1. Article 3(1) of Directive 77/187 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings 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 Council Directive 77/187 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings 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.

REPORT FOR THE HEARING
In Joined Cases C-132/91, C-138/91 and C-139/91 *

I — Facts and procedure

1. *The applicable Community legislation*

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) seeks 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 to the directive).

According to Article 1(1), the directive is applicable to 'the transfer of an undertaking, business or part of a business to another

* Language of the case: German.

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) guarantees that the transferee will maintain the conditions of employment agreed by collective agreement to the same extent as they were laid down by such agreement for the transferor.

The directive further provides in Article 4(1) that the transfer of an undertaking shall not in itself constitute grounds for dismissal by the transferor or the transferee, without prejudice, however, to any dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce.

Article 7 makes it clear that the directive 'shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees'.

2. *The national legislation applicable to the main proceedings*

According to Paragraph 613a of the German Civil Code (Bürgerliches Gesetzbuch — BGB) on the transfer of undertakings in the version laid down by the Law of 13 August 1980 adapting labour law to the European Community (BGBl. I, p. 1308):

'Where an undertaking or a part of an undertaking is transferred by means of a legal transaction to another owner, the latter shall take over the rights and obligations arising under the contracts of employment existing at the time of the transfer. If those rights and obligations are governed by the legal rules laid down in a collective agreement or by an agreement applicable to a single undertaking, they shall become the substance of the employment relationship between the new employer and the employee, and may not be varied to the detriment of the employee for one year following the date of the transfer. The second sentence shall not be applicable if the rights and obligations of the new owner are governed by the legal rules of another collective agreement or of an agreement applicable to a single undertaking. Before the expiry of the period referred to in the second sentence, the rights and obligations may be varied if the collective agreement or agreement applicable to a single undertaking is no longer applicable or in the absence of a reciprocal obligation to comply with a collective agreement within the scope of another collective agreement which has been agreed will apply between the new owner and the employee ...'.

It appears from the orders of the Arbeitsgericht Hamburg (Cases C-138/91 and C-139/91) that, according to the consistent case-law of the Bundesarbeitsgericht:

'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 (see principally BAG AP No 1 on Article 613a of the BGB and, most recently, BAG AP No 55 on Article 613a of the BGB).'

3. *The facts*

— In Case C-132/91

According to the case-file, Mr Katsikas, the plaintiff in the main proceedings, was employed as a cook in a restaurant run by Mr Konstantinidis, the defendant in the main proceedings, at Lichtenfels.

By a contract, Mr Konstantinidis entrusted Mr Mitossis to manage the business as from 2 April 1990. In the agreement concluded between Mr Konstantinidis and Mr Mitossis, the latter undertook to discharge Mr Konstantinidis from all obligations arising in connection with the operation of the restaurant as from 2 April 1990 and, in particular, from obligations to pay wages and salaries.

Mr Katsikas, who had asked to be employed in another restaurant run by Mr Konstantinidis, was dismissed by the latter on 26 June 1990. Mr Konstantinidis claims to have acted on behalf of Mr Mitossis on that occasion.

Mr Katsikas brought an action in the Arbeitsgericht (Labour Court) Bamberg (Coburg Chamber) for the payment of remuneration to which he considered he was entitled for the period prior to his dismissal and for the period of notice which he should have been given.

In his defence, Mr Konstantinidis claims that he was not the employer of the plaintiff in the main proceedings at the date of his dismissal, since he had transferred his business to Mr Mitossis.

In those circumstances, the Arbeitsgericht Bamberg (Coburg Chamber) requested the Court to give a preliminary ruling on the following questions:

'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 1 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?'

— In Cases C-138/91 and C-139/91

Mr Skreb and Mr Schroll are employees of PCO Stauereibetrieb Paetz & Co. Nfl. GmbH (hereinafter 'PCO'), where they worked as dockers, stack-drivers and heavy stack-drivers predominantly in the 'stevedoring department'.

