OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 8 July 1999 *

1. The Leeds Industrial Tribunal, United Kingdom, has referred to the Court of Justice under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Directive 77/187/EEC [1] on the safeguarding of employees' rights in the event of transfers of undertakings (hereinafter 'the Directive'). In essence, the issue is whether there can be a transfer for the purposes of the Directive where an operation takes place between two companies which not only belong to the same corporate group but also have common ownership, management and premises and are engaged, in part, in the same activity.

I — Facts

2. This question on the interpretation of Community law arose from an application made to the Leeds Industrial Tribunal by a group of workers for a declaration, under Section 11 of the Employment Protection (Consolidation) Act 1978, as to what were the terms and conditions of their employment with the respondent, Amalgamated Construction Co. Ltd (hereinafter 'ACC'). To that end, the Tribunal has to decide whether the Transfer of Undertakings (Protection of Employment) Regulations 1981, the purpose of which is to bring national law into line with the Directive, is applicable in the case before it.

3. According to the findings in the order for reference, following the nationalisation of the coal industry, most deep mining was carried out by British Coal. Initially, the construction and civil engineering work required to enable the mine owner to get at and extract minerals was carried out by the mine owner itself using its own workforce. Subsequently, it began to use outside contractors.

4. ACC is one of those contractors. It has been involved in the mining industry for some 25 years, having worked in the main for British Coal and, subsequently, for RJB Mining (UK) Limited (hereinafter 'RJB'),

* Original language: Spanish.

1 — 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).

when that company acquired some of the assets of British Coal following its privatisation in 1994. ACC is a wholly-owned subsidiary of AMCO Corporation PLC (hereinafter 'AMCO'). AMCO has another wholly-owned subsidiary, AM Mining Services Limited (hereinafter 'AMS'). There are some ten other companies within the AMCO Group. There is a Group headquarters which performs certain functions, such as personnel, payroll and accountancy, on a central basis for the subsidiary companies.

5. ACC's activities consist essentially in the construction of underground roadways and the driving of tunnels. It is a competitive industry, in that contracts are almost always awarded following invitation to tender, without any guarantee that the mine owner will award further contracts to the same firm on expiry of the current contract. However, it is clear that contracts tend to be awarded on a rolling basis, if only because the mine owner is familiar with the contractor *in situ* and knows that, in that way, there will be no transition period between contracts, so that continuity of the work is ensured. The Industrial Tribunal found that there was no occasion when ACC lost a contract under a competitive tender procedure.

6. In contrast, the history of AMS, the other subsidiary involved in these proceedings, is much shorter. It was established in 1993 for the purpose of competing with other contractors for work associated with pit closures, such as shaft filling. It was not intended that it would carry out driveage work of the sort undertaken by ACC. It began to operate as a distinct legal entity, with its own workforce, offering its own terms and conditions of employment. It enjoyed a certain success in obtaining and performing new contracts and, in 1993, it provided employment for approximately 150 people.

7. The duration of the work was laid down in the specific contracts in each case. When a contract was awarded, its time span was known and redundancy notices were issued to the workforce on a protective basis. Some of the applicants had been working under these precarious terms for several years.

In the autumn of 1994, a number of contracts were due to come to an end and ACC notified the competent authority of 92 potential redundancies. Notification of those redundancies was also given to the National Union of Mineworkers [2] (hereinafter 'the NUM'), which was the Trade Union which represented the majority of the employees concerned.

8. In August 1994, British Coal announced an invitation to tender for a contract for

2 — The national court states in its order that, although neither ACC nor the AMCO Group purports to recognise the NUM, it is satisfied that over a number of years the NUM has been treated, for all practical purposes, as being recognised. It states that it is unable to understand why the respondent would have thought it appropriate to give notice of the redundancies in the statutory form to the NUM unless it was recognised as a union.

substantial driveage work at the Prince of Wales collieries. ACC took the view that it would not be able to compete with other contractors if it did not submit a tender based on considerably lower labour costs than those applicable to earlier contracts. It submitted a tender on the basis that the contract would not be carried out by its workforce but by employees of AMS, whose terms of employment were more in line with those of the employees of competitors. [3]

ACC was awarded the contract and subcontracted the work to AMS. [4] Because of this, there was insufficient work for all ACC employees and some of them were given notice that they were to be made redundant and were informed that they could be taken on by AMS after a weekend break. [5]

9. Towards the end of March 1995 another contract awarded to ACC, which was being carried out by its own employees, was coming to an end, and the appropriate notice of redundancies was given to the Department of Employment and the NUM. [6] At that time, RJB awarded ACC new contracts on the basis of tenders reflecting AMS terms and conditions of employment. As before, the workers who had received redundancy notices from ACC were taken on by AMS, without any break, under AMS terms and conditions of employment, and those who were eligible received redundancy payments from ACC. This time too, although the change was connected with the contracts which were to be carried out, the nature of the underground work was the same, so that there was not a genuine break between the two employments. [7]

10. After some time, RJB expressed concern about the terms and conditions of employment which various contractors, including AMS, were applying and the deterioration of those terms. It took the view that, in general, their employees lacked motivation, which might be attributable to the fact that the terms and conditions under which they were now working were much less favourable than those to which they had previously been

3 — Both British Coal and RJB were aware of the intention of ACC to subcontract the contract to AMS. There had been discussions prior to tenders being submitted and it appears that, although neither British Coal nor RJB had any objection to AMS being a subcontractor, they preferred that ACC should itself be the tendering contractor.

