JUDGMENT OF THE COURT
16 December 1992 *

In Joined Cases C-132/91, C-138/91 and C-139/91,

REFERENCES to the Court under Article 177 of the EEC Treaty by the Arbeitsgericht Bamberg (Case C-132/91) and the Arbeitsgericht Hamburg (Cases C-138/91 and C-139/91) for preliminary rulings in the proceedings pending before those courts between

Grigorios Katsikas

and

Angelos Konstantinidis,

between

Uwe Skreb

and

PCO Stauereibetrieb Paetz & Co. Nfl. GmbH,

and between

Günther Schroll

and

PCO Stauereibetrieb Paetz & Co. Nfl. GmbH,

on the interpretation of Article 3(1) and Article 7 of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member

* Language of the case: German.

States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26),

THE COURT,

composed of: O. Due, President, C. N. Kakouris, G. C. Rodríguez Iglesias and M. Zuleeg (Presidents of Chambers), R. Joliet, J. C. Moitinho de Almeida and F. Grévisse, Judges,

Advocate General: W. Van Gerven,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the plaintiffs in the main proceedings in Cases C-138/91 and C-139/91, by Klaus Bertelsmann, Rechtsanwalt, Hamburg,

— the German Government in Cases C-138/91 and C-139/91, by Ernst Röder, Ministerialrat in the Federal Ministry for Economic Affairs, acting as Agent,

— the German Government in Case C-132/91, by Ernst Röder and Joachim Karl, Regierungsdirektor in the Federal Ministry for Economic Affairs, acting as Agents,

— the Commission of the European Communities in all three cases, by Karen Banks and Bernd Langeheine, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument at the hearing on 7 October 1992 from the plaintiffs in the main proceedings, Uwe Skreb and Günther Schroll, PCO Stauereibetrieb Paetz & Co. Nfl. GmbH, represented by Manfred Confurius, Rechtsanwalt, Hamburg, and the Commission of the European Communities,

after hearing the Opinion of the Advocate General at the sitting on 10 November 1992,

gives the following

Judgment

1 By order of 7 May 1991, which was received at the Court on 22 May 1991, the Arbeitsgericht (Labour Court), Bamberg (Coburg Chamber), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions in Case C-132/91 on the interpretation of Article 3(1) and Article 7 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 (OJ 1977 L 61, p. 26, hereinafter 'the directive').

2 By orders of 4 April 1991, which were received at the Court on 27 May 1991, the Arbeitsgericht (Labour Court) Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two identically-worded questions (Joined Cases C-138/91 and C-139/91) on the interpretation of Article 7 of the directive.

3 The questions referred by the Arbeitsgericht Bamberg were raised in proceedings between Mr Katsikas and his former employer, Mr Konstantinidis, concerning the payment of various items of remuneration in respect of the period prior to his dismissal on 26 June 1990.

4 It appears from the case-file that Mr Katsikas was employed in a restaurant run by Mr Konstantinidis, which the latter sub-let to Mr Mitossis as from 2 April 1990. In the sub-lease, Mr Mitossis undertook *inter alia* to discharge Mr Konstantinidis

from any obligations arising out of the operation of the restaurant, in particular, those relating to the payment of wages and other items of remuneration.

5 Mr Katsikas refused to work for Mr Mitossis. He was therefore dismissed by Mr Konstantinidis on 26 June 1990.

6 In the Arbeitsgericht Bamberg, Mr Konstantinidis argued that he had ceased to be Mr Katsikas' employer on 2 April 1990, since he had transferred his undertaking to Mr Mitossis on that date. He contended that in those circumstances he could not be sued in the national court.

7 The Arbeitsgericht Bamberg accordingly decided to refer the following questions to the Court for a preliminary ruling:

'1. Is it possible under Article 3(1) of the Council Directive 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 (Directive 77/187/EEC) for an employee of the transferor at the date of transfer within the meaning of Article 1(1) of Directive 77/187/EEC to object to the transfer of rights and obligations from the transferor to the transferee, with the result that the transferor's rights and obligations are *not* transferred to the transferee?

