OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 27 September 2001 [1]

I — Introduction

1. In this case the Cour du travail de Bruxelles (Higher Labour Court, Brussels), asks the Court to clarify the scope 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 (hereinafter: 'the directive'). [2]

2. At first sight, the facts appear to be rather complicated. The national court asks whether there is a transfer of an undertaking where undertaking A originally contracted with undertaking B for cleaning operations and undertaking B entrusts that work to undertaking C. Following the loss of the contract by undertaking B, undertaking C dismisses all its staff, except for four persons. Thereupon undertaking A awards that contract to undertaking D which employs a proportion of the staff of undertaking C under a collective labour agreement but takes over none of the assets of undertaking C, which continues to exist.

3. The Court has commented previously on the scope of the directive as regards the contracting out of services, in particular in the cleaning sector. [3] The reference for a preliminary ruling from the Cour du Travail gives the Court an opportunity to clarify its case-law.

II — Legal background

A — *Community law*

4. The directive makes the necessary provision for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded. Article 1(1) states that the directive is to apply to the transfer of an

1 — Original language: Dutch.

2 — OJ 1977 L 61, p. 26.

3 — See Case C-392/92 *Schmidt* [1994] ECR I-1311; Case C-13/95 *Süzen* [1997] ECR I-1259; and Joined Cases C-127/96, C-229/96 and C-74/97 *Vidal Hernández and Others* [1998] ECR I-8179.

undertaking, business or part of a business to another employer as a result of a legal transfer or merger.

5. Article 2(a) provides that 'transferor' means, for the purposes of the directive, any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the business. Article 2(b) defines 'transferee', for the purposes of the directive, as any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the business.

6. Under Article 3(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) are, by reason of such transfer, to be transferred to the transferee.

7. Under the first paragraph of Article 4(1), the transfer of an undertaking, business or part of a business does not in itself constitute grounds for dismissal by the transferor or the transferee. This provision does not preclude dismissals on economic, technical or organisational grounds requiring changes in the workforce.

8. The directive has been amended twice. 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 codified certain terms in particular in the light of the case-law of the Court. [4] In order to rationalise the wording, the Council repealed Directive 77/187 on 12 March 2001 and replaced it with Directive 2001/23/EC 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 undertakings or businesses. [5]

9. Pursuant to Directive 98/50, Article 1(1) of the directive was renumbered Article 1(1)(a). Directive 98/50 introduced a new Article 1(1)(b) concerning the concept of 'transfer' which reads as follows:

'Subject to subparagraph (a) ..., there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity,

4 — OJ 1998 L 201, p. 88. The time-limit for transposing Directive 98/50 expired on 17 July 2001.

5 — OJ 1998 L 82, p. 16. Unless stated otherwise, any reference hereinafter is to the wording of the original directive.

meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.'

This clarification was prompted by considerations of legal security and transparency but does not alter the scope of the directive as interpreted by the Court of Justice. [6]

B — *National law*

10. The abovementioned provisions of the directive were transposed into Belgian law by Collective Labour Agreement No 32 bis of 7 June 1985 concerning the safeguarding of employees' rights in the event of a change of employer as a result of the legal transfer of an undertaking and regulating the rights of employees taken over in the event of a takeover of assets following liquidation or judicial composition with transfer of assets, made mandatory by Royal Decree of 25 July 1985. [7]

11. Also relevant to the case is a collective labour agreement of 5 May 1993 concerning 'the taking over of staff on transfer of a daily-maintenance contract', which applies to the cleaning sector. This has no connection with the collective labour agreement of 7 June 1985.

12. Under Article 3 of the collective labour agreement of 5 May 1993, the undertaking which secures the contract must, within a week of securing it, enquire of the undertaking losing the contract as to members of staff and working conditions. Article 4 provides that the undertaking securing the contract must, within two weeks of securing it and in any event at least one week before resumption of works, offer in writing at least 75% of the jobs on the site after the transfer to workers chosen by it forming part of the staff of the undertaking losing the contract, provided that those workers have at least six month's experience on the site. The selection is to be made on the basis of functional criteria. Under Article 5, workers taken over in accordance with the arrangements set out in Article 4 are to obtain a new contract of employment without any trial period and without loss of seniority.

III — Facts in the main action and procedure

13. The facts and background to the case can be summarised as follows.

14. In the period from 2 May 1993 to 8 January 1995 Volkswagen awarded the

6 — According to the fourth recital in the preamble to Directive 98/50.

