OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 9 December 1987 *

Mr President,
Members of the Court,

1. The two questions concerning the interpretation 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] which have been referred to this Court by the Danish Supreme Court may lead this Court to give a ruling regarding two points not expressly covered by the directive. In the first question, which relates to Article 1 (1), the national court seeks to ascertain the scope of the directive; more specifically, it asks whether it is applicable when an undertaking has been transferred, in certain circumstances, in two consecutive stages. In the second question, which does not refer to any specific provision, this Court is asked to state to what extent an employee may waive a right conferred on him by the directive.

2. The facts of the case in which these questions were raised are stated in the Report for the Hearing, and I need not reiterate them here. However, in dealing with the first question it must be recalled that Mr Tellerup was engaged by Daddy's Dance Hall as the manager of a restaurant which initially had been leased by the owner, Palads Teatret, to Irma Catering. After the first lease was terminated the new lessee re-employed the first lessee's staff, including Mr Tellerup. Those employees, who had been dismissed by Irma Catering with the statutory period of notice, continued to work for Irma Catering throughout that period.

3. The question whether the directive is applicable arises because the lease between the owner and the first lessee was not transferable. That is to say, there was no direct transfer or legal connection between Irma Catering and Daddy's Dance Hall. The operation was triangular: Irma Catering was obliged to give up the lease, and a new contract was therefore concluded between Palads Teatret and Daddy's Dance Hall. It must be pointed out, however, that after terminating its contract Irma Catering continued to run the restaurant until the lease in favour of Daddy's Dance Hall took effect.

4. The United Kingdom and the Commission, which were the only parties to submit observations in this case, argue, although for somewhat different reasons, that the directive is applicable in a case such as this. In the view of the United Kingdom the situation should be analysed in terms of a double transfer, albeit a notional one: the first from the lessee to the owner, the second from the owner to the new lessee. However, the United Kingdom stresses that such a solution is only justifiable when the operation of the leased business has not been interrupted. For its part, the

* Translated from the French.

1 — Official Journal 1977, L 61, p. 26.

Commission relies on the Court's case-law, in particular the judgment in *Spijkers*,[2] in which the Court declared that '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'.[3]

The Commission is concerned by the fact that a different solution would allow the provisions of the directive to be evaded; it considers that where the undertaking's activities are continued without interruption the employees are in a situation identical to that resulting from a direct transfer.

5. I am happy to adopt the solution advocated by the United Kingdom and the Commission. Indeed, it is dictated by the scope and the spirit of the directive. As the Court held in *Spijkers*, [2], the directive

'is intended to ensure the continuity of employment relationships existing within a business, irrespective of any change of ownership'.

The purpose of the directive[4] is to guarantee stability of employment and to ensure that employees' rights are safeguarded in the event of transfers of undertakings. This objective explains the derogation from the rule that contracts are binding only on the parties to them. To limit the application of the directive solely to cases of direct transfer, disregarding the fact that the activities of the transferred undertaking were at no time interrupted, would have the effect of considerably reducing its scope and consequently its effectiveness.

6. The essence of the second question is whether, with regard to his new employer, an employee may waive rights conferred on him by the directive if the benefits which he derives from such an alteration of his employment relationship place him in a situation which, viewed as a whole, is not less favourable than his previous situation. The United Kingdom and the Commission consider that that question turns on the interpretation of the first subparagraph of Article 3 (1) of the directive. That provision states as follows:

'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'.

7. In the view of the United Kingdom such a possibility should be available to the employee provided that it existed with respect to his former employer. In the view of the Commission an employee may only waive rights conferred by provisions of the directive which are not mandatory, in other words those which are not a matter of public policy. Furthermore, the Commission maintains that such a waiver may never place the employee in a situation which is less favourable, viewed as a whole, than his previous situation.

8. As the Commission points out, the provisions of the directive, in particular the first subparagraph of Article 3 (1), are a matter of public policy. This means that a worker cannot waive the transfer of his rights against his former employer so as to bind his new employer. It does not mean, on the other hand, that the rights thereby safeguarded are all sacrosanct. On the latter

2 — Judgment of 18 March 1986 in Case 24/85 [1986] ECR 1119.

3 — Ibid., at paragraph 11.

4 — The adoption of this directive was provided for by the Council Resolution of 21 January 1974 concerning a social action programme (Official Journal 1974, C 13).

point reference must be made to national law to determine whether the employee may waive some of those rights and, if so, on what conditions. It is clear that pursuant to Article 7 of the directive a Member State may adopt provisions 'which are more favourable to employees'. It is with that in mind that it must be assessed whether the waiver of certain rights in return for new benefits granted by the employer places the employee 'in a less favourable situation' viewed as a whole. In other words the transfer of rights and obligations following the transfer is, pursuant to the first subparagraph of Article 3 (1) of the directive, neutral with regard to those rights and obligations. This neutrality also covers the possibility of amending the contract; as the United Kingdom points out, such amendments must be possible with regard to the new employer if they were possible with regard to his predecessor.

9. I therefore propose that the Court should rule as follows:

'(1) It follows from 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 that the directive is applicable where, upon the termination of a lease of an undertaking, the undertaking is transferred without any interruption in its activities to a new lessee who continues to employ the same staff;

(2) In his relations with his new employer an employee may not waive rights conferred by the directive which are a matter of public policy, in particular those flowing from the first subparagraph of Article 3 (1). It is for national law to determine whether and under what conditions it is possible to waive rights which are not a matter of public policy and in particular to what extent a general assessment of the employee's situation should be made.