotel and Restaurant Employees). According to that agreement, the Ny Mølle Kro was to comply with the terms of any collective agreement in force between that association and Arbeijdsgiverforeningen af Hoteller og Restauranter (Federation of Hotel and Restaurant Employers). The members of staff covered by the agreement were required to be members of the association.

In January 1981 Mrs Hannibalsen rescinded the lease and repossessed the tavern on the ground that Mrs Larsen had failed to comply with the terms of the lease of the business. The restaurant then remained closed until the end of March 1981. Since then Mrs Hannibalsen has operated the tavern herself, with the exception of the period from 1 May to 31 August 1981 when it was leased to a third party. It appears from the documents before the Court that the Ny Mølle Kro operates as a restaurant exclusively during the summer season and that outside that season it caters solely for parties; the restaurant may be hired for private parties.

In May 1983 Ketty Hansen was engaged as a waitress at the restaurant until the end of August 1983. The terms of her contract of employment were to be renegotiated for the period after 1 September 1983. Mrs Hansen's wage was fixed at DKR 195 per day plus 12.5% of the takings. She worked at the restaurant on that basis from 12 May 1983 to 19 August 1983, when she left without giving notice.

After Mrs Hansen left her employment the relevant trade union claimed that Mrs Hannibalsen had paid to her a wage lower than the amount due under the collective agreement entered into by Mrs Larsen on 1 October 1980. As Mrs Hannibalsen denied that she was bound by that agreement, proceedings were brought before Arbejdsretten (the Labour Court).

4. In the proceedings before Arbejdsretten the plaintiff in the main action, Landsorganisationen i Danmark (Danish Trades Union Congress) on behalf of Tjenerforbundet i Danmark (Danish Union of Waiters and Waitresses), claims in essence that Mrs Hannibalsen is bound to comply with the relevant agreement and in addition that she should pay a penalty to Tjenerforbundet i Danmark. In support of its claim it contends that there has been a transfer of an undertaking within the meaning of Law No 111 of 21 March 1979 and that, conse-

quently, Mrs Hannibalsen, as transferee, succeeded to the obligations arising from the agreement concluded between the transferor and the relevant trade union.

The defendant in the main proceedings, Mrs Hannibalsen, disputes that there is a transfer of an undertaking within the meaning of Law No 111 when the owner of an undertaking repossesses it following a breach of a lease. She also maintains that the application of that legislation presupposes the transfer of a business which is in operation, which was not the position in this case.

Faced with those arguments, Arbejdsretten considered that Law No 111 of 21 March 1979 had to be interpreted in the light of Council Directive 77/187 and that the case therefore raised questions of the interpretation of that directive. Accordingly, it stayed the proceedings and referred to the Court of Justice, pursuant to Article 177 of the EEC Treaty, the following questions for a preliminary ruling:

'(1) Do 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 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 cover the situation in which, following the lessee's breach of a lease agreement, the owner of a leased undertaking rescinds that agreement and subsequently himself takes over the running of the undertaking?

(2) Does the directive apply where the transferred undertaking was temporarily closed at the time of the transfer, so that at that time no employees were employed by the undertaking?

(3) Is it material to the answer to question 2 that the undertaking concerned closes regularly for part of the year, as in the case 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 notwithstanding the fact that at the time of the transfer no employees were employed by the undertaking?'

5. The decision seeking a preliminary ruling was received at the Court Registry on 21 November 1986.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Landsorganisationen i Danmark, represented by Knud Christensen and Finn Thorgrimson, by Dansk Arbejdsgiverforening (Danish Employers' Organization), represented by H. C. Springborg, by the United Kingdom, represented by H. R. L. Purse, of the Treasury Solicitor's Department, and by the Commission of the European Communities, represented by its Legal Adviser Johannes Føns Buhl and by Enrico Traversa, a member of its Legal Department.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided on 20 May 1987 to assign the case to the Third Chamber and to open the oral procedure without any preparatory inquiry.