7 — *Moniteur Belge* of 9 August 1985, p. 11527.

contract to clean certain of its production plants to Buyle-Medros-Vaes Associates SA (hereinafter: 'BMV'). From the outset, BMV entrusted to General Maintenance Contractors SPRL (hereinafter: 'GMC') performance of the contract. GMC stated that the performance of the contract with Volkswagen was its only business at that time. In December 1994 Volkswagen terminated the contract between itself and BMV and, by a contract, awarded the cleaning operations to Temco Service Industries SA (hereinafter: 'Temco') as of 9 January 1995. For Temco the Volkswagen contract was one of many.

15. Volkswagen's choice of Temco had an effect on the staff of GMC which carried out the cleaning work at Volkswagen.

16. Since the contract between Volkswagen and BMV expired on 8 January 1995, GMC lawfully dismissed its entire staff, with the exception of four people, that is to say Messrs S. Imzilyen, M. Belfarh, A. Afia-Aroussi and K. Lakhdar, who enjoy special protection owing to their status as trade-union delegates. [8] GMC served the notices provided for under Belgium law and took the steps necessary for closure of an undertaking and collective dismissal, authorised on 30 November 1994 by the Brussels Regional Office of Employment.

17. Applying the collective labour agreement of 5 May 1993, Temco engaged 42 of a total of 80 former GMC employees. The four trade-union delegates were not amongst the members of staff taken over.

18. Since GMC had a contract only with Volkswagen at the time, it sought acceptance by the relevant joint committee that there were economic or technical grounds allowing it to dismiss the four trade-union delegates. That request was turned down on 28 February 1995. In appeal proceedings the Tribunal du travail declared by judgment dated 13 September 1995 that it did not have jurisdiction to determine the claim. By judgment dated 23 November 1995 the Cour du travail upheld this judgment.

19. The file shows that the four received payment from GMC until December 1995 despite the fact that GMC took the view, as is apparent from correspondence with Temco, that in law the four had already been taken over by Temco by virtue of the Collective Labour Agreement No 32 bis. On 12 December 1995 the trade-union delegates were dismissed by GMC.

8 — The order for reference refers to a collective bargaining agreement of 18 April 1968 concluded within Joint Committee 121 of the cleaning undertakings which accords to trade-union delegates the protection enjoyed by elected members and candidates for membership of the advisory boards of companies and security and hygiene committees.

20. Under those circumstances the four brought claims against GMC, BMV and Temco before the Tribunal du travail de Bruxelles.

21. By a judgment of 12 March 1998 the Tribunal du travail de Bruxelles, declared the claim by the four persons concerned admissible and well founded in part as regards Temco SA. The Tribunal du travail declared *inter alia* that, pursuant to Collective Labour Agreement No 32 bis, the claimants, Messrs Afia Aroussi and Lakhdar, were automatically taken over on 9 January 1995 by the defendant Temco.

22. Temco lodged an appeal with the national court. It states the following reasons for the questions referred for a preliminary ruling.

23. The facts of the case are unusual in that Volkswagen entrusted the cleaning of its industrial plants to BMV which, for its part, did not perform the cleaning itself, but instead subcontracted it to GMC which, on losing the contract as a result of termination of the contract between Volkswagen and BMV, dismissed its entire staff, except the four trade-union delegates, whilst continuing, as indicated in the minutes of general meetings held in 1996 and 1997, to carry on business and seek new customers. That confirms that the attainment of its objective, as provided in the articles of association, related to more than mere performance of the Volkswagen contract, even if that was its principal or sole activity in 1994.

24. On the other hand, until December 1995, the four trade-union delegates, who considered that they enjoyed special protection against dismissal, demonstrated by their conduct that they were still members of the staff of GMC. The national court also notes that they never claimed to have entered into the service of Temco under Collective Labour Agreement No 32 bis. In the proceedings before the labour courts, GMC also took the view, even whilst expressing reservations, that the four persons concerned were still in its service. There would otherwise have been no sense to the proceedings seeking a declaration that there were technical or other grounds justifying their dismissal. The fact that those proceedings were unsuccessful is irrelevant.

25. The national court also notes that there is no relationship between GMC and Volkswagen, and no assets of any kind whatever passed from GMC to Temco. It is evident from the files that Volkswagen provides the contracted cleaning companies with the means necessary for the industrial cleaning of its plants.

IV — Questions referred for a preliminary ruling

26. The order for reference from the *Cour du travail* (Sixth Chamber), Brussels, dated

14 February 2000 was registered with the Court on 17 February 2000. The questions referred for a preliminary ruling are worded as follows:

'1. Does Article 1(1) of Council Directive 77/187 of 14 February 1977 apply in a situation where undertaking A contracts with undertaking B for the cleaning of its industrial plants and undertaking B entrusts that work to undertaking C, which, following loss of the contract by undertaking B, dismisses its staff, except for four persons, whereupon undertaking D is awarded the contract by undertaking A, employs a proportion of the staff of undertaking C under a collective labour agreement but takes over none of the assets of undertaking C, which latter undertaking continues to exist and to pursue the objects for which it was incorporated?