On 1 October 1990, PCO transferred the 'stevedoring department' of its business to Carl Tiedemann GmbH&Co. (hereinafter 'Tiedemann').

Mr Skreb and Mr Schroll, along with other employees, objected pursuant to Paragraph 613a of the BGB to the transfer of their employment relationships to Tiedemann.

By letter dated 8 October 1990, PCO terminated Mr Skreb's and Mr Schroll's contracts of employment.

Mr Skreb and Mr Schroll brought an action in the Arbeitsgericht (Labour Court) Hamburg for a declaration that their dismissal was not socially justified on the grounds (*inter alia*) that there were sufficient employment possibilities within the business and there were vacancies.

In its defence, PCO argued that the provisions of Directive 77/187, cited above, precluded an employee from objecting to the transfer of his employment relationship upon the transfer of a business.

The Arbeitsgericht Hamburg considered, on the one hand, whether the right of objection conferred on employees by the case-law of the Bundesarbeitsgericht was compatible with the provisions of Article 3(1) of the directive, as interpreted by the Court of Justice in the judgment in Joined Cases 144/87 and 145/87 *Berg* v *Besselsen* [1988] ECR 2559, and, on the other hand, whether under Article 7 of the directive the national legal system was entitled to confer on employees a right of objection in the event of a transfer of a business and to cause the employment relationship between the employees and the transferor to continue to exist.

In each of those cases, therefore, it referred the following question to the Court:

'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. *Procedure before the Court*

The order of the Arbeitsgericht Bamberg of 7 May 1991 was received at the Court Registry on 22 May 1991. The orders of the Arbeitsgericht Hamburg of 4 April 1991 were received at the Court Registry on 27 May 1991.

Cases C-138/91 and C-139/91 were joined by order of the Court of 19 June 1991. Cases C-138/91 and C-139/91 were joined to Case C-132/91 by order of the President of the Court of 3 October 1991.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, observations were lodged:

— in the three cases, by the German Government, represented by Ernst Röder, Ministerialrat in the Federal Ministry for Economic Affairs, in Cases C-138/91 and C-139/91, by Ernst Röder, Ministerialrat in the Ministry for Economic Affairs, and in Case C-132/91 by Ernst Röder and Joachim Karl, Regierungsdirektor in the Federal Ministry for Economic Affairs, acting as Agents, and by the Commission of the European Communities represented by Karen Banks and Bernd Langeheine, of its Legal Service, acting as Agents;

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

In its observations, the German Government requested that the case be decided in plenary session pursuant to Article 95(2) of the Rules of Procedure.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court ordered the oral procedure to be opened without any preparatory inquiry.

II — Summary of the written observations submitted to the Court

A — *The first question raised by the Arbeitsgericht Bamberg*

1. The *German Government* suggests that this question should be answered in the affirmative. It argues in the first place that Article 3(1) of the directive provides for the maintenance of contracts of employment existing at the date of transfer with the new employer in accordance with the aim of the directive, which is to guarantee the maintenance of employees' rights in the event of a transfer of an undertaking. Secondly, it argues that the Member States are entitled to deal with that principle either by providing in the national legal system for joint and several liability on the part of the transferor and the transferee for obligations arising under the contract of employment (Article 3(1) of the directive) or by introducing into their legal systems provisions which are more favourable to employees (Article 7 of the directive), such as the employee's right to object to the transfer of his contract of employment.

2. The *Commission* suggests that the question should be answered in the negative.

In its view, it follows from the Court's case-law, in particular the judgments in Case 324/86 *Foreningen af Arbejdsledere i Danmark* v *Daddy's Dance Hall* [1988] ECR 739, paragraphs 14 and 15, in *Berg* v *Besselsen*, cited above, paragraph 11, and in Case 362/89 *D'Urso* [1991] ECR I-4105 that the transfer of the transferor's obligations is independent of the will of the parties to the contract of employment and therefore an employee cannot prevent such a transfer.