## II — Written observations

1. *The first question*

Landsorganisationen i Danmark, the United Kingdom and the Commission propose that the reply to the first question should be in the affirmative. Dansk Arbejdsgiverforening, on the other hand, considers that the reply should be in the negative.

(a) Landsorganisationen i Danmark observes that a lessee who has concluded a collective agreement in his capacity as employer must be regarded as an owner in his relations with employees of the undertaking. Where, as in this case, the owner takes over the running of the undertaking following the lessee's breach of the lease not pursuant to an order of the competent public authority (Fogedretten (enforcement division of District Court)) but by virtue of an agreement between the transferor and the transferee, the transfer is a transfer pursuant to an agreement and not a transfer ordered in judicial proceedings.

(b) The *Dansk Arbejdsgiverforening* takes the view that an agreement for the lease of a business involves the transfer of property to another person for his use on payment of a periodic charge, in general for a fairly long period. It follows that the lessor is the owner whereas the lessee is a tenant. Even if the lessee recruits staff he cannot be regarded as the owner in his relations with employees of the undertaking.

In addition, the concept of a transfer within the meaning of the law on the transfer of undertakings relates solely to transfers by agreement and does not therefore cover a situation such as the present, where, although the repossession of the undertaking by the owner following a breach of the lease by the lessee is clearly provided for in the agreement between the parties, it is none the less in the nature of an enforcement measure since an alternative would have been an enforcement order issued by Fogedretten.

Consequently, the case relates to an enforcement measure which would not have taken place if the parties had complied with their obligations under the agreement.

(c) The *United Kingdom* considers that the first question seeks to ascertain in essence whether there is a transfer by agreement in a case in which a lease is rescinded. The reply is provided by the Court's judgment of 7 February 1985 in Case 135/83 *Abels* v *Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 469, in which the Court stated that a transfer in the context of insolvency proceedings under the supervision of the competent judicial authority does not fall within the scope of Directive 77/187 but that a transfer taking place in the context of a 'surséance van betaling', a case where judicial supervision is more limited, does fall within its scope.

In this case the lessor has not regained possession after legal proceedings. On the contrary, the transfer of possession was effected with the lessee's consent. The directive is applicable to such a case.

(d) The *Commission* points out that Directive 77/187 applies only to transfers by agreement. The concept of transfer therefore refers in the case of the vast majority of undertakings to a purchase with a real change in ownership. However, the directive refers to transfer to 'another employer', not necessarily to another owner. Consequently, it is clear that it applies to a case where a lessee takes over an undertaking which is in operation and the

question of taking over existing contracts of employment arises.

The criterion for determining the applicability of the directive is whether the transferee takes over an undertaking as a going concern and engages in the same or similar activities (judgment of 18 March 1986 in Case 24/85 *Spijkers* v *Gebroeders Benedik Abattoir CV* and Alfred Benedik en Zonen BV [1986] ECR 1119).

Transfers in the course of insolvency proceedings are characterized by the fact that they are effected under the supervision of the competent judicial authority and their purpose is to realize the transferor's assets. On the other hand, in a case such as that before the Court, where the owner of a leased undertaking rescinds the lease for failure by the lessee to fulfil his obligations and himself resumes the running of the business, the powers of the parties to the lease are not transferred to a judicial authority for the purpose of realizing the transferor's assets. Despite the fact that it is taken over following a breach of the lease the business in question retains its identity.

2. *The second question*

Landsorganisationen i Danmark replies to the second question in the affirmative. On the other hand, Dansk Arbejdsgiverforening replies in the negative. The United Kingdom and the Commission propose a qualified reply.

(a) *Landsorganisationen i Danmark* considers that in view of the Court's judgment in the *Spijkers* case, cited above, the reply to the second question must be in the affirmative.

(b) The *Dansk Arbejdsgiverforening* considers that Directive 77/187 is not applicable where the undertaking is temporarily closed at the time of the transfer so that it has no employees at the relevant time. The Court's judgment in the *Spijkers* case, cited above, may not be relied upon to support the opposite conclusion since in that case most of the employees of the transferor's undertaking had found employment in the transferee's undertaking.