2. In the event that undertaking C is held to be the transferor, even though it continues to exist, does the abovementioned directive preclude it from being able to retain certain workers in its service?'

27. Written observations were submitted by Temco, Messrs S. Imzilyen and M. Belfarh, Messrs A. Afia-Aroussi and K. Lakhdar, SA Three S (formerly GMC) and BMV, and the Commission. On 17 May 2001 a hearing was held at which all the parties and the Commission set out their views.

V — Appraisal

A — *The scope of the directive*

Introduction

28. The first question referred by the Cour du Travail allows the Court to determine the scope of the directive on the basis of a situation in which an undertaking has terminated a contract with a business for the provision of services in order to carry on the contract thereafter with another business.

29. This is the fourth occasion on which the Court has been confronted, pursuant to the procedure laid down in Article 234 EC, with the question of the application of the directive to transactions in the cleaning sector. Each case turned on somewhat different facts. *Schmidt* [9] concerned a case in which an undertaking entrusted by contract to another undertaking the responsibility for carrying out cleaning operations which it had previously performed itself directly. In *Hernández Vidal and Others* [10] the opposite situation arose and an undertaking which used to entrust the cleaning of its premises or part of them

9 — Cited in footnote 3.
10 — Cited in footnote 3.

to another undertaking decided to terminate its contract with that other undertaking and in future to carry out the cleaning work itself.

30. The facts in *Süzen*[11] are most closely related to those in the main proceedings. A person who had entrusted the cleaning of his premises to a first undertaking terminated his contract with the latter and, for the performance of similar work, entered into a new contract with a second undertaking. In *Süzen* the Court ruled that the directive does not apply 'to a situation in which a person who had entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of similar work, enters into a new contract with a second undertaking, if 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'.

31. On the basis of an extensive interpretation of the legal reasoning in *Süzen* the Commission and all the parties other than Temco conclude that in the present case there was a contractual transfer of an undertaking within the meaning of Article 1(1) of the directive.

11 — Cited in footnote 3.

32. However, I do not consider this approach to be satisfactory. In my view, such a finding takes insufficient account of the economic context in which services are contracted out. The particular economic conditions under which contracts for the provision of services are concluded, and also the purpose of the directive, the case-law of the Court, and the circumstances of the case set out by the national court, lead me to conclude that the directive does not apply in the present case.

Contracting out of services: the economic context

33. In support of my view I must first examine in greater depth the economic context in which contracts for the contracting out of services are concluded.

34. Volkswagen's conduct is characteristic of the present trend for companies to contract out tasks which do not form part of their core activities to companies specialised in providing ancillary services under contract. Obvious examples are companies engaged in cleaning operations, surveillance services, catering activities, customer service, education and training, hardware and software provision, and product development, etc. The service providers often operate on a local level and on a small scale, carrying on their activities on the

premises of the company awarding the contract. In that respect the possibility cannot be ruled out that competing companies will be performing work for the same contracting company at the same time. [12] Essentially, particular blocks of economic activities are engaged in on these service markets for a specific period. This period can range from one day for the provision of catering at a specific event, for example, to a number of years in the case of cleaning operations. Once the contract expires, the service provider competes again for the favour of the contract awarder who will select a competitor if it offers better conditions and services. Where, for example, the staff of an establishment complains about the catering, the awarder will seek a contract with a caterer which offers better service.

35. In the case of such economic activities labour generally constitutes a major cost item. Since the contracts between undertakings contracting out and service providers are usually concluded for a relatively limited period, staffing in this sector is characterised by an appreciable rate of turnover.

36. The markets for these categories of services are developing apace. There is a large and growing number of undertakings contracting out and the number of service providers is also increasing. This constitutes a significant difference from contracts offered on markets on which there are a relatively limited number of providers and customers such as, for example, the markets in rail transport and radio and television frequencies. On these markets the selection of a particular trader by the contract awarder has a significant influence on the market position of the competitors and the loss of a contract can in itself jeopardise the continued existence of the service provider. In the case of the contracting out of services such as in the present case, a service provider which loses a contract will, generally speaking, go in search of new customers.

37. Moreover, the markets in the contracting out of services are characterised by great diversity. This applies both to high-quality services with great added value, such as software and engineering activities, and services which are provided by persons with fewer skills, such as cleaning operations. Furthermore, sub-specialisations appear within sectors. The present case is illustrative of this diversity. At the hearing it was pointed out that the cleaning of industrial plants occupies a special position within the cleaning sector and is not comparable with more customary cleaning work in schools and offices.

