OPINION OF ADVOCATE GENERAL LENZ
delivered on 4 July 1996 *

A — Introduction

1. This case concerns a reference from the Tribunal du Travail de Bruxelles (Labour Court, Brussels) for a preliminary ruling on questions regarding the interpretation of Article 3 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] The questions arose in the context of a dispute between an employee (Mrs Claude Rotsart de Hertaing, the plaintiff) and her former employer.

2. The plaintiff had been employed by the company Housing Service SA since 1 March 1987. According to the Commission, Housing Service changed its name to J. Benoidt SA on 19 November 1993 and the company went into liquidation on that date. The activities of J. Benoidt SA, in liquidation, are being carried on by a newly formed company, IGC Housing Service SA, in the premises of J. Benoidt SA. The relevant agreement was concluded with effect from 1 December 1993.

3. On 23 November 1993, the plaintiff was given six months' notice of dismissal, to run from 1 December 1993. According to the Commission and the national court, that notice was given by Housing Service.

4. On 22 December 1993, the plaintiff was given notice of dismissal with immediate effect by the liquidator of J. Benoidt, in liquidation, on the ground of serious breach of contract. By letter of 8 January 1994, the plaintiff challenged that notice on both formal and substantive grounds, and finally brought an action against

1. J. Benoidt SA, in liquidation, and

2. IGC Housing Service SA

seeking an order requiring the defendants to pay *inter alia* compensation in lieu of notice, damages for wrongful dismissal, the 13th month's salary for 1993 and unpaid holiday bonus.

* Original language: German.

1 — OJ 1977 L 61, p. 26.

5. The plaintiff claimed that J. Benoidt, in liquidation, and IGC Housing Service constituted a single undertaking. In any case, she had been transferred from one undertaking to another in the circumstances envisaged in Collective Agreement No 32(a). Under that agreement, the transferor and the transferee were liable *in solidum* for sums due to employees. As a result of the legal transfer of the undertaking, Housing Service [2] had become her employer together with J. Benoidt, in liquidation.

6. IGC Housing Service contended that it had never been — and had never been under a duty to be — the plaintiff's employer, and that it had not dismissed her.

7. The national court considered that it was common ground that there had been a legal transfer of an undertaking within the meaning of Directive 77/187 and Collective Agreement No 32(a) in this case. It was also clear that the plaintiff's contract of employment had not been transferred to the transferee, as the transfer agreement made no provision for that transfer.

8. The national court considered that this raised the questions whether the transferee, IGC Housing Service, was under an obligation to employ the plaintiff and, if so, what penalties should be imposed for failure to comply with that obligation. The national court took the view that the answer to those questions depended on the interpretation of Article 3 of Directive 77/187, which reads as follows:

'(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.

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.

(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.

...'

2 — It appears from the plaintiff's submission that she probably meant the newly established company, IGC Housing Service.

9. Article 1(1) of the Directive, which is referred to, reads:

'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.'

10. Article 3 of Directive 77/187 is transposed into Belgian law in Article 7 of Collective Agreement No 32(a), which reads as follows:

'The transferor's rights and obligations arising from a contract of employment 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.'

11. In the case of the action against J. Benoidt, in liquidation, the national court held that it was admissible and well founded, albeit only in part.

12. In the case of the action against IGC Housing Service, in the light of the Court's ruling of 10 February 1988 that the protection afforded by Directive 77/187 is a matter of public policy and therefore independent of the will of the parties to the contract of employment, [3] the national court considered it necessary to refer to the Court for a preliminary ruling the following questions:

1. Is Article 3 of Directive 77/187 to be interpreted as meaning that all employment contracts existing on the date of the transfer and concerning staff employed in the undertaking transferred are, by virtue of the transfer, transferred from the transferor to the transferee without any option on the part of the transferor or the transferee?

2. If so,

— are the staff automatically transferred regardless of the refusal by the transferee to comply with his obligation?

— are the staff transferred on the date of the transfer, or may either the transferor or the transferee fix a later date?

3 — Case 324/86 *Tellerup* v *Daddy's Dance Hall* [1988] ECR 739.