(c) The *United Kingdom* points out that in the *Spijkers* case, cited above, the Court emphasized that the transfer of an undertaking or business is more than a mere disposal of assets; it assumes that the business transferred retains its identity, account being taken of any period for which its activities were suspended. If the business has ceased to exist as a business by the time of the transfer there will be nothing apart from the assets to be transferred.

The absence of employees at the time of the transfer is an important factor. Article 3 (3) of the directive does provide some protection to those who are no longer employed in the business, but the directive envisages a situation where the business, at the time of its transfer, has employees capable of benefiting from its provisions. It is possible for a business to exist without employees but it must be unusual for it to do so for any substantial period; the absence of employees would raise serious doubts as to whether a business still exists.

(d) According to the *Commission* the key issue in replying to the second question is whether the phrase 'existing on the date of a transfer' in Article 3 (1) of the directive qualifies the words 'the transferor's rights and obligations' or the words 'a contract of employment or . . . employment relationship'. Examination of the different language versions of that provision in their context

leads to the conclusion that the latter interpretation must be adopted. Such a conclusion is consistent with the Court's judgment of 7 February 1985 in Case 19/83 *Wendelboe* v *L. J. Music* [1985] ECR 457.

It follows that the directive is not applicable in a case where the undertaking is not in operation at the date of the transfer, subject to the application of Article 4 protecting employees from dismissal solely by virtue of the transfer. The temporary closure of an undertaking on its transfer to another employer cannot be used to circumvent the mandatory provisions of the directive.

By way of conclusion, the Commission proposes that the reply to the second question should be that Directive 77/187 is inapplicable in a case where the undertaking transferred is temporarily closed at the time of the transfer, provided, however, that such temporary closure is not contrary to the mandatory provisions of the directive.

3. *The third question*

Landsorganisationen i Danmark considers that the fact that a business is regularly closed on a seasonal basis does not prevent the application of the directive. Dansk Arbejdsgiverforening, on the other hand, considers that such closure does render the directive inapplicable as there is no employment relationship at the time of the transfer. The United Kingdom and the Commission maintain in essence that the seasonal closure of a business is a factor to be taken into account in determining whether a business has been transferred as a going concern.

(a) *Landsorganisationen i Danmark* emphasizes that in the case of a business engaged in seasonal activities the normal operation of the business involves interruptions in those activities. That should mean that if a transfer takes place at a time when the business is normally closed such closure does not prevent the directive from applying if it appears that the duration of the closure is consistent with the normal period of closure.

(b) The *Dansk Arbejdsgiverforening* accepts that in certain situations the temporary closure of a business does not preclude the application of the directive if it reopens with the same staff; such an interpretation is consistent with the legislator's wish to avoid circumvention of the directive.

However, such a risk does not exist in the case of an undertaking of a seasonal nature in so far as it is possible to assume that its closure is based on objective considerations. The reopening of such an undertaking cannot give rise to the application of the directive. An employee who may be reengaged by the transferee after the transfer of the business and its reopening has no rights under the directive as there is no employment relationship at the date of the undertaking's transfer.

(c) The *United Kingdom* maintains that regular closure is a fact to be taken into account in deciding whether a business retains its identity. The regular closing and reopening of a business in the past may be evidence of a continuing business but it is by no means conclusive.

There is obviously a difference between a large hotel which is closed to visitors but retains a skeleton staff for maintenance and for dealing with advance bookings and a small café which is simply locked up and left unattended during the period of closure. In the former case the business continues, albeit at a reduced level; in the latter case the indications are that the business has ceased for the time being. The fact that there is a business which, although it has ceased, is capable of being revived does not mean that the business has retained its identity.

(d) The *Commission* observes that the essential criterion enabling a worker to rely on the directive is the extent to which he is bound to the undertaking at the time of the transfer. According to Article 3 (1) of the directive it applies to employees whose contract of employment *or* employment relationship exists at the date of the transfer. It is not therefore necessary to require both conditions to be satisfied.