38. On account of the heterogenous and dynamic nature of these markets, the Court must, in my view, be reticent in regard to the application of the directive in the case of changes of contract. The dynamics of the market might be disrupted if the existence of a transfer within the meaning of the directive were assumed too readily. The

12 — At the hearing the representative of Messrs Afia-Aroussi and Lakhdar pointed out that several cleaning companies are responsible for various sectors of the Volkswagen plant at the same time.

obligation to respect the rights of all the members of staff of a company *solely* on the basis of the takeover of a contract and the takeover of a proportion of existing staff will give a potential new contractor less incentive to pick up the contract. Undertakings might even be deterred from competing for the contract. All this could lead to the ossification of markets. The facts in the main proceedings again provide an example. The question is whether or not Temco would have been willing to enter into the contract for the cleaning operations at Volkswagen under the same conditions if the company had had to take over the entire staff of GMC instead of 42 employees.

39. It could be argued that in this connection the compulsory takeover of the entire staff forms part of the normal risk run by traders. This finding is correct where there is an actual takeover of the operation of a company within the meaning of company law. In that case the transferee makes a cost-benefit analysis of the undertaking to be taken over and the takeover price is determined *inter alia* by past performance and the compulsory takeover of the staff. The same occurs in the case of contracts which run for a long time and which are awarded through official invitations to tender. However, where services are contracted out, the award of a contract for a relatively short period is central and in that respect the compulsory takeover of the staff cannot, in my view, be regarded as a normal commercial risk.

40. The aim of Directive 77/187 is to ensure continuity of employment relationships within an economic entity, irrespective of any change of ownership. [13] The directive is based on Article 100 of the EC Treaty (now Article 94 EC) and for that reason considerations relating to the market and competition must be taken into consideration. In a market which is characterised by specialisms, short-term contracts between undertakings contracting out and service providers and considerable turnover of staff, employee protection is better served by conventional employment law than by employment protection relating to the takeover of undertakings. [14] Furthermore, if the service provider is required too readily to take over the entire staff, the objective of the directive will become disproportionate in relation to the principle of freedom of contract and of freedom to engage in business activities.

The criteria for application of the directive and development of the Court's case-law

41. The fact that, in assessing a transaction, account must be taken of the economic context in which it takes place is also clear from the case-law of the Court. As has been seen, the Community legislature did not define the concepts 'transfer', 'undertaking', 'legal transfer' or 'merger' in Article 1(1) of the directive. For this reason

13 — Case 24/85 *Spijkers* [1986] ECR 1119, paragraph 11. Settled case-law, see most recently judgment of 25 January 2001 in Case C-172/99 *Liikenne* [2001] ECR I-745, paragraph 19.

14 — Under national employment law, an employee enjoys protection in the event of changes in his working conditions and therefore may not be dismissed in advance and without a statement of reasons. In the main action GMC attempted to dismiss the four trade-union delegates as early as January 1995 'on economic or technical grounds', but, as the order for reference shows, this request was turned down by a joint committee (see paragraph 18 of this opinion).

it is for the Court to define these Community terms. In a series of decisions and in light of the social purpose of the directive those basic concepts must be interpreted flexibly. Instead of rigid, closely circumscribed definitions the Court has opted for criteria which must be applied by the national court in accordance with the circumstances of the case.

42. The criteria for application of the directive can be summarised as follows. Firstly, the transfer must relate to an 'undertaking' which is defined as a stable economic entity. [15] The undertaking must be transferred pursuant to a 'contract' and in that respect the Court has stated that there must be a change, on the basis of a contract, in the legal or natural person responsible for operating this entity and who incurs the obligations of an employer vis-à-vis the employees of the undertaking. [16]

43. Secondly, the *decisive criterion* for establishing whether there is a transfer for the purpose of the directive is whether the business in question retains its identity, as indicated by the fact that its operation is actually continued or resumed with the same or similar activities. [17] That criterion has now been codified by Regulation 98/50 in Article 1(1)(b) of the amended directive.

44. In the specific case before it the national court must determine whether these conditions are met in the light of the interpretative criteria laid down by the Court. According to the Court, the national court must consider *all* the facts characterising the transaction in question, including the type of undertaking or business, whether or not the business's 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 its customers are transferred and the degree of similarity between the business carried on before and after the transfer and the period, if any, of any interruptions in that business. It should be noted, however, that all those circumstances are merely individual factors in the overall assessment to be made and cannot therefore be considered in isolation. [18]

45. Since the national court must consider all the facts in assessing a transaction, the type and characteristics of the relevant markets for the provision of services must, in my view, also be taken into account

15 — Case C-48/94 *Rygaard* [1995] ECR I-2745, paragraph 20. See *Liikenne*, cited in footnote 13, paragraph 31.