4 — It appears that, in the mining industry, substantial elements of plant and equipment are provided by the mine owner. Once it became the subcontractor, AMS had the use of all the equipment which had previously been provided for ACC and was also able to use other items of plant and equipment which were the property of ACC, without any charge being made for such use.

5 — On that point, the Industrial Tribunal is satisfied, on the basis of the evidence before it, that the employees were advised of this change simply by being told that they were moving from ACC to AMS. There was no formal re-engagement by way of job interview, nor were there any of the other procedures which might have been expected if there had been a genuine break between the two employments. However, those who moved from ACC to AMS received redundancy payments calculated according to their total length of service with ACC, and began to work with AMS under that firm's terms and conditions, which were significantly less favourable that those enjoyed with ACC.

6 — Long gone are the days when Sir Harold Macmillan, 1st Earl of Stockton and British Prime Minister from 1957 to 1963, was able to say: 'There are three bodies no sensible man directly challenges: the Roman Catholic Church, the Brigade of Guards and the National Union of Mineworkers', *The Observer*, 22 February 1981.

7 — The Industrial Tribunal observes that, whatever the start and finish dates of the contracts, the reality was that the preparatory and tidying-up work at the beginning and end of contracts would overlap so that, during that period, it was difficult to say whether an employee was working under the old contract or the new one and thus whether he was working for ACC or AMS, particularly as the day-to-day management in that colliery was undertaken by ACC managers, who used labour according to the needs of the day.

accustomed. Consequently the colliery owner sent a circular to all contractors recommending that they give their employees a minimum period of paid leave and improve certain other aspects of their conditions of employment. These changes reduced the competitive edge which some of the mining contractors competing with ACC had, and RJB suggested that, in future, ACC should carry out the contracts rather than AMS.

11. ACC submitted further tenders for work in the same colliery. Its tenders reflected the changes in the terms and conditions of employment, but there were no plans to subcontract work to AMS. None the less, a workforce was required, as a large part of the workforce had been made redundant when previous contracts were subcontracted to AMS. It did not attempt to recruit externally but took on, under the then applicable terms and conditions, those who had been working for AMS and whose employment was coming to an end. Those terms and conditions were better in certain respects than those of AMS but were not as beneficial as those offered by ACC before 1994. [8]

8 — As Adam Smith observed, as long ago as 1776, 'What are the common wages of labour, depends everywhere upon the contract usually made between those two parties, whose interests are by no means the same. The workmen desire to get as much, the masters to give as little as possible. The former are disposed to combine in order to raise, the latter in order to lower the wages of labour. It is not, however, difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage of the dispute, and force the other into a compliance with their terms.', *An Inquiry into the Nature and Causes of the Wealth of Nations*, Ed. A. Skinner, Pelican Classics, 1979, p. 169.

12. The applicants in the main proceedings are 23 of the miners who worked for ACC until they were made redundant, were taken on by AMS under less beneficial terms and conditions of employment and, on being made redundant by that company, were taken on again by ACC.

II — The questions referred for a preliminary ruling

13. In order to resolve the case, the Leeds Industrial Tribunal decided to suspend proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is the Acquired Rights Directive (77/187/EEC) capable of applying to two companies in the same corporate group which have common ownership, management, premises and work, or are such companies a single undertaking for the purpose of the Directive? In particular, can there be a transfer of an undertaking for the purposes of the Directive when Company A transfers a substantial part of its labour force to Company B in the same corporate group?

2. If the answer to Question 1 is in the affirmative, what are the criteria for

deciding whether there has been such a transfer? In particular, has there been a transfer of undertaking in the following circumstances:

(i) Over a period of time the workers involved have been dismissed from Company A, purportedly for redundancy, and offered employment with associated Company B carrying out a geographically distinct undertaking or part of the undertaking of Company A, namely the driving of mine tunnels.

(ii) No transfer of premises, management, infrastructure, materials or assets occurred between Company A and B and the majority of significant assets used by both companies in the work of driving main tunnels is supplied by a third party, the mine operator.

(iii) Company A remains the sole contractor with the third party client which engaged it to work on construction projects which were undertaken on a "rolling" basis.

(iv) There was little or no contemporaneity between the movement of the workers from Company A to Company B and the beginning and/or end of the contracts under which the work was performed.

(v) Company A and Company B share the same management and premises.