B — Analysis

The first question

13. The national court considers that it is common ground that there was a legal transfer of an undertaking within the meaning of Directive 77/187 and Collective Agreement No 32(a) in the present case. The Court has consistently held that it is for the national court to make the necessary factual appraisal, in the light of the criteria for interpretation specified by the Court, in order to establish whether or not there is a transfer of an undertaking within the meaning of the Directive. [4] In its order for reference, the national court states the reasons that led it to conclude that there was a transfer of an undertaking within the meaning of the Directive: the existing economic unit was transferred with immediate effect to the transferee, which pursued the same activities as those carried on by the transferor; the subject-matter of the transfer was the assets of the estate agency, that is to say, in particular, the name, trade name, clientele, equipment, lease entitlement and all estate agent's contracts, together with the employment contracts of three employees which were transferred with effect from 1 January 1994.

14. The national court considers that the plaintiff's employment contract had clearly not been transferred, as the transfer agreement made no provision for such a transfer. It also points out that the transferee contends that it had never been the plaintiff's employer, whereas the transferor claims that it was the plaintiff's sole employer up to the date on which the contract was terminated.

15. The first question submitted by the national court seeks to ascertain whether the transferor and the transferee have such an option or whether, by virtue of the transfer, *all* employment contracts existing on that date are transferred.

16. The Commission concludes that, under Article 3(1) of Directive 77/187, all contracts of employment or employment relationships existing on the date of the transfer between the transferor and his employees are, solely by reason of the transfer, automatically transferred to the transferee, who thereby steps into the shoes of the transferor in respect of the rights and obligations arising from those employment relationships. The Commission's view is based on the case-law of the Court, in particular on the judgments in *Wendelboe*, [5] *Berg*, [6] *Daddy's Dance Hall*, [7] and *d'Urso*. [8]

17. The Commission's view must be accepted. In this connection I should like to

4 — Case 24/85 *Spijkers* v *Benedik* [1986] ECR 1119, paragraph 14; Case C-29/91 *Redmond Stichting* v *Hendrikus Bartol* [1992] ECR I-3189, paragraphs 23, 24 and 25.

5 — Case 19/83 *Wendelboe* v *L. J. Music* [1985] ECR 457.

6 — Joined Cases 144/87 and 145/87 *Berg* v *Besselsen* [1988] ECR 2559.

7 — Case 324/86 *Tellerup* v *Daddy's Dance Hall*, cited in footnote 3.

8 — Case C-362/89 *d'Urso and Others* [1991] ECR I-4105.

refer, first, to the judgment in *d'Urso*. That case concerned a transfer of an undertaking in which, pursuant to the contract of transfer and in accordance with the trade-union agreements to which that contract referred, only 940 out of a total of 1 458 employees were transferred to the service of the transferee. The Court was then called upon to consider whether Article 3(1) of the Directive is to be interpreted as meaning that all contracts of employment or employment relationships existing on the date of the transfer of an undertaking between the transferor and the employees of that undertaking are automatically transferred to the transferee by the mere fact of the transfer. The Court answered that question in the affirmative, on the basis of its own case-law. Thus it confirmed the view it had already expressed in *Berg*, [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, in the interests of the employees, the existing employment relationships which are part of the economic entity transferred.' [10]

18. The Court also refers to its judgment in *Daddy's Dance Hall*. [11] In that case, it held that the protection afforded by the Directive is a matter of public policy and therefore independent of the will of the parties to the contract of employment. In particular, the rules of the Directive concerning the protection of workers against dismissal by reason of the transfer must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees.

19. The Court consequently concluded, in its judgment in *d'Urso*, [12] that the implementation of the rights conferred on employees by the Directive may not be made subject to the consent of either the transferor or the transferee nor the consent of the employees' representatives or the employees themselves. It follows that the contract of employment may not be maintained with the transferor and is automatically continued with the transferee. However, as the Court had already ruled in *Danmols Inventar*, [13] the employee may decide of his own accord not to continue the employment relationship with the new employer after the transfer.

20. Whether or not an employment relationship still exists at the time of the transfer, and is consequently transferred to the transferee, must be assessed on the basis of national law, subject, however, to compliance with the mandatory provisions of the Directive concerning protection of employees from dismissal as a result of the transfer. Accordingly, the employees of the undertaking whose contract of employment or employment relationship was terminated with effect from

9 — Joined Cases 144/87 and 145/87 *Berg* v *Besselsen*, cited in footnote 6, paragraphs 12 and 13.