16 — Joined Cases 144/87 and 145/87 *Berg* [1988] ECR 2559, paragraph 19.

17 — *Spijkers*, cited in footnote 13, paragraph 11.

18 — *Spijkers*, cited in footnote 13, paragraph 13.

where services are contracted out. This can be achieved by having regard to those characteristics in interpreting the concepts 'legal transfer' and 'undertaking' within the meaning of Article 1(1) of the directive.

46. The case-law of the Court in respect of the abovementioned concepts has undergone significant development.

47. Thus, the requirement that the transfer must take place pursuant to a 'contract' is not limited to situations in which contractual relations exist between the transferor and transferee of the undertaking. On account of the differences between language versions and between the laws of the Member States, regard must also be had, in determining that concept, to the scheme and objective of the directive. [19] For those reasons, the Court has extended the concept 'contract' so that the directive is applicable wherever, *in the context of contractual relations*, there is a change in the natural or legal person who is responsible for carrying on the business and incurs the obligations of an employer towards employees of the undertaking. [20] For example, it is irrelevant whether or not there is a transfer of ownership [21] or that there is consensus as regards the transfer. [22] The fact that termination of a lease of a restaurant is followed by a new lease with another operator does not preclude application of the directive. The reasoning of the Court is that in such a situation the transfer is effected in two stages, through the intermediary of a third party, in that the undertaking is first transferred by the original lessee to the owner and the latter then transfers it to the new lessee. [23]

48. However, the Court has not gone so far as to accept that there may be no link at all between the transferor and the transferee. In *Redmond*, in which a public authority — the Municipality of Groningen — changed its subsidy policy and decided to withdraw the subsidy to a foundation seeking to assist drug addicts and to grant it to another foundation with the same aim, the Court, while considering that the directive could be applicable, attached importance to the fact that the old and the new foundation arranged for by mutual agreement the transfer of patients,

19 — See Case 135/83 *Abels* [1985] ECR 469, paragraph 13.

20 — See, for example, Joined Cases C-171/94 and C-172/94 *Merckx* [1996] ECR I-1253, paragraph 28.

21 — See, for example, Case 287/86 *Ny Molle Kro* [1987] ECR 5465.

22 — The directive can apply in the event that the lessor takes over operation of the leased undertaking after a judge has terminated the lease-purchase agreement on the ground of non-performance. See *Berg*, cited in footnote 16, paragraph 19.

23 — Case 324/86 *Tellerup* ('*Daddy's Dance Hall*') [1988] ECR 739, paragraph 10. In *Lukenne* the Court did not rule out application of the directive to the taking over of the operation of scheduled local bus routes which were previously operated by another undertaking but which were transferred following a procedure for the award of a public service contract under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1). The Court ruled that contractual links exist in accordance with the 'two-stage doctrine' where a legal person governed by public law awards a contract for operation successively to two undertakings. *Lukenne*, cited in footnote 13, paragraphs 28 to 30.

accommodation, information and resources.[24] In the case where a motor vehicle dealership concluded with one undertaking was terminated and a new dealership was awarded to another undertaking the Court ruled that the fact that an 'agreement and guarantee' containing a provision relating to costs incurred in the transfer of the staff was concluded between the principal shareholder of the old undertaking and the new dealer confirmed that there was a legal transfer within the meaning of the directive.[25]

49. In *Süzen* the Court considered that the lack of any direct contractual link between the two undertakings successively entrusted with the cleaning of a school can certainly not be conclusive as regards the application of the directive.[26] However, at the same time the Court applied the requirement that, for the purposes of contractual relations, there must be a change in the operation of the undertaking.[27]

50. Moreover, the complete abandonment of the requirement relating to contractual relations between transferee and transferor would be *contra legem*. The wording of the directive refers expressly to the contractual relationship in the form of a contract or merger.

51. Alongside the concept 'contract' the concept of 'undertaking' within the meaning of Article 1(1) of the directive has also been further elaborated in the case-law. The Court proceeds on the basis that the directive can be applied wherever the transfer relates to a stable economic entity whose activity is not limited to performing one specific works contract. The concept of 'entity' refers to an organised grouping of persons and assets facilitating the exercise of an economic activity with a view to a specific objective.[28] There can be a transfer only were the identity of such an economic entity is retained. However, an undertaking can retain its identity where, for example, its principal place of business moves to another municipality, the transferor terminates all its activities after the transfer and a large proportion of the staff are dismissed.[29]

52. Such an extensive interpretation is also central to *Süzen* in which the concept 'economic entity' is separated from the existence of assets. In sectors in which an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, the Court argues, be logically dependent on the transfer of such assets. In certain labour-intensive sectors, such as the cleaning sector, the Court acknowledges that a group of workers engaged in a joint activity on a permanent basis may constitute an

24 — Case C-29/91 *Redmond Stichting* [1992] ECR I-3189, paragraph 27.

