OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 8 October 1992 *

Mr President,
Members of the Court,

1. In this case, the Court has to consider once again a number of questions relating to the scope 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] (hereinafter 'the Directive').

The Sø-og Handelsretten i København (Maritime and Commercial Court, Copenhagen, 'the national court') has referred those questions in connection with two pending disputes, one between Anne Watson Rask and her former employer, ISS Kantineservice ('ISS'), a company, the other between Mrs Watson Rask and Kirsten Christensen, on the one hand, and ISS, on the other.

Background to the case

2. Mrs Watson Rask and Mrs Christensen were employed in one of the works canteens of the company Philips A/S at the time when Philips handed over the management of its works canteens to ISS. The transfer was effected by an agreement concluded on 2 December 1988 which took effect on 1 January 1989. Under the agreement, Philips undertook to pay ISS a fixed monthly fee to cover wages, insurance, work clothes and management costs. It also made available to ISS the necessary premises, equipment, electricity, heating, telephone and cloakrooms and a refuse removal service. It further agreed to provide various consumables (disposable plates, serviettes, etc.) at wholesale prices. For its part, ISS agreed, among other things, to offer jobs to Philips permanent staff employed in its works canteens at the time when the agreement took effect on the same terms and conditions as regards pay and notice as they had previously enjoyed. In that connection, the agreement provided that the wages paid to the employees concerned would consist of the basic ISS wages plus a transfer supplement so that former Philips employees taken over by ISS would not suffer any loss of income.

3. The two disputes which are the subject of the proceedings in the national court may be summarized as follows. In the first set of proceedings, Mrs Watson Rask seeks compensation for wrongful dismissal and non-pecuniary damage. At the end of January 1989, her wages were paid late. After she had insisted on receiving her wages at the time at which she had been accustomed to getting them, she was paid by cheque. In February 1989, the same thing happened, but this time ISS refused to pay her her wages on Philips' pay day. ISS claimed that it was entitled to alter the pay day so to opt for the last

* Original language: Dutch.
1 — OJ 1977 L 61, p. 26.

working day in the month rather than the last Thursday. Mrs Watson Rask maintained for her part that, under the Danish Law on transfers of undertakings,[2] she was employed on the same terms and conditions as had been in force when she was employed by Philips. She then declared that she no longer wished to work for ISS if her wages were not paid to her at the usual time, whereupon the manager dismissed her without notice.

The second set of proceedings relate to the composition of the wages which ISS has to pay under the agreement. Following the transfer, Mrs Watson Rask and Mrs Christensen no longer received the allowances for laundry, footwear and so on which had formed part of their pay at Philips. They argued before the national court that the agreement effected a transfer of part of an undertaking, with the result that the Law on transfers of undertakings and the Directive were applicable and that transferred employees should not be paid less than they would have received from Philips.

4. The national court considered that it was necessary to obtain a preliminary ruling from the Court under Article 177 of the EEC Treaty on the following questions:

'(1) Is Council Directive 77/187/EEC 1 applicable in a case where one undertaking, Undertaking A, contracts to operate the canteen in another undertaking, Undertaking B, and where:

— Undertaking A, in return for a fixed monthly fee, is to cover "all ordinary operating expenditure, such as direct or indirect remuneration, insurance, work clothes, personnel management and supervisory and administrative costs";

— Undertaking B makes the following available without charge: approved sales and production premises, including lockable storage areas, canteen equipment, electricity, heating and telephones, wardrobe facilities for the canteen staff, and carries out refuse removal;

— Undertaking B pays the costs of disposable plates, packaging, serviettes and cleaning materials;

— Undertaking A offers undertaking B's canteen staff employment with the same pay and seniority as they had before?

(2) Is the answer to Question 1 any different in so far as the operation of the canteen is only a facility for undertaking B's employees and thus does not con-

2 — Law No 111 of 21 March 1979 on the legal situation of employees in the event of transfers of undertakings. It was by that law that Denmark implemented the Directive.

cern that undertaking's general production?

(3) Is it incompatible with Article 3(2) of Directive 77/187/EEC to alter the time when wages are paid to the employees and/or to alter the composition of the employees' wages if it is otherwise provided that the total amount of the wages remains unchanged?'

Applicability of the Directive

5. The national court's first and second questions essentially seek to establish whether the Directive is applicable in a situation in which an undertaking transfers to another undertaking the operation of its works canteens together with its canteen staff, but there is no transfer of assets. Consequently, once again, the scope of the Directive, as defined in Article 1(1), is at issue:

'This directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger'.