10 — Case C-362/89 *d'Urso and Others*, cited in footnote 8, paragraph 9.

11 — Case 324/86 *Tellerup* v *Daddy's Dance Hall*, cited in footnote 3, paragraph 14 et seq.

12 — Case C-362/89 *d'Urso and Others*, cited in footnote 8, paragraph 11.

13 — Case 105/84 *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar* [1985] ECR 2639, paragraph 16.

a date prior to that of the transfer, contrary to Article 4(1) of the Directive, must be regarded as still in the employ of the undertaking on the date of the transfer. [14]

21. The answer to the first question submitted by the national court should therefore be that Article 3 of Directive 77/187 is to be interpreted as meaning that *all* employment contracts existing on the date of the transfer and concerning staff employed in the undertaking transferred are, by virtue of the transfer, transferred from the transferor to the transferee without any option on the part of the transferor or the transferee.

The second question

22. The first part of this question seeks to ascertain whether, by refusing his consent, the transferee can prevent the automatic transfer of all employment contracts.

23. As already mentioned in the answer to the first question, the Court held in *d'Urso* that the implementation of the rights conferred by the Directive may not be made subject to the consent of either the transferor or the transferee. [15] That means that the transferee cannot prevent the transfer of employment contracts by refusing his consent.

24. If we consider the purpose of the Directive, which is to protect employees when a business is transferred, it becomes clear that the employment contracts must be transferred regardless of whether the transferee refuses his consent. If he could prevent them from being transferred by refusing his consent, the protection afforded by the Directive would have no practical effect.

25. This does not mean that it is impossible for the transferee to terminate employment contracts transferred by reason of the transfer of an undertaking. The Court has already pointed out in *d'Urso* that, although Article 4(1) of Directive 77/187 does state that the transfer is not in itself to constitute grounds for dismissal, dismissals may nevertheless still take place for economic, technical or organizational reasons entailing changes in the workforce. [16]

26. It follows from the foregoing considerations that the transferee may not refuse his consent to the transfer of the plaintiff's contract of employment.

14 — Case 101/87 *Bork International* v *Foreningen af Arbejdsledere i Danmark* [1988] ECR 3057, paragraphs 17 and 18.

15 — Case C-362/89 *d'Urso and Others*, cited in footnote 8, paragraph 11.

16 — Case C-362/89 *d'Urso and Others*, cited in footnote 8, paragraph 19.

27. That conclusion is also consistent with the case-law of the Court, according to which the employee cannot be obliged to work for the new employer. [17] The employee's position is different from that of the new employer when an undertaking is transferred. He was not a party to the transfer agreement and he cannot therefore — according to the Court — be obliged, against his will, to work for the new employer. '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.' [18]

28. Moreover, the purpose of the Directive is to protect the employee, not the employer. So, an employee who refuses to continue to work for the transferee of an undertaking is merely waiving the protection afforded to him by the Directive. However, if he agrees to the transfer of the employment contract, he too is bound to comply with the mandatory rules of the Directive. This means that, even with his consent, he cannot continue in that employment on terms other than those agreed with the transferor of the undertaking. [19]

29. The answer to the first part of the second question should therefore be that the staff are automatically transferred regardless of the refusal by the transferee to comply with his obligation. The Commission also takes this view.

30. The second part of the second question submitted by the national court is concerned with the date on which staff are transferred or, to be more precise, it seeks to ascertain whether either the transferor or the transferee may fix a date for the transfer of staff which is later than the date on which the undertaking is transferred.

31. The Commission considers that it follows implicitly from Article 3(1) of the Directive that a later date cannot be fixed for the transfer of staff. In its opinion, if the rights and obligations arising from the employment relationship are transferred to the transferee by reason of the transfer, then the transferee steps into the shoes of the transferor on that date.

32. This question too has already been decided by the Court in its judgment in *Berg*, where it held that 'Article 3(1) of Directive 77/187 of 14 February 1977 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 ...'. [20]

17 — Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas* v *Konstantinidis, Skreb and Schroll* v *Stauereibetrieb Paetz* [1992] ECR I-6577.

18 — Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas* v *Konstantinidis, Skreb and Schroll* v *Stauereibetrieb Paetz*, cited in footnote 17, paragraph 32.

19 — Case 324/86 *Tellerup* v *Daddy's Dance Hall*, cited in footnote 3, paragraphs 14 and 15.