25 — *Merckx*, cited in footnote 20, paragraphs 30 and 31.

26 — Cited in footnote 3, paragraph 11.

27 — Cited in footnote 3, paragraph 12.

28 — See *Liikenne*, cited in footnote 13, paragraph 31.

29 — *Merckx*, cited in footnote 20, paragraphs 20 to 26.

economic entity. Therefore, such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of numbers and skills, of the employees specifically assigned by his predecessor to that task. In those circumstances, the new employer takes over a body of assets enabling him to carry on the activities or certain activities of the transferor undertaking on a regular basis. [30]

53. This reasoning determines the limits in regard to the situations to which the Court considered the directive could properly be applied. Other judgments are more restrictive. The driving of underground tunnels [31] and the operation of bus routes [32] are not labour-intensive activities. In *Rygaard* it was made clear that 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 within the meaning of the directive. In that case undertaking A had accepted a contract to complete joinery work for undertaking B. With the consent of undertaking B, undertaking A then had part of the work completed by undertaking C. The Court considered that there was no takeover as between undertakings A and C because the transfer of the work did not include the transfer of a body of assets enabling the activities or certain activities of the transferor undertaking to be carried on permanently. [33]

54. *Süzen* states unequivocally that, in regard to the contracting out of services, the mere fact that the service provided by the old and the new contracting parties is similar does not therefore 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. In the Court's view, the mere loss of a service contract to a competitor cannot by itself support the proposition that there has been a transfer within the meaning of the directive. [34]

55. This case-law concerning the subject-matter of the takeover within the meaning of Article 1(1) of the directive shows that the Court interprets the retention of the identity of an economic entity broadly but that that identity must be reflected in a degree of organisation and permanence and cannot be constituted merely by the placing of a contract by one customer.

30 — *Süzen*, paragraphs 18 and 21, and *Hernández Vidal and Others*, paragraph 27, both cited in footnote 3. In its judgment in *Hidalgo and Others*, which was delivered on the same date as the judgment in *Hernández Vidal and Others*, the Court also considered that the surveillance sector is a sector in which assets are often reduced to their most basic and the activity is essentially based on manpower (Joined Cases C-173/96 and C-247/96 *Hidalgo and Others* [1998] ECR I-8237, paragraph 26).

31 — Case C-234/98 *Allen and Others* [1999] ECR I-8643, paragraph 30.

32 — *Lukenne*, cited in footnote 13, paragraph 39.

33 — *Rygaard*, cited in footnote 15, paragraph 21.

34 — *Süzen*, cited in footnote 3, paragraphs 15 and 16.

The application of the criteria in the present case

56. Returning to the case before the Court, I would point out that the national court has highlighted a number of specific circumstances. In the first instance Volkswagen had awarded the cleaning contract to BMV which subsequently entrusted the work to GMC. Therefore, there was no direct contractual link between GMC and Volkswagen or *a fortiori* between GMC and the new contracting party, Temco. Furthermore, no assets of any kind were transferred from GMC to Temco. A proportion of the staff were indeed taken over by Temco, but the takeover took place after the employees other than the four trade-union delegates had already been dismissed by GMC. The takeover of the staff is a consequence of the obligations on Temco arising from a collective labour agreement. Moreover, the national court states that GMC continued to exist even after BMV had lost the contract with Volkswagen. [35]

57. Since the case concerns cleaning operations, consideration could be given, in keeping with *Süzen*, solely to whether or not Temco is carrying on the activities which BMV-GMC carried on at Volkswagen and has taken over a major part of the staff which GMC used for the cleaning operations in question. As I noted earlier, I take the view that such consideration is too limited. In assessing the facts characterising the transaction in question, it is also necessary, under the case-law referred to above, to consider the type of undertaking [36] and the type of activity carried on. [37] I propose that the Court should adopt a broader criterion in this regard by also taking account of the economic circumstances under which the transaction takes place.

58. In this respect I find it difficult, on the basis of the information provided by the national court and in view of the economic context, to conclude that the *identity* of the cleaning company was transferred to the new contracting party in the context of *contractual relations*. The sole inference that may be drawn is that Temco took over a proportion of the staff of GMC in order to perform the contract which it concluded with Volkswagen.