A legal transfer within the meaning of the Directive manifestly took place in this case, certainly in the light of the very broad meaning which the Court has given to this expression in its case-law. According to the Court, such a transfer exists

'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'. [3]

It is irrelevant that the ownership of the undertaking has not been transferred, the Court held in *Ny Mølle Kro*: employees of an undertaking whose employer changes without any change in ownership are in a situation comparable to that of employees of an undertaking which is sold, and require equivalent protection. [4]

6. By contrast, the question in this case is whether there can be said to have been a 'transfer of an undertaking, business or part of a business' within the meaning of Article 1(1) of the Directive. Here too there is a consistent line of cases, which have been summarized recently by the Court in the *Redmond Stichting* case. The decisive criterion employed by the Court is whether the economic entity in question (that is to say, the undertaking, business or part of a business) retains its identity and this would be indicated by the fact that its operation was actually continued or resumed by the new employer with the same or similar economic activities. [5] According to that which the Court has consistently held, in order to determine whether that condition is met, it is necessary to

3 — Judgments in Case 101/87 *Bork International* v *Foreningen af Arbejdsledere i Danmark* [1988] ECR 3057, paragraph 13, and in Case C-29/91 *Redmond Stichting* v *Bartol and Others* [1992] ECR I-3189, paragraph 11.

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

5 — Judgments in Case 24/85 *Spijkers* v *Benedik* [1986] ECR 1119, paragraph 12, and in *Redmond Stichting*, paragraph 23.

'consider all the facts characterizing the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation'. [6]

In my view, if those assessment criteria are applied to the facts in this case, there is little, if any, room for doubt: ISS contracted to take over Philips permanent canteen staff as from 1 January 1989; the 'customers' of the canteens were the same before and after the transfer, namely the staff of Philips; the activity carried out was the same before and after (the agreement goes so far as to prohibit rationalization during the first six months of the currency of the agreement) and ISS assumed responsibility for this. Moreover, according to the case-file, there was no break in the canteens' operations (wages were paid by Philips until 31 December 1988 and by ISS as from 1 January 1989).

To my mind, ISS's arguments in this connection do not affect this conclusion. The fact that moveable property was not transferred by Philips, but made available without charge, constitutes part of the overall contractual arrangements between ISS and Philips in relation to the transfer; that fact in itself does not preclude the application of the Directive. [7] The fact that the part of the undertaking transferred, which constitutes merely a facility for the benefit of Philips's staff, is non-profit-making is also irrelevant in my view: moreover, the Court held in *Redmond Stichting* that the Directive was in principle applicable to non-profit-making undertakings. [8]

In the final analysis, however, it is for the national court to make the necessary factual assessments, having regard to the abovementioned interpretative criteria laid down by the Court, [9] in order to establish whether or not there has been a transfer within the meaning of the Directive. The national court is in fact best placed to assess the significance of the facts which it mentions in its order for reference.

7. I should now turn to the national court's second question: should works canteens be regarded as being a part of an undertaking or a business within the meaning of the Directive regardless of the fact that they are not part of the actual production activity of the undertaking in question? As the Commission rightly observes, the answer to that question is already contained in essence in the Court's judgment in *Botzen*: the crucial criterion is not the 'usual' character of the activity of the part of the business

6 — Judgments in *Redmond Stichting*, paragraph 24, and in *Spijkers* v *Benedik*, paragraph 13; cf. also *Bork International* v *Foreningen af Arbejdsledere i Danmark*, paragraph 15.

7 — The Court followed the same reasoning, moreover, in *Redmond Stichting*, paragraph 29.

8 — See my Opinion in that case, in particular at sections 6 to 12.

9 — Judgments in *Spijkers* v *Benedik*, paragraph 14, and in *Redmond Stichting*, paragraph 29.

concerned, but the link existing between the employees and the part of the undertaking transferred. [10] In other words, the national court may merely find that the employees concerned were assigned, that is to say, that they actually formed part of the organizational framework of the undertaking or business transferred. Moreover, the Court confirmed in the judgment in *Redmond Stichting* that, even if some activities of an undertaking constituting an independent function — in this case Philips's production activity — are not transferred, the provisions of the Directive may still be applicable; those provisions were

'laid down not only for transfers of undertakings, but also for transfers of businesses or parts of businesses, with which activities of a specific nature may be equated'. [11]

No more, in my estimation, can there be any doubt in this regard: the catering activity transferred can be described without any difficulty as an activity of a specific nature constituting an identifiable organizational entity within Philips to which Mrs Watson Rask and Mrs Christensen were assigned as employees.