2. If Question I is answered in the negative:

Is a right of objection as referred to above, which is provided for under the national law of a Member State, a more favourable rule for employees within the meaning of Article 7 of Directive 77/187/EEC?

3. If Question 2 is answered in the affirmative:

Is Article 7 of Directive 77/187/EEC to be interpreted as meaning that it must refer to *express* provisions of laws, regulations or administrative measures (which are more favourable to employees)?

4. If Question 3 is answered in the negative:

Is Article 7 of Directive 77/187/EEC to be interpreted as meaning that the courts and tribunals in the Member States may, in interpreting national laws, regulations or administrative provisions, create "rules" within the meaning of Article 7 of Directive 77/187/EEC?'

8 The questions referred by the Arbeitsgericht Hamburg were raised in proceedings between Mr Skreb (Case 138/91) and Mr Schroll (C-139/91) and their employer, PCO Stauereibetrieb Paetz (hereinafter 'PCO'), concerning their dismissal.

9 Mr Skreb and Mr Schroll were dismissed by PCO after they refused to allow their employment relationship to be transferred to the Carl Tiedemann company along with its 'stevedoring department', to which they were chiefly assigned.

10 In the Arbeitsgericht Hamburg, the two employees argued *inter alia* that they were entitled under Paragraph 613a of the Bürgerliches Gesetzbuch (German Civil Code, hereinafter referred to as 'the BGB'), as interpreted in the case-law of the Bundesarbeitsgericht (Federal Labour Court), to object to the transfer of their employment relationship. For its part, PCO contended that such a right of objection was contrary to the provisions of the directive, which provided for the automatic transfer of the employment relationship to the new employer.

11 The Arbeitsgericht Hamburg observed that, according to the consistent case-law of the Bundesarbeitsgericht on Paragraph 613a of the BGB, 'where a part of a business is transferred by means of a legal transaction to another owner, objection by one of the employees working in that part of the business prevents the transfer of the employment relationship to the transferee and the employment relationship with the transferor remains in existence'.

12 The Arbeitsgericht Hamburg went on to consider the compatibility of the Bundesarbeitsgericht's case-law with the provisions of the directive, in particular Article 7, which permits Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees.

13 Accordingly, the Arbeitsgericht Hamburg referred the following question to the Court in each case:

'Does the grant to an employee of a right of objection by which, in the event of a transfer of the business, he can prevent the transfer of his employment relationship to the transferee of the business, constitute a more favourable legal provision within the meaning of Article 7 of Council Directive 77/187/EEC?'

4 Reference is made to the Report for the Hearing for a fuller account of the facts of the cases before the national courts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

5 The questions raised by the Arbeitsgericht Hamburg and the Arbeitsgericht Bamberg essentially seek to establish whether Article 3(1) or Article 7 of the directive authorizes a national court to interpret a provision of national law as conferring on employees in the transferor's employ at the date on which the undertaking was transferred the right to object to the transfer of their contracts of employment or employment relationships to the transferee.

16 The questions raised by the Arbeitsgericht Bamberg enlarge upon and specify the various aspects of the question raised by the Arbeitsgericht Hamburg in Case C-138/91 and C-139/91. Consequently, the questions should be considered and answered together.

17 In fact, the questions raise two separate issues.

18 In the first place, the national courts ask whether Article 3(1) of the directive is to be interpreted as meaning that an employee in the transferor's employ at the date of a transfer within the meaning of Article 1(1) of the directive has no right to object to his contract of employment or employment relationship being transferred to the transferee.

19 Secondly, if the employee is not entitled to object to the transfer of his contract of employment or employment relationship under Article 3(1) of the directive, the national courts ask whether Article 7 of the directive is to be interpreted as meaning that a judicial interpretation of a provision of national law, according to which employees are entitled to object to the transfer of their contracts of employment or employment relationships to the transferee, is among the 'laws, regulations or administrative provisions which are more favourable to employees' mentioned in that article.

Article 3(1) of the directive

20 Article 3(1) of the directive provides 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.

Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.'