59. First of all, it is clear that the fact that Volkswagen awards a contract for industrial cleaning operations to a new contracting party does not constitute a takeover within the meaning of company law. There is merely a contract to perform certain economic activities. Moreover, in light of

35 — The parties partially contest and partially complement the facts cited by the national court. For example, it is claimed that BMV and GMC are *de facto* the same undertaking. Furthermore, GMC is merely a shell company which no longer has any intention of carrying on activities and whose continued existence is due solely to the pending proceedings. In addition, doubts have been voiced as to the degree to which the collective labour agreement of 5 May 1993 was regarded as the sole reason for taking over the 42 members of staff. Temco would have been unable to perform the contract with Volkswagen without the specialist staff of GMC. It is for the national court to consider these claims. As far as is possible, I will base this Opinion on information which the national court provided in the statement of the grounds for the order for reference.

36 — *Spijkers*, cited in footnote 13. See paragraph 44 of this Opinion.

37 — *Süzen*, cited in footnote 3. See paragraph 52 of this Opinion.

the abovementioned paragraphs of the judgment in *Süzen*, [38] the fact that BMV lost the contract to provide cleaning services at Volkswagen to Temco does not support the proposition that there was a transfer of an undertaking for the purposes of the directive.

60. In my view, it is not logically possible to speak of a 'takeover of an undertaking as a result of legal transfer or merger' merely on the basis of the fact that, where services are contracted out, the new contracting party takes over (a major part of) the staff of the previous contracting party. In this respect it is irrelevant whether or not this takeover of staff takes place voluntarily, for example because the new contracting party requires the know-how of the staff in order to perform the contract to provide services, or involuntarily, for example because a collective labour agreement compels it to do so.

61. In regard to the requirement concerning contractual relations, apart from the fact that one succeeded the other as service provider in respect of Volkswagen, there is no actual link between BMV-GMC and Temco. [39] Temco took over a proportion of the staff *after* GMC had already lawfully dismissed its members of staff. GMC stated that, when dismissal of the 76 employees was requested, it was unaware of the identity of the new contracting party. It is evident from the facts set out by the national court that consent for the dismissal was granted on 30 November 1994 by the Employment Department for the Brussels region, whilst Volkswagen entered into the contract with Temco in December 1994. No artificial arrangement between GMC, BMV and Temco, for example to escape the application of the directive, is evident. In my view, there can therefore be no question of any contractual relationship, even an indirect one. The 'two-stage' reasoning applied by the Court in its case-law, that is to say that no direct contractual link is necessary between the transferor and the transferee, also assumes a certain link and the mediation of an 'intermediary' undertaking. [40] However, it is not evident that Volkswagen, as the undertaking contracting out services, was actively involved in the relationship between the old and the new contracting party.

62. Furthermore, the business did not retain its identity. In the present case that identity cannot be constituted by the continuation of the same activities — in this case industrial cleaning operations — because this continuation is inherent in the change in contracting party where services are contracted out.

63. Nor in my view does such an entity retain its identity where the new employer not only continues the activity in question

38 — See paragraph 54 of this Opinion.

39 — There was indeed a contract between the old and the new service provider. The file contains a copy of a letter dated 14 December 1994 from Volkswagen to Weisspunkt, whose assets and liabilities BMV took over, informing that undertaking that Euroclean, a member of the Temco group, would take over the cleaning operations at Volkswagen. Furthermore, the file shows that correspondence took place between GMC and Temco in connection with the provision of information as referred to in Article 3 of the collective labour agreement of 5 May 1993.

40 — See, in a similar sense, Advocate General La Pergola in his opinion in *Süzen*, cited in footnote 3, paragraph 7.

but also takes over a major part, in terms of numbers and skills, of the employees specially assigned by his predecessor to that task.[41] Since the employees dismissed by GMC clearly have specific knowledge of the operations at Volkswagen,[42] it is entirely normal, from a market point of view, for Temco to have offered contracts to some of the staff who had been dismissed. In my view, the mere take-over of a major part of the staff by the new contracting party in a dynamic market has no connection with the identity of a business and therefore provides no conclusive argument. In that case the new contractor does not acquire the body of assets enabling the activities or certain activities of the transferor undertaking to be carried on a permanent basis.[43] Even if activities carried out are essentially based on manpower, the identity of a business cannot be derived solely from the number and skills of the staff who are taken over. In determining identity, account must be taken of other factors relating to the staff, such as management, organisational structure, division of labour, and systems of training, pay and promotion. If, where services are contracted out, a proportion of the staff are taken over as a result of a change of contracts for the performance of a specific contract, it is not possible to regard that as permanent continuation of the activity in question on account of the nature of the contract, which is by definition of temporary duration.