(vi) After being employed by Company B the employees carry out work for both Companies A and B as needed by the local management who are responsible for both companies.

(vii) The work undertaken was continuous, there was no suspension of activities at any time or any change in the manner in which they were conducted?'

III — The Community legislation

14. The Leeds Industrial Tribunal does not seek an interpretation of any specific provision, although it refers to Directive 77/187 in a general way. In view of the

substance of the questions, the Court must consider the following provisions:

Article 1

'1. 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.

...'

Article 3

'...

2. Following the transfer... 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.

...'

Article 4

'1. The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the work-force.

...'

IV — Procedure before the Court of Justice

15. The applicants and the respondent undertaking in the main proceedings, the French Government, the United Kingdom Government and the Commission presented written observations within the period prescribed for that purpose by Article 20 of the EC Statute of the Court of Justice.

At the hearing on 16 June 1999, the representatives of the applicants and of the respondent undertaking in the main proceedings, the representative of the Gov-

ernment of the United Kingdom and the representative of the Commission presented their oral observations.

V — Examination of the questions referred for a preliminary ruling

16. By the two questions it has referred, which I believe should be dealt with together, the Leeds Industrial Tribunal is asking whether there can be a transfer of an undertaking, business or part of a business, within the meaning of Article 1(1) of Directive 77/187, between two companies belonging to the same corporate group, which have common ownership, common management and premises and undertake the same work, when one such company transfers a substantial part of its labour force to the other; what the criteria are for determining whether there has been a transfer; and whether there has been a transfer in the circumstances of the present case.

17. I must make clear at the outset that it is not for this Court to determine whether or not there was a transfer in the present case. That is a task which falls to the national court, which must decide the case on its merits and, in order to do so, must take account of the criteria for interpretation which the Court will provide in its judgment.

18. This is the first time a question concerning the interpretation of Directive 77/187 in circumstances in which the purported transfer was between companies belonging to the same corporate group has been referred to the Court of Justice.

Apart from the respondent undertaking, all those who submitted observations in these proceedings agree that the fact that the transfer of an undertaking, business, or part of a business is between companies belonging to the same corporate group does not preclude the applicability of Directive 77/187. I should say here and now that I share that view, if only because the Directive does not exclude it and because, since these companies can be the subject of a legal transfer or merger like any other, there is no reason to exclude their employees from the protection afforded by the Directive. However, as I will have occasion to explain below, those are not the only reasons.

19. Directive 77/187 was adopted by the Council on the basis of Article 100 of the EC Treaty (now Article 94 EC), to guarantee continuity of employment for workers in the event of a change of employer and, in particular, to ensure that their rights are safeguarded.

Its preamble highlights the differences between the Member States as regards the extent of the protection of employees in this respect and the need to reduce these

differences, as they can have a direct effect on the functioning of the common market. Its adoption was proposed in the Council Resolution of 21 January 1974 concerning a social action programme. [9] Its objective is set out, in the main, in Article 3(1), which provides for the transfer to the transferee of the transferor's rights and obligations arising from an employment relationship existing on the date of a transfer, and in Article 4(1), which provides that the transfer is not in itself to constitute grounds for dismissal by the transferor or the transferee.

20. The Court has confirmed, in its case-law, that the purpose of the Directive is to ensure that the rights of employees are safeguarded in the event of a change of employer by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor. [10] However, it is not intended to establish a uniform level of protection throughout the Community on the basis of common criteria. So, 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. [11]

21. The Directive is applicable, according to Article 1(1) thereof, to transfers of undertakings, businesses or parts of businesses to another employer as a result of a legal transfer or merger. However, it does not contain a definition of undertaking, business, part of business, employer or legal transfer. It has been the Court of Justice which, in its many judgments, has provided a Community definition of these terms. [12]

22. Directive 98/50/EC, which made significant amendments to the wording of Directive 77/187, [13] does contain some definitions, including that of 'transfer', [14] that of 'undertaking', [15] and that of 'worker', [16] which enhance and supplement its content and which codify the case-law of the Court of Justice. However, the Member States have until 17 July 2001 to incorporate its provisions into their national law.

9 — OJ 1974 C 13, p. 1.

10 — Case 287/86 *Ny Mølle Kro* [1987] ECR 5465, paragraph 12, and Case 324/86 *Daddy's Dance Hall* [1988] ECR 739, paragraph 9.

11 — Judgment in *Daddy's Dance Hall*, cited above in footnote 10, paragraph 16, and Case 105/84 *Danmols Inventar* [1985] ECR 2639, paragraph 26.

12 — The Court has given 29 rulings on Directive 77/187 in references for a preliminary ruling and in actions against Member States for failure to fulfil obligations.

13 — Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC 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 1998 L 201, p. 88).

14 — The fourth recital of that directive states that considerations of legal security and transparency require that the legal concept of transfer be clarified in the light of the case-law of the Court of Justice but that such clarification does not alter the scope of Directive 77/187/EEC. The definition of transfer within the meaning of Directive 77/187, as amended, is given by Article 1(1)(b): '... a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'.