11 The Court has consistently held (see the judgment in Case 362/89 *D'Urso* [1991] ECR I-4105, paragraph 9) that the directive is intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the new employer on the same conditions as those agreed with the transferor. The rules applicable in the event of a transfer of an undertaking or a business to another employer are thus intended to safeguard, to the maximum possible extent in the interests of the employees, the existing employment relationships which form part of the economic entity transferred.

12 As the Arbeitsgericht Hamburg points out in the grounds of its orders, the Court held in the judgment in Joined Cases 144/87 and 145/87 (*Berg* v *Besselsen* [1988] ECR 2559, paragraph 14) that Article 3(1) of the directive must be interpreted as meaning that after the date of transfer and by virtue of the transfer alone, the transferor is discharged from all obligations arising under the contract of employment or the employment relationship, even if the workers employed in the undertaking did not consent or if they object, subject however to the power of the Member States to provide for joint liability of the transferor and the transferee after the date of the transfer.

13 In that case, the Court was asked by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) whether it was necessary for the workers concerned to consent in order for the transferor to be discharged from his obligations under a contract of employment or an employment relationship to which he was a party before the transfer, when that contract or relationship is transferred to the new employer.

Consequently, unlike the question raised by the German courts in this case, that question related only to a situation in which an employee objects to the transfer of the obligations which the transferor had previously assumed in regard to him under a contract of employment or an employment relationship, but does not object to the transfer of his contract of employment or employment relationship.

25 The Commission pointed out in its observations on Case C-132/92 that the Court held in Case 324/86 *(Foreningen af Arbejdsledere i Danmark* v *Daddy's Dance Hall* [1988] ECR 739, paragraph 15) that the protection provided by the directive was independent of the will of the parties to the contract of employment.

26 In that case, the Court was asked by the Højesteret (Supreme Court of Denmark) whether an employee might agree to an amendment of his employment relationship with his new employer, even if the disadvantages of that amendment for him were offset by benefits of such a kind that, taking the matter as a whole, he was not placed in a worse position.

27 Consequently, that judgment as well was concerned with a situation different from the one at issue here, namely one in which the employee does not object to the transfer of his contract of employment or employment relationship and agrees to amendments of the contract or relationship binding him to his new employer.

28 In order to answer the Højesteret's question, the Court observed in paragraphs 14 and 15 of the judgment in *Foreningen af Arbejdsledere i Danmark* v *Daddy's Dance Hall* that since the protection which the directive sought to afford employees was a matter of public policy and therefore independent of the will of the parties to the contract of employment, the rules of the directive were to be considered to be mandatory, so that it was not possible to derogate from them in a manner unfavourable to employees. It followed that the employees concerned were not entitled to waive the rights conferred on them by the directive and that those rights could not be restricted even with their consent.

29 Consequently, it was not the Court's intention to hold in those two judgments that Article 3(1) of the directive had to be interpreted as meaning that an employee was not entitled to object to the transfer of his contract of employment or employment relationship.

30 On the contrary, in paragraph 16 of its judgment in Case 105/84 (*Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar* [1985] ECR 2639), the Court held that the protection which the directive is intended to guarantee is redundant where the person concerned decides of his own accord not to continue the employment relationship with the new employer after the transfer. In that situation Article 3(1) of the directive does not apply.

31 Whilst the directive, which effects only partial harmonization in the area in question (see the judgment in *Foreningen af Arbejdsledere i Danmark* v *Daddy's Dance Hall*, cited above, paragraph 16), allows the employee to remain in the employ of his new employer on the same conditions as were agreed with the transferor, it cannot be interpreted as obliging the employee to continue his employment relationship with the transferee.

32 Such an obligation would jeopardize the fundamental rights of the employee, who must be free to choose his employer and cannot be obliged to work for an employer whom he has not freely chosen.

33 It follows that Article 3(1) of 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 him by the directive.

34 However, as the Court has held (judgment in *Berg* v *Besselsen*, cited above, paragraph 12), the purpose of the directive is not to ensure that the contract of employment or employment relationship with the transferor is continued where the undertaking's employees do not wish to remain in the transferee's employ.