The Directive and the alteration by the employer of the arrangements for the payment of wages

8. The national court's third question seeks to establish whether it is contrary to the Directive for the new employer to alter arrangements for the payment of wages, in particular the pay day and the way in which wages are made up — but not the total amount ultimately paid. Although the question refers solely to paragraph 2 of Article 3 of the Directive, it seems desirable to me to relate it also to paragraph 1 of that provision. It cannot be told from the documents in the case-file whether the advantages mentioned by the plaintiffs in the main proceedings are based on a collective agreement or on a legal or administrative provision. I shall therefore set out the relevant passages of Article 3 of the Directive:

'1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

...

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

...'

9. Before answering that question, it is worth recalling the purpose of those

10 — Judgment in Case 186/83 *Botzen* v *Rotterdamsche Droogdok Maatschappij* [1985] ECR 519, paragraph 15.

11 — Judgment in *Redmond Stichting*, paragraph 30.

provisions within the framework of the Directive. As the Court has repeatedly stated, the purpose of the Directive is

'to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer'. [12]

Paragraphs 1 and 2 of Article 3 have to be read in that light: they are intended to ensure the assumption, by the transferee, of the legal or administrative obligations of the transferor or the continued observance of the terms of conditions of employment agreed in a collective agreement in force at the date of the transfer. [13]

In contrast, the Directive only effects partial harmonization of the social protection of employees in the event of a transfer of an undertaking. As the Court held in the *Danmols Inventar* and *Daddy's Dance Hall* cases, the Directive essentially aims at

'extending the protection guaranteed to workers independently by the laws of the individual Member States to cover the case where an undertaking is transferred. It is not intended to establish a uniform level of protection throughout the Community on the basis of common criteria. Thus the directive can be relied on only to ensure that the employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the Member State concerned'. [14]

10. It follows from the foregoing that, in replying to the third question, the Court can do no more than refer to the national law of the Sø-og Handelsretten i København: it is for that court to consult the system of social protection elaborated by the national rules — set out, not only in legislative and administrative provisions, but also in collective agreements and other provisions of general scope. In so far as national law allows the employer unilaterally to alter the time of payment and/or the composition of wages (while leaving the total amount unaffected) in situations other than the transfer of an undertaking, Community law does not automatically preclude such alterations merely because the undertaking or part of it has been transferred in the meantime. In other words, under the Directive, the employment relationship may be altered unilaterally by the employer with regard to the transferee to the same extent as it could have been with regard to the transferor, provided that the transfer of the undertaking itself may never constitute the reason for that amendment. [15]

12 — Judgment in *Ny Molle Kro*, paragraph 25; cf. the judgments in Case 19/83 *Wendelboe* [1985] ECR 457, paragraph 15, and in Case 105/84 *Danmols Inventar* [1985] ECR 2639, paragraphs 15 and 26.

13 — Cf., as regards Article 3(2), the judgment in *Ny Molle Kro*, paragraph 26.

14 — Judgment in Case 324/86 *Foreningen af Arbejdsledere i Danmark* v *Daddy's Dance Hall* [1988] ECR 739, paragraph 16; judgment in *Danmols Inventar*, paragraph 26.

15 — Cf. the judgment in *Daddy's Dance Hall*, paragraph 17.

Conclusion

11. In view of the foregoing, I propose that the Court should answer the national court's questions in the following terms:

(1) Council Directive 77/187/EEC of 14 February 1977 is applicable where an undertaking concludes an agreement with another undertaking with a view to the latter's running its works canteens and taking over the permanent staff of that part of its undertaking, in so far as the part of the undertaking transferred retains its identity. It is for the national court to find whether its identity has been retained, regard being had to all the factual circumstances characterizing the transaction in question.

(2) In order for Directive 77/187/EEC to be applicable, it is not necessary that the part of the undertaking transferred should be involved in the undertaking's production activities. It is sufficient that the part of the undertaking is identifiable as an organizational entity and carries out activities, even of a specific nature, to which the employees concerned are assigned.

(3) Directive 77/187/EEC does not preclude the new employer's altering unilaterally the time of payment and/or the composition of wages, while leaving the total amount unchanged, provided that national provisions allow an employer to make such changes in situations other than the transfer of an undertaking.