B — *The second question of the Arbeitsgericht Bamberg and the questions raised by the Arbeitsgericht Hamburg*

1. The *German Government* proposes that these questions should be answered in the affirmative. It relies on the following arguments:

— Paragraph 613a of the BGB, as interpreted by the Bundesarbeitsgericht, constitutes a provision which is more favourable to employees within the meaning of Article 7 of the directive. According to the consistent case-law of the Bundesarbeitsgericht, Paragraph 613a of the BGB authorizes an employee to object to the transfer to the transferee of his contract of employment and to maintain his employment relationship with the transferor.

That provision guarantees the rights provided for by the directive, but also afford the employee the possibility of choosing between the former and the new employer.

The favourable character of the provision is particularly clear-cut where only one part of the undertaking (business or part of a business) is transferred: the employee then has the right to be employed in an untransferred part of the undertaking if a job is available. According to the German Government, the employee may also have an interest in maintaining his relationship with his former employer even if all the undertaking is transferred, in particular on retirement (solvency of the employer where the employer holds rights acquired by the employee; refusal to change employer before giving up work) or where the contract of employment embodies a clause in restraint of competition.

— The employee's right to maintain the existing employment relationship corresponds to the general principle of German law according to which the transfer of a contractual right necessitates the consent of all the parties; Article 7 of the directive enables that principle to be respected.

— The employee's right of objection also takes account of the principles of personal freedom and free choice of occupation enshrined in the German Basic Law and in the Court's case-law (see the judgment in Case 4/73 *Nold* v *Commission* [1974] ECR 491). The right also flows from the prohibition of forced or compulsory labour set out in Article 4(2) of European Convention on Human Rights.

— The right of objection does not constitute a waiver of rights provided for in the directive, but an alternative way of protecting the employment relationship. It is

not contrary to the principles set out by the Court in the judgment in *Daddy's Dance Hall*, cited above.

— If a right to elect is regarded as being favourable within the meaning of the directive, it must be allowed that the right of election may relate to continuing the employment relationship with the transferor.

2. The Commission also proposes that the questions should be answered in the affirmative.

It observes that whilst the availability of an extra option may be regarded as being more favourable to employees, assuming that they will be make the best use of that possibility, it may also be considered that that possibility exposes employees to the risk of being dismissed, contrary to the aim of the directive, which is to preserve the employment relationship.

In the Commission's view, however, it appears from the judgment in Case 105/84 *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar* [1985] ECR 2639, paragraph 16, that the aim of the directive does not prevent an employee from deciding of his own accord not to work for the transferee and from thereby waiving the protection afforded him. Paragraph 12 of the judgment in *D'Urso* [1991], cited above, according to which, in the event of a transfer of a business, the employment relationship with the transferor cannot be maintained, should be read in the light of the judgment in *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar*.

According to the Commission, neither the judgment in *Berg* v *Besselsen*, cited above and mentioned by the Arbeitsgericht Hamburg in its orders for reference, nor the judgment in *Daddy's Dance Hall*, cited above, call that solution in question. *Berg* v *Besselsen* was concerned with the question as to whether the transfer of the rights depended on the employee's consent, and *Daddy's Dance Hall* with the employee's power to waive certain rights only.

The Commission argues that it might be considered that the employee's right of objection is 'more favourable' within the meaning of Article 7 of the directive if, in every case, it makes for an improvement in the employee's legal situation as compared with the aims of the directive (maintenance of the existing employment relationship and protection against dismissal). Four conditions at least should be met:

(1) the risk of dismissal run by the employee should be equivalent with the transferor and the transferee;

(2) the transferor should be required to maintain his employment relationship with the employee;

(3) the employment relationship should be maintained under the conditions existing at the time of the transfer;

(4) the transferor should not be able to dismiss the employee merely on account of the transfer.

The Commission argues that the first condition is particularly awkward to assess and that, as a result, the system is impractical.