15 — According to Article 1(1)(c) of Directive 77/187, as amended, its provisions are to apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, are expressly excluded from its scope.

16 — According to Article 2(1)(d) of Directive 77/187, as amended, any person who, in the Member State concerned, is protected as an employee under national employment law is to be considered an employee.

For that reason, I must base my answers to the questions referred for a preliminary ruling by the Leeds Industrial Tribunal on the case-law rather than on that new text.

23. The Court of Justice did not attempt to define separately the terms used by the Directive to describe the entities which could be transferred to another employer, namely 'undertakings', 'businesses' or 'parts of businesses'. Instead, it devised the term 'economic entity'.

24. In its judgment in *Spijkers*,[17] the Court held that the Directive is intended to ensure the continuity of employment relationships existing within a business, irrespective of any change of ownership and 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. It added that, in determining whether the business was disposed of as a going concern, the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities, is of crucial significance.

25. The Court refined its definition of economic entity in subsequent decisions. In its judgment in *Rygaard*[18] it held that in order for the Directive to be applicable, the transfer had to relate to a stable economic entity whose activity was not limited to performing one specific works contract, and went on to rule, in its judgment in *Süzen*,[19] that the term entity thus referred to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective.

26. The definition of worker whose employment relationship is covered by the Directive in the event of a transfer of the economic entity for which he works is given in the judgments in *Danmols Inventar*[20] and *Redmond Stichting*.[21] It covers all employees who enjoy some, albeit limited, protection against dismissal under national law. Under the Directive, that protection may not be taken away from

17 — Case 24/85 *Spijkers* [1986] ECR 1119, paragraphs 11 and 12.

18 — Case C-48/94 *Rygaard* [1995] ECR I-2745, paragraph 20.

19 — Case C-13/95 *Süzen* [1997] ECR I-1259, paragraph 13.

20 — Judgment in *Danmols*, cited above in footnote 11, paragraph 27.

21 — Case C-29/91 *Redmond Stichting* [1992] ECR I-3189, paragraph 18.

them or curtailed solely because of the transfer. [22]

27. In its judgment in *Botzen*, the Court considered whether the scope of the Directive extends to a transferor's rights and obligations arising from a contract of employment or employment relationship existing on the date of the transfer and entered into with employees who, although not belonging to the part of the undertaking which was transferred, carry on certain activities using the assets assigned to the transferred part. Since an employment relationship is essentially characterised by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties, in order to decide whether the rights and obligations under an employment relationship are transferred under Directive No 77/187 by reason of a transfer, it is sufficient to establish to which part of the undertaking or business the employee was assigned. [23]

28. As regards the requirement that the employment relationship should exist at the time of the transfer, the Court has held that, unless otherwise expressly provided, the Directive may be relied on solely by workers whose contract of employment or employment relationship is in existence at the time of the transfer. Whether or not such a relationship exists must be assessed on the basis of national law, subject to compliance with the mandatory provisions of the Directive concerning protection of employees from dismissal as a result of the transfer. [24]

29. The Court has held that, in view of the differences between the various language versions of Article 1(1) of the Directive and the divergences between national legislation on the concept of legal transfer, its scope cannot be appraised solely on the basis of a textual interpretation. [25] In its judgment in *Bork International*, [26] the Court interpreted that concept fairly flexibly to meet the objective of the Directive, which is to protect workers in the event of a transfer of their undertaking, and declared that the Directive is applicable wherever, in the context of contractual relations, there is a change in the legal or natural person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the undertaking.

30. For the purposes of illustration and without seeking to draw up an exhaustive list, the Court has held that the Directive is applicable to a transfer of undertaking

22 — Case 237/84 *Commission* v *Belgium* [1986] ECR 1247, paragraph 13.

23 — Case 186/83 *Botzen* [1985] ECR 519, paragraph 15.

24 — Judgment in *Ny Mølle Kro*, cited above in footnote 10, paragraph 25, and Case 101/87 *Bork International* [1988] ECR 3057, paragraph 17.

25 — Case 135/83 *Abels* [1985] ECR 469, paragraphs 11 to 13.

26 — Judgment in *Bork*, cited above in footnote 24, paragraph 13.