35 It follows that, in the event of the employee deciding of his own accord not to continue with the contract of employment or employment relationship with the transferee, the directive does not require the Member States to provide that the contract or relationship is to be maintained with the transferor. In such a case, it is for the Member States to determine what the fate of the contract of employment or employment relationship should be.

36 The Member States may, in particular, provide that in such a case the contract of employment or employment relationship must be regarded as terminated either by the employee or by the employer. They may also provide that the contract or relationship should be maintained with the transferor.

37 The answer to be given to the part of the questions referred to the Court by the Arbeitsgericht Bamberg and the Arbeitsgericht Hamburg on Article 3(1) of the directive must therefore be that Article 3(1) is to be interpreted as not precluding an employee of the transferor on the date of the transfer of the undertaking, within the meaning of Article 1(1) of the directive, from objecting to the transfer of his contract of employment or employment relationship to the transferee. The directive does not, however, require Member States to provide that, in the event of the employee deciding of his own accord not to continue with the contract of employment or employment relationship with the transferee, the contract or relationship should be maintained with the transferor. Neither does the directive preclude this. In such a case, it is for the Member States to determine what the fate of the contract of employment or employment relationship with the transferor should be.

Article 7 of the directive

38 The questions referred by the Arbeitsgericht Bamberg and the Arbeitsgericht Hamburg seek, on the one hand, to establish whether the words 'laws, regulations or administrative provisions' in Article 7 of the directive also cover an interpretation of national laws, regulations or administrative provisions given by the national courts and, on the other, whether such an interpretation conferring on employees a right to object to the transfer of their contracts of employment or employment relationships constitutes a provision which is 'more favourable to employees' within the meaning of Article 7 of the directive.

39 So far as the first point is concerned, it should be borne in mind that, as the Court has consistently held (see the judgment in Case C-347/89 *Eurim-Pharm* [1991] ECR I-1747, paragraph 15), the scope of national laws, regulations or

administrative provisions has to be assessed having regard to the interpretation given to them by the national courts.

40 It follows that the expression 'laws, regulations or administrative provisions' within the meaning of Article 7 of the directive must be understood as meaning the laws, regulations or administrative provisions of a Member State as they are interpreted by the courts of that State.

41 So far as the second point is concerned, suffice it to note, first, that the Arbeitsgericht Bamberg expressly stated that it asked the question concerning that point only in the event of the Court's ruling that Article 3(1) of the directive prohibited an employee from objecting to the transfer of his contract of employment or employment relationship to the transferee and, secondly, that it appears from the grounds of the orders for reference from the Arbeitsgericht Hamburg that it sought a ruling from the Court only because it considered that Article 3(1) of the directive precluded the employee's right to object.

42 Since the Court has ruled in paragraph 37 of this judgment that Article 3(1) of the directive does not preclude an employee of the transferor from objecting to the transfer of his contract of employment or employment relationship to the transferee, there is no need to answer the question concerning the scope of the expression '... provisions ... more favourable to employees' in Article 7 of the directive.

Costs

43 The costs incurred by the German Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national courts, the decision on costs is a matter for those courts.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Arbeitsgericht Bamberg, by order of 7 May 1991, and by the Arbeitsgericht Hamburg, by orders of 4 April 1991, hereby rules:

1. **Article 3(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 is to be interpreted as not precluding an employee of the transferor on the date of the transfer of the undertaking, within the meaning of Article 1(1) of the directive, from objecting to the transfer of his contract of employment or employment relationship to the transferee. The directive does not, however, require Member States to provide that, in the event of the employee deciding of his own accord not to continue with the contract of employment or employment relationship with the transferee, the contract or relationship should be maintained with the transferor. Neither does the directive preclude this. In such a case, it is for the Member States to determine what the fate of the contract of employment or employment relationship with the transferor should be.**

2. **The expression 'laws, regulations or administrative provisions' within the meaning of Article 7 of the directive must be understood as meaning the laws, regulations or administrative provisions of a Member State as they are interpreted by the courts of that State.**

Due Kakouris Rodríguez Iglesias

Zuleeg Joliet Moitinho de Almeida Grévisse

Delivered in open court in Luxembourg on 16 December 1992.

J.-G. Giraud O. Due

Registrar President