20 — Joined Cases 144/87 and 145/87 *Berg* v *Besselsen*, cited in footnote 6, paragraph 14 (my emphasis).

33. This is, in my opinion, confirmed by the wording of the second sentence of Article 3(1), pursuant to which Member States may provide that, after the date of transfer and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment. This means that, normally, the transferor has no obligations after the date of the transfer as they are transferred to the transferee on that date. As already explained in the first part of this Opinion, it was established by the judgment in *Daddy's Dance Hall* that the rules of the Directive are mandatory, [21] so that it is not possible to derogate from them in a manner unfavourable to employees.

34. The judgment in *Ny Mølle Kro* too may — as the Commission suggests — provide an indication as to the date on which employment contracts are transferred. In that case, the Court held that there is a transfer of a business when there is a change in the person who incurs the obligations of an employer *vis-à-vis* the employees. [22] A transfer of an undertaking cannot very well be defined in terms of the transfer of the employment relationships unless the two dates coincide.

35. I find the Commission's reference to the judgment in *Abels* less convincing. The Court held in that case that the transferee is liable for bearing the burdens resulting from employees' rights existing at the time of the transfer. [23] That does not preclude the possibility of employment contracts being transferred in the form in which they existed at the time of the transfer, but at a later date.

36. However, it is already clear from the judgment in *Berg* that the answer to the second part of the second question should be that staff are transferred on the date on which the undertaking is transferred and a later date cannot be fixed for their transfer.

37. Lastly, I should like to make some further remarks about the applicability of the Directive to the present case. It appears both from the order for reference and from the Commission's observations that the undertaking was in liquidation on the date of the transfer. It is not, however, clear from the order for reference itself when the undertaking went into liquidation. Up to 29 November 1993, Housing Service is mentioned as the active party in the matter. According to the national court, it was not handled by the liquidator of J. Benoidt, in liquidation (formerly Housing Service) until 13 December 1993. This means that the undertaking was already in liquidation on that date. It appears from the plaintiff's statement, as quoted by the national court, that the transfer of the undertaking took place on 1 December 1993, but it is not clear from that statement whether the undertaking was in liquidation on the date of the transfer or not.

21 — Case 324/86 *Tellerup* v *Daddy's Dance Hall*, cited in footnote 3, paragraph 14.

22 — Case 287/86 *Landsorganisationen i Danmark for Tjenerforbundet i Danmark* v *Ny Mølle Kro* [1987] ECR 5465, paragraph 12.

23 — Case 135/83 *Abels* v *Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 469, paragraph 36.

38. According to the Commission, the change of name from Housing Service to J. Benoidt and the liquidation both date from 19 November 1993. But according to the national court, Housing Service was still acting on that date.

39. It is not clear from the documents in the case whether the undertaking was in liquidation on the date of the transfer. That is a matter for the national court to determine.

40. If however — as there is some reason to suppose — the undertaking was indeed in liquidation on the date of the transfer, it is doubtful whether the Directive applies to the present case at all.

41. As the Court held in *Abels*, [24] the Directive is not applicable in the context of insolvency proceedings. What happens in the event of liquidation remains to be decided by the Court in Case C-319/94 *Dethier*, now pending. Should the Court decide that the Directive is not applicable in the event of liquidation, it may not be applicable in the present case either and the questions examined above would then become irrelevant. That is however a matter for the national court to decide.

42. However, Member States have the right under Article 7 of the Directive to introduce national regulations which are more favourable to employees, so the Directive may possibly apply in the event of liquidation too, by virtue of that provision. Whether that is so in the present case is likewise a matter for the national court to determine.

C — Conclusion

43. In the light of the foregoing I propose that the Court give the following answer to the questions submitted by the national court:

1. Article 3 of Directive 77/187/EEC is to be interpreted as meaning that all employment contracts existing on the date of the transfer and concerning staff employed in the undertaking transferred are, by virtue of the transfer, transferred

24 — Case 135/83 *Abels* v *Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie*, cited in footnote 23, paragraph 17.

from the transferor to the transferee without any option on the part of the transferor or the transferee.

2. The staff are automatically transferred regardless of the refusal by the transferee to comply with his obligation. They are transferred on the date of the transfer of the undertaking and neither the transferor nor the transferee may fix a later date.