which takes place in the course of a procedure such as a 'surséance van betaling' (judicial leave to suspend payment of debts);[27] where the owner of a leased undertaking takes over its operation following a breach of the lease by the lessee;[28] where, upon the termination of a non-transferable lease, the owner of an undertaking leases it to a new lessee who carries on the business without interruption with the same staff, who had been given notice on the expiry of the initial lease;[29] to the transfer of an undertaking pursuant to a lease-purchase agreement and to the retransfer of the undertaking upon the termination of the lease-purchase agreement by a judicial decision;[30] where, after giving notice bringing the lease to an end or upon termination thereof, the owner of an undertaking retakes possession of it and thereafter sells it to a third party who shortly afterwards brings it back into operation, which had ceased upon termination of the lease, with just over half of the staff that was employed in the undertaking by the former lessee;[31] when, in accordance with a body of legislation such as that governing special administration for large undertakings in critical difficulties, it has been decided that the undertaking is to continue trading for as long as that decision remains in force;[32] to a situation in which a public authority decides to terminate the subsidy paid to a foundation set up to assist drug addicts, which is its only source of income, as a result of which its activities are fully and definitively terminated, and to transfer it to another foundation with a similar aim;[33] to a situation in which one businessman, by a contract, assigns to another businessman responsibility for running a facility for staff, which was formerly managed directly, in return for a fee and various advantages, details of which are laid down by the agreement between them;[34] to a situation in which an undertaking holding a motor vehicle dealership for a particular territory discontinues its activities and the dealership is then transferred to another undertaking which takes on part of the staff and is recommended to

27 — Judgments in *Abels*, cited above in footnote 25, paragraph 30; Case 179/83 *FNV* [1985] ECR 511, paragraph 7; and *Botzen*, cited above in footnote 23, paragraph 9. However, the Directive does not apply to transfers made in insolvency proceedings in which the assets of the insolvent transferor are wound up under the control of the competent judicial authority.

28 — Judgment in *Ny Mølle Kro*, cited above in footnote 10, paragraph 15.

29 — Judgment in *Daddy's Dance Hall*, cited above in footnote 10, paragraph 11.

30 — Joined Cases 144/87 and 145/87 *Berg* [1988] ECR 2559, paragraph 20.

31 — Judgment in *Bork*, cited above in footnote 24, paragraph 20.

32 — Case C-362/89 *d'Urso and Others* [1991] ECR I-4105, paragraph 34. In contrast, it does not apply to transfers of undertakings made as part of a creditors' arrangement procedure of the kind provided for in the Italian legislation on compulsory administrative liquidation to which the Law of 3 April 1979 on special administration for large undertakings in critical difficulties refers, given that, as in the case of bankruptcy, the purpose of the procedure is to wind up the assets of the debtor with a view to repaying all creditors.

33 — Judgment in *Redmond Stichting*, cited above in footnote 21, paragraph 21.

34 — Case C-209/91 *Watson Rask and Others* [1992] ECR I-5755, paragraph 21. The agreement between Philips and ISS provided that ISS would assume responsibility for managing Philips's canteens (including menu planning, purchasing, preparation, dispatch and all administrative functions, together with staff recruitment and training), taking over Philips's permanent canteen staff on the same terms and conditions as regards wages and seniority. Philips agreed to pay ISS a fixed monthly fee to cover all ordinary operating expenditure and the costs of various products, such as disposable plates and packaging, serviettes and cleaning materials. In addition, Philips made available to ISS without charge approved sales and production premises, the necessary canteen equipment, electricity, hot water and telephones, and carried out general maintenance of the premises and equipment and refuse removal.

customers, without any transfer of assets; [35] in the event of the transfer of an undertaking which is being wound up by the court if the undertaking continues to trade; [36] and where a company in voluntary liquidation transfers all or part of its assets to another company from which the worker then takes his orders which the company in liquidation states are to be carried out. [37]

31. In contrast, the taking over, with a view to completing, with the consent of the awarder of the main building contract, works started by another undertaking, of two apprentices and an employee, together with the materials assigned to those works, does not constitute a transfer of an undertaking, business or part of a business, within the meaning of Article 1(1) of the Directive. Such a transfer could come within the terms of the Directive only if it included the transfer of a body of assets enabling the activities or certain activities of the transferor undertaking to be carried on in a stable way. In its judgment in *Rygaard*, the Court made clear that the transfer of an undertaking, a business or part of a business within the meaning of the Directive presupposes that the transfer relates to a stable economic entity whose activity is not limited to performing one specific works contract and that such is not the case of an undertaking which transfers to another undertaking one of its works with a view to its completion. [38]

32. In its judgment in *Schmidt* [39] the Court held that the application of the Directive covered a situation in which an undertaking entrusted by contract to another undertaking the responsibility for carrying out cleaning operations which were previously performed by its own staff, even where, prior to the transfer, such work was carried out by a single employee. Here it confirmed 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, which is indicated *inter alia* by the actual continuation or resumption by the new employer of the same or similar activities. The Court took the — to my mind quite radical — view that neither the fact that the activity transferred was, for the transferor, only an ancillary activity not necessarily connected with its objects, nor the fact that the activity in question was performed, prior to the transfer, by a single employee, nor the absence of any transfer of tangible assets, was sufficient to preclude the application of the Directive.

35 — Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253, paragraph 32.

36 — Case C-319/94 *Dethier* [1998] ECR I-1061, paragraph 32.

37 — Case C-399/96 *Europièces* [1998] ECR I-6965, paragraph 36.

38 — Cited above in footnote 18, paragraphs 20 to 23.