Moreover, such an approach, which the Commission describes as 'paternalistic', would conflict with the principle that an employee cannot be compelled to remain in the employ of an employer. The Commission points out that that principle is enshrined in the case-law of the Bundesarbeitsgericht, under which no employee can have general or individual protection of his acquired rights imposed upon him.

The Commission also argues that presumably the employee will not exercise his right of objection if there are serious risks of his being dismissed by the transferor, and that presumably even if he were dismissed, he would not be in a more unfavourable situation than an employee who decided to terminate his contract of employment with the transferor or the transferee (judgment in *Danmols Inventar*, cited above).

It considers that at the most the right of objection could be confined to cases where the transferor has at least one other business capable of taking on the employee, but, as the Bundesarbeitsgericht held in its judgment of 6 February 1980, the employee may have an interest in maintaining relations with the transferor even if the business transferred is its only business, in particular where the employee is about to retire or has to comply with clauses in restraint of competition.

The Commission therefore takes the view that there is nothing to prevent a right of objection provided for by national law being regarded as a 'more favourable provision' within the meaning of Article 7 of the directive.

3. Mr Skreb and Mr Schroll also consider that the questions referred by the Arbeitsgericht Hamburg should be answered in the affirmative. They therefore propose that the answer should be as follows:

'The grant to employees of a right of objection whereby employees can preclude the transfer of the employment relationship to the transferee in the event of a transfer of a business constitutes a more favourable law or regulation within the meaning of Article 7 of Directive 77/187/EEC'.

The plaintiffs in the main proceedings indicate *in limine* that, in a very detailed judgment of 14 February 1991 (Case 25b Ca 358/90), the Arbeitsgericht Hamburg held that the right of objection under German law constituted a provision which was more favourable to employees within the meaning of Article 7 of the directive, and upheld an application brought by one of PCO's employees against his dismissal following his objection to the transfer of his employment relationship to Tiedemann.

According to Mr Skreb and Mr Schroll, Article 3 of the directive grants employees no right to object to the transfer of a business, as the Court held in the judgment in *Berg* v *Besselsen*, cited above.

The plaintiffs in the main proceedings go on to submit that the provisions of Paragraph 613a of the BGB, as interpreted by the Bundesarbeitsgericht, are provisions which are more favourable to employees within the meaning of Article 7 of the directive.

They argue that, according to well-established case-law of the Bundesarbeitsgericht antedating the introduction of the provisions of Paragraph 613a into the BGB (Law of 15 January 1972 on the organization of businesses — 'Betriebsverfassungsgesetz' — Paragraph 122) and since confirmed (in particular following the amendment of Article 613a by the Law of 21 August 1980 on equal treatment of men and women at the workplace and on the maintenance of rights in the event of transfers of businesses, 'Gesetz über die Gleichbehandlung von Männer und Frauen am Arbeitsplatz und über die Erhaltung von Ansprüchen bei Betriebsübergang', adopted to implement Directive 77/187), the employment relationship, and not merely the various rights and obligations, cannot be transferred to another employer without the employee's consent. They point out that all the chambers of the Bundesarbeitsgericht have consistently justified the right of objection thereby conferred on employees on the grounds of the fundamental principles of German law, in particular the freedom to exercise the occupation of one's choice guaranteed by Article 12 of the Basic Law.

In their view, that interpretation, which is not at issue in this case, constitutes a 'law, regulation or administrative provision which is more favourable to employees' within the meaning of Article 7 of the Directive.

In the first place, they argue that any enlargement of decision-taking possibilities is more favourable to employees than a total lack of choice.

According to the plaintiffs in the main proceedings, the right of objection allows, as far as possible, the employee to continue to be employed by the same employer on similar or identical conditions. They point out that in practice the right of objection plays an important role where employment openings exist in parts of the business which have not been transferred, where the employee considers that the new employer may no longer discharge its obligations in the short term, and that he is liable to lose his job if it is transferred, or where the transfer is designed simply to separate out unviable units which are fated to become insolvent, in order to economize on the cost of a redundancy plan.