Consequently, it is sufficient if there is a contract of employment at the date of the transfer. It is perfectly conceivable in the case of seasonal undertakings that the employer, seeking to ensure the continuity of the business, should conclude a contract of employment by which an employee undertakes to work for a certain part of the year over a period of several years. In such a case the scheme of the directive indicates that where an undertaking is transferred while it is temporarily closed following the pattern of its normal periods of business a worker employed by it may also rely on the provisions of the directive if his contract provides for the resumption of the employment relationship on the reopening of the business.

By way of conclusion, the Commission proposes that the reply to the third question should be that in the case of a business which is regularly closed for part of the year Directive 77/187 is applicable in so far as a contract of employment or an employment relationship exists at the time of the transfer regardless of whether the transfer takes place at a time when the business is open.

4. *The fourth question*

Landsorganisationen i Danmark proposes that the reply to the fourth question should be in the affirmative. On the other hand, Dansk Arbejdsgiverforening, the United Kingdom and the Commission consider that the reply should be that only employees of the undertaking at the time of the transfer are entitled to the benefit of the directive.

(a) *Landsorganisationen i Danmark* observes that if it is considered, on the basis of an appraisal of the situation of an undertaking as a whole, taking into account the fact that it was closed for a certain time and had no employees during that period, that there is a transfer within the meaning of Article 1 of the directive, it follows directly from Article 3 (2) that the transferee is bound by the terms of any collective agreement by which the undertaking is bound until that collective agreement is terminated or expires or until the entry into force or application of another collective agreement.

(b) The *Dansk Arbejdsgiverforening* considers that for Article 3 (2) of the directive to apply there must at the very least be an employment relationship at the time of the transfer, so that only employees who are parties to a contract of employment at the time of the transfer may seek to benefit from the application of the directive, to the exclusion of those who are not engaged until after the transfer. It follows from the Court's judgment in the *Abels* case, cited above, that the directive relates solely to

to rights and obligations in relation to employees whose contract of employment or employment relationship actually subsists at the time of the transfer.

The fact that at the time of the transfer there were no employees working for the undertaking and, moreover, the employee engaged on the reopening of the business had never previously been employed by it are of decisive significance in this case.

(c) The *United Kingdom* states that taken as a whole Article 3 of the directive is intended to maintain the continuity of employment relationships. (see the Court's judgment in the *Wendelboe* case, cited above). In a case where, at the time of the transfer, no employees are employed by the undertaking the only persons able to take advantage of the directive are former employees, in respect of the rights referred to in the second subparagraph of Article 3 (3). The purpose of the directive, as set out in its preamble, is 'to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'. However, the protection of future employees is not one of the objects of the directive.

The transferee is therefore under no obligation to observe the terms of any collective agreement applicable to the transferor under Article 3 (2) where the business has no employees at the time of the transfer. Consequently, any new member of the staff does not benefit from the protection afforded by the directive.

(d) The *Commission* interprets Article 3 (2) of Directive 77/187 as being intended, like Article 3 (1), to ensure that when an undertaking is transferred the rights and obligations of employees under their employment relationship at that time are maintained *vis-à-vis* the new employer. In the light of the scheme and aim of the directive, it must be concluded that the express reference to the fact that the transferee is bound by the terms of any collective agreement concluded by the transferor is intended solely to define more precisely the nature of the transferee's obligations *vis-à-vis* the employees on the transfer of an undertaking.

Consequently, it would be improper to interpret Article 3 (2) as meaning that where the transferor of a business has become party to a collective agreement a trade union which is a party to that collective agreement may claim an independent right based on that agreement for one of its members who was not employed by the undertaking at the time of the transfer.

On the other hand, the directive does not prevent national legislation from providing independently that where a transferor is a party to a collective agreement the transferee who subsequently engages staff is bound by that agreement even if he is unaware that the business is subject to such an obligation.

By way of conclusion, the Commission proposes that the reply to the fourth question should be that Article 3 (2) of Directive 77/187 guarantees the continued observance of the conditions of employment provided for in a collective agreement only in relation to contracts of employment or employment relationships existing on the date of the transfer of an undertaking which was a party to that collective agreement.

U. Everling
Judge-Rapporteur