39 — Case C-392/92 *Schmidt* [1994] ECR I-1311. The applicant was employed by a bank to clean the premises of one of its branches. She was dismissed because the cleaning was in future to be carried out by a specialist firm which already undertook the cleaning of most of the bank's offices. The cleaning firm offered to employ the applicant for a monthly wage which was higher than that which she had previously been receiving. However, she was not prepared to work on those terms, as she calculated that her hourly wage would in fact be lower as a result of the increase in the surface area to be cleaned, and brought an action challenging her dismissal.

33. However, that case-law was qualified, from 1997 onwards, by the judgments in *Süzen*, [40] *Hernández Vidal* [41] and *Sánchez Hidalgo*, [42] in which the Court placed greater emphasis on the need for the transfer to relate to a stable economic entity, the term entity referring to an organised grouping of persons and assets enabling an economic activity which pursues a specific objective to be carried on.

In its judgment in *Süzen*, the Court stated that, where a contract for cleaning services, concluded with an outside undertaking, is cancelled and awarded to another outside undertaking, the mere fact that the service provided by the old and the new awardees of a contract is similar is not sufficient to support the conclusion that an economic entity has been transferred: an entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it. That reasoning led the Court to conclude that the Directive does not apply to a situation in which there is no concomitant transfer, from one undertaking to the other, of significant tangible or intangible assets or taking over by the new employer of a major part of the workforce, in terms of their numbers and skills, assigned by his predecessor to the performance of the contract. [43]

In its judgment in *Hernández Vidal*, concerning an undertaking which employed another undertaking to clean its premises and decided to end the contract and thereafter carry out the work itself, the Court made it clear that, whilst such an entity must be sufficiently structured and autonomous, it need not necessarily have significant assets, tangible or intangible. Indeed, in certain sectors, such as cleaning, these assets are often reduced to their most basic and the activity is essentially based on manpower. Thus, an organised grouping of wage earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity. [44]

The questions referred in *Sánchez Hidalgo* concerned public bodies which had contracted out a home-help service for persons in need and a surveillance contract to two

40 — Cited above in footnote 19. Advocate General La Pergola observed in point 10 of his Opinion in this case '...the fact that the majority of workers engaged in a particular activity may subsequently have been employed, with corresponding duties, by another undertaking, is not in my view the decisive criterion (or controlling test) for establishing whether the activity in question exhibits the characteristics of organisational independence which distinguish the concept of undertaking..... There is a transfer of an undertaking, business or part of a business within the meaning of the Directive only if the activity is being pursued and at the same time one undertaking has transferred tangible and intangible assets to the other'.

41 — Joined Cases C-127/96, C-229/96 and C-74/97 *Hernández Vidal* [1998] ECR I-8179.

42 — Joined Cases C-173/96 and C-247/96 *Sánchez Hidalgo and Others* [1998] ECR I-8237.

43 — Cited above in footnote 19, paragraphs 15 and 23.

44 — Cited above in footnote 41, paragraph 27.

private undertakings and decided, on expiry of the contracts, not to renew them with the same undertakings but to conclude contracts with other undertakings. In that judgment, the Court observed in addition that the presence of a sufficiently structured and autonomous entity within the undertaking awarded the contract is, in principle, not affected by the circumstance, which occurs quite frequently, that the undertaking is subject to observance of precise obligations imposed on it by the contract-awarding body. Although the influence which the contract-awarding body has on the service provided by the undertaking concerned may be extensive, the service-providing undertaking nevertheless normally retains a certain degree of freedom, albeit reduced, in organising and performing the service in question, without its task being capable of being interpreted as simply one of making personnel available to the contract-awarding body. [45]

34. It is clear from the judicial reasoning set out above that the criteria identified hitherto by the Court for determining whether there has been a transfer within the meaning of Article 1(1) of Directive 77/187 are the following: there must be an economic entity, defined as an organised grouping of persons and assets for the exercise of an economic activity which pursues a specific objective; that entity must be organised in a stable manner and not limited to performing one specific works contract; there must be a change, in terms of contractual relations, in the legal or natural person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the entity; the economic entity must retain its identity, which is marked both by the continuation by the new employer of the same activities and by the continuity of its workforce, its management staff, the way in which its work is organised, its operating methods or the operational resources available to it.

35. According to the order of the Leeds Industrial Tribunal, that court is satisfied that ACC had been active for many years in driveage work in the mining industry and that it decided to stop doing the work itself because of the high cost of its workforce. It seems that its workforce was dismissed as the works contracted for were completed and, at the same time, in response to RJB's tenders, it submitted bids based on the labour costs of AMS to which it intended to subcontract and to which it did subcontract the performance of the contracts with the consent of the colliery owner. The redundant workers, who were paid the compensation due to them, were taken on, without any break in continuity but under less favourable conditions than those they had previously enjoyed, by AMS, which required manpower to carry out the contracts. This state of affairs, which went on for several years, did not appear temporary but could be described as stable, particularly bearing in mind that it only changed when the colliery owner insisted that the working conditions of the employees concerned be improved. From that moment

45 — Cited above in footnote 42, paragraph 27.