Secondly, Mr Schroll and Mr Skreb argue that the right of objection is not contrary to the provisions of Article 3 of the directive, the purpose of which is to prevent employees from losing their jobs or from being employed on more unfavourable terms as a result of a transfer of an undertaking. They point out that the applicable provisions of German law preserve for the employee the guarantee provided for by Article 3 of the directive, whilst affording him the additional possibility of choosing on his accord to remain with his former employer. In their view, those provisions do not cause the employee to forfeit any individual or general rights; on the contrary, they increase the range of his legal possibilities.

Thirdly, they argue that the right of objection is consistent with the aims of the directive, of which the Court held in *Berg* v *Besselsen*, cited above, 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', but that 'its purpose is not to ensure that the contract of employment or the employment relationship with the transferor is continued where the undertaking's employees do not wish to remain in the transferee's employ'. In their view, that is precisely the aim of German law in giving employees the right to object to the transfer of their employment relationships to the transferee, as described in academic writings.

Fourthly, they maintain that the provisions of Article 3(1) of the directive are mandatory only for employers, not for employees, who are entitled to prefer other options provided for under national law where those options are more favourable to their interests.

Fifthly, the plaintiffs in the main proceedings point out that, in its judgment of 6 February 1980 (AP No 21 under Paragraph 613a of the BGB, at paragraph II(2)(a)), the Bundesarbeitsgericht held as follows:

'It is not, however, necessary to reach a definitive decision on the tenor of Article 3(1) of Directive 77/187/EEC. Article 7 of the directive leaves the Member States of the European Community free to apply or introduce provisions which are more favourable to employees. The grant to employees by German law of a right of objection constitutes a more favourable provision for employees and, if only on that ground, it is not contrary to Community law.'

Lastly, Mr Skreb and Mr Schroll argue that a judicial interpretation of a provision constitutes a 'law, regulation or administrative provision' within the meaning of Article 7 of the directive. They assert in that regard that it is generally acknowledged that the approximation of national legislation provided for in Article 100 of the EEC Treaty covers all legal rules of the Member States, that is to say, both black-letter law and unwritten law and laws in the substantive sense of the word. A directive may be transposed into domestic law by a law or by judge-made law. In their opinion, the right of objection conferred on German employees is not a creation purely of the judges, since the case-law of the Bundesarbeitsgericht is based on the interpretation of pre-existing provisions (Paragraph 415 and Paragraph 612(1) of the BGB and Article 12 of the Basic Law). Even if it were purely a creation of the courts, it should still be regarded as a 'provision' within the meaning of Article 7 of the directive, as the Arbeitsgericht Hamburg held in its judgment of 14 February 1991 (Case 25b Ca 358/90, cited above).

C — *The third and fourth questions of the Arbeitsgericht Bamberg*

— The *Commission* discusses these questions together and suggests that the answer should be that the principles evolved by the courts of a Member State fall within the class of 'laws, regulations and administrative provisions which are more favourable to employees' within the meaning of Article 7 of the directive.

It observes that the questions referred to the Court do not call in question the transposition into German law of the rules set out in the directive, but the exercise by a Member State of an option afforded it by the directive.

The Commission considers that the legal principles resulting from well-established case-law of a court from which no appeal lies may perfectly well constitute 'provisions which are more favourable to employees' within the meaning of Article 7 of the directive.

— The *German Government* proposes a separate answer to each of the two questions.

It suggests that the third question should be answered in the negative. On the one hand, the wording of Article 7 does not impose a restrictive interpretation. On the other, such an interpretation would be contrary to the very spirit of the provision.

It proposes that the fourth question should be answered in the affirmative.

In its view, the judicial interpretation is part and parcel of the provision concerned and, from the legal point of view, there is no need to draw any distinction depending on whether the 'favourable' nature of a provision stems from its wording or from its interpretation by the courts.

F. Grévisse
Judge-Rapporteur