ACC took back control of performance of the works and the workforce who were promptly dismissed by AMS.

36. In determining whether or not there was a transfer of part of a business from ACC to AMS, the Leeds Industrial Tribunal will have to decide whether the driveage work in the Prince of Wales colliery, originally carried out by ACC, which, in August 1994, ACC decided to begin subcontracting to AMS, a company set up in 1993, constituted an identifiable economic entity within ACC, organised in a stable manner, defined as an organised grouping of persons and assets which pursues a specific objective; whether that decision to subcontract was temporary in being confined to the execution of specific works or whether it was of an indefinite nature; whether the employees dismissed by one undertaking and taken on immediately by the other were precisely the ones who had been assigned permanently to the performance of that activity; whether, as a result of the subcontracting of the activity and subsequent dismissal and re-engagement of employees, AMS assumed an employer's obligations towards the workers assigned to that activity. Finally, if the driveage work in the Prince of Wales colliery constituted an economic entity, the national court will have to determine whether it retained its identity when it was subcontracted to AMS and when ACC took it on again having decided to end that arrangement.

37. It cannot be denied that the fact that ACC and AMS are companies in the same corporate group, that they have common ownership, management and plant and are engaged in the same activity, greatly complicates the task of the national court, but it is not decisive so as to preclude a transfer within the meaning of Article 1(1) of Directive 77/187.

38. The Court has been telling national courts that, in determining whether the conditions for the transfer of an economic entity are met, it is necessary to consider all the facts characterising the transaction in question, including in particular the type of undertaking or business, whether or not its 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, 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. However, all those circumstances are merely single factors in the overall assessment to be made and cannot therefore be considered in isolation. [46]

39. As regards the seven facts which the national court puts before this Court in its

46 — Judgments in *Spijkers*, cited above in footnote 17, paragraph 13, *Ny Mølle Kro*, cited above in footnote 10, paragraph 19, *Redmond Stichting*, cited above in footnote 21, paragraph 24, *Merckx and Neuhuys*, cited above in footnote 35, paragraph 17, *Süzen*, cited above in footnote 19, paragraph 14, *Sánchez Hidalgo*, cited above in footnote 42, paragraph 29 and *Hernández Vidal*, cited above in footnote 41, paragraph 29.

second question, I have to say that none of them appears to me to be decisive in ascertaining whether or not there was a transfer within the meaning of Article 1(1) of the Directive.

40. For instance, the fact that there was no transfer of assets between ACC and AMS (point (ii)) may be due to the fact that it is common in that industry for plant and equipment to be provided by the colliery owner. In any event, according to the order for reference, AMS had the use of equipment which previously ACC had used and the absence of any transfer of premises, management or infrastructure may be explained by the fact that both companies shared them. Whilst there was no transfer of customers (point (iii)), it is clear that there was a sole client and that the operation took place with its consent. The fact that there was little or no contemporaneity between the movement of the workers of ACC to AMS and the beginning or end of the contracts (point (iv)) may very well be due, as the Commission observes, to the fact that a transfer of undertakings is a complex legal operation which may take some time to complete. The fact that ACC and AMS share the same management and premises (point (v)) does not preclude one transferring to the other an economic entity having the characteristics described. The fact that the work undertaken was continuous and there was no suspension of activities or change in the manner in which they were conducted (point (vii)) is a normal feature of a transfer of undertakings.

I cannot formulate an opinion regarding point (vi) of the second question referred for a preliminary ruling, according to which, after being employed by AMS, the employees carried out work for both ACC and AMS as needed by the local management who were responsible for both companies, as there is not sufficient information. If the work undertaken by ACC was the driving of tunnels in the Prince of Wales collieries and it ceased such work when it subcontracted it to AMS, presumably dismissing the majority of its workforce, which was taken on by AMS, I have to ask to what activity ACC could be assigning the staff which AMS employed.

41. It remains for me to consider point (i) of the second question, which deals with the dismissal of the workers by ACC and their subsequent engagement by AMS for the driveage work which ACC had been carrying out.

42. As I have already said, Article 4(1) of the Directive provides that the transfer is not in itself to constitute grounds for dismissal by the transferor or the transferee, although this provision is not to stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce. The applicants in the main proceedings were dismissed by ACC pur-

portedly for precisely such economic reasons.

However, this provision applies to a transfer of an undertaking within the meaning of the Directive, and ACC denies that such a transfer took place. In my opinion, that undertaking not only dismissed its workforce because, having the intention to subcontract the work to AMS, it would not need them any more, but apparently also in order to meet that company's requirement for a specialist workforce to carry out the contracts without having to go in search of it. It cannot, therefore, be ruled out that there was an intention to evade the obligations imposed by the Directive by transferring workers, according to the requirements of the works contracts, from one undertaking to another, reducing their salaries in order to bring down labour costs.

43. In any event, the Court has held that, if the employees of an undertaking are dismissed solely as a result of a transfer, contrary to Article 4(1) of the Directive, those employees must be regarded as still in the employ of the undertaking, with the result that the employer's obligations towards them are automatically transferred from the transferor to the transferee in accordance with Article 3(1) of the Directive. In order to determine whether the employees were dismissed solely by reason of the transfer, it is necessary to take into consideration the objective circumstances in which the dismissal took place and, in particular, the fact that it took effect on a date close to that of the transfer and that the employees in question were taken on again by the transferee. [47]

Similarly, the Court has held that employees unlawfully dismissed by the transferor shortly before the undertaking is transferred and not taken on by the transferee may claim, as against the transferee, that their dismissal was unlawful. [48]

44. If the Leeds Industrial Tribunal arrives at the conclusion that there was a transfer within the meaning of Article 1(1) of the Directive, this will mean that the dismissal of the employees concerned by ACC was void and that their terms and conditions of employment should have been maintained by the transferee undertaking. Since the transferee is subrogated to the transferor's rights and obligations under the employment relationship, that relationship may be altered 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. Nevertheless, the Directive does not preclude an agreement with the new employer to alter the employment relationship, in so far as such an alteration is permitted by the

47 — Judgment in *Bork*, cited above in footnote 24, paragraph 18.

48 — Judgment in *Dethier*, cited above in footnote 36, paragraph 42.

applicable national law in situations other than the transfer of an undertaking. [49]

I gather from the facts set out by the national court that the British legislation does not allow an employer to alter the terms and conditions of employment of its employees for the worse. [50] Otherwise ACC would not have needed to submit tenders based on AMS labour costs and subcontract the work to that company.

45. Finally, the respondent in the main proceedings claims, in its observations, that the Directive is not applicable to two companies such as ACC and AMS, both subsidiaries of AMCO, which functioned as a single economic unit working together towards common commercial objectives and that, for the purposes of competition law, they would be regarded as a single undertaking. Moreover, AMS did not have real autonomy in determining its course of action in the market, being merely an instrument whereby the commercial objectives of the group were realised.

46. I cannot accept that analysis. It is true that, in its judgment in *Viho* v *Commission*, [51] the Court of Justice held that a parent company and its subsidiaries form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, [52] but carry out the instructions issued to them by the parent company controlling them. [53] However, this case-law was established in the field of competition law, in which context the term undertaking must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal. [54] The Court of First Instance has added that, for the purposes of the application of the competition rules, the unified conduct on the market of the parent company and its subsidiaries takes precedence over the formal separation between those companies as a result of their separate legal personalities. [55]

49 — Judgment in *Daddy's Dance Hall*, cited above in footnote 10, paragraphs 17 and 18.

50 — This analysis was confirmed by the replies given by the representatives of the applicants in the main proceedings and by the Government of the United Kingdom to the questions I put to them at the hearing.

51 — Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457, paragraph 16.

52 — In these proceedings, it was found that the parent company owned 100% of the capital of its subsidiaries established in various Member States and that the sales and marketing activities of the subsidiaries were directed by an area team which was appointed by the parent company and which controlled, in particular, sales targets, gross margins, sales costs, cash flow and stocks. That team also laid down the range of products to be sold, monitored advertising and issued directives concerning prices and discounts.

53 — Case-law established in the judgments in Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 133 and 134; Case 15/74 *Sterling Drug* [1974] ECR 1147, paragraph 41; Case 16/74 *Winthrop* [1974] ECR 1183, paragraph 32; Case 30/87 *Bodson* [1988] ECR 2479, paragraph 19; and Case 66/86 *Ahmed Saeed Flugreisen and Others* [1989] ECR 803, paragraph 35.

54 — Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11.

55 — Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 50.

47. As can be seen, the definition of undertaking applied in competition law for giving effect to Articles 85 and 86 of the EC treaty (now Articles 81 EC and 82 EC) differs greatly from the definition of undertaking as an economic entity developed by the Court of Justice for the purposes of the application of Directive 77/187, and is of no assistance in deciding whether there was a transfer of an undertaking, business or part of a business between two companies belonging to the same corporate group, even where they are wholly-owned subsidiaries of the same parent company.

VI — Conclusion

48. In the light of the foregoing arguments, I propose that the Court of Justice should reply to the questions referred for a preliminary ruling by the Leeds Industrial Tribunal as follows:

(1) 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 must be interpreted as meaning that the Directive is applicable to two companies which belong to the same corporate group, which have common ownership, management and premises and carry out the same work, provided that the transaction in question meets the criteria laid down by the Court of Justice for establishing that there has been a transfer of an undertaking.

(2) It is for the Leeds Industrial Tribunal to determine whether, in the present case, the relevant criteria have been fulfilled and whether, therefore, an economic entity has been transferred and has retained its identity.