64. In light of the foregoing, I am thus of the view that the directive is not applicable in the present case. The requirement that within the context of contractual relations the identity of the business be retained is not fulfilled.

65. That conclusion is in my opinion, also warranted.

66. Firstly, any other view would have the paradoxical result that the directive, which seeks to protect *all* employees where undertakings are taken over, would even apply to the contracting out of services if *a proportion of the* staff were taken over to carry out a block of similar work. It would be even less comprehensible if the takeover of the staff by the new contracting party did not occur voluntarily but took place on the basis of obligations arising from a collective labour agreement. For in such a case the transfer of an undertaking is dictated by the collective labour agreement.

67. Secondly, there is no reason why, where a service provider loses a contract as a result of commercial considerations, that is to say because another undertaking would offer better terms, the new contracting party should automatically have to retain the entire staff of the undertaking which lost the contract merely because its commercial activity happens to be essentially based on manpower. A significant consequence of this would be, for example, that if a caterer in a company canteen were changed on account of the poor service provided by the staff the new contracting party would have to deal with the staff with

41 — *Süzen*, cited in footnote 3, paragraph 21.

42 — As stated at the hearing by the representative of Messrs Afia-Aroussi and Lakhdar.

43 — *Rygaard*, cited in footnote 15, paragraph 21.

whom the party awarding the contract was not satisfied. In market terms, an excessively broad view would be unwarranted and could result in far-reaching and unforeseeable consequences in a dynamic economic situation. Further extension of the criteria for application of the directive would inevitably lead on those markets to arbitrariness and legal uncertainty.

68. Thirdly, the directive is aimed at protecting 'existing' staff, but, as indicated above, the contracting out of services primarily involves, in my view, a change of contracts of a specific duration and not a permanent takeover of an undertaking together with its existing staff. In the present case the complete takeover of the staff, with the safeguarding of the employees' rights arising from the collective labour agreement with GMC, could result in discrimination against the employees of Temco. It cannot be ruled out that Temco has better motivated and qualified staff who would be excluded from the operations at Volkswagen as a result of the application of the directive. For Temco, Volkswagen was only one of many principals. Furthermore, Temco is deprived of an opportunity to seek other members of staff on the labour market. The protection afforded to sitting employees thereby results in clear discrimination against employees entering the market.

B — *The protection afforded by the directive*

69. If the Court rules that there was no transfer of an undertaking in the present case, the second question need not be answered. In the event that the Court should take a different view, I will deal with this question in brief below.

70. By the second question the national court seeks to ascertain whether the directive nevertheless precludes GMC, in its capacity as the transferor in the event of takeover, from being able to retain workers in its service. In the main proceedings tensions arose because the dismissal by GMC of four trade-union delegates was not permitted on account of the protection from dismissal afforded by national law. As a result the four were able to exercise their rights under the directive with greater difficulty or not at all. In fact, this question comes down to whether the four employees could have relied on the protection afforded by Article 3(1) of the directive vis-à-vis Temco if they had not terminated their employment with GMC on account of their protection against dismissal and also if they had not been dismissed by the transferor.

71. Therefore, it is necessary to examine the significance of the national legislation concerned for the interpretation of the directive, in relation to the action of the employees concerned.

72. The directive is intended to protect workers in the event of takeover by making it possible for them to enter automatically

into the service of the new employer under the same conditions as those agreed with the transferor. The rules of the directive are, in the view of the Court, mandatory in nature, so that it is not possible to derogate from them in a manner unfavourable to employees. Accordingly, the transfer of the contracts of employment cannot be dependent on the intention of the transferor or the transferee.[44] Nor are they free to determine, by mutual agreement, the time at which the obligations arising in the employment relationship are transferred to the transferee because the obligations in question are transferred to the transferee as from the date of transfer.[45]

73. Therefore, it follows that GMC, as the transferor, cannot infringe the rights of the employees concerned by retaining them in its service. In my view, the fact that GMC is compelled to do so by national law is not decisive. When the directive has been transposed, national law cannot be interpreted to the detriment of these employees. The abovementioned case-law precludes such an interpretation which, moreover, would undermine the practical effect of the directive.

74. However, the mandatory nature of Article 3(1) of the directive is limited by a worker's freedom to choose his occupation. The protection which the directive is intended to guarantee is redundant where the worker concerned decides of his own accord not to continue the employment relationship with the new employer after the transfer.[46] In that case, it is for the Member States to determine what is to happen concerning the contract of employment or employment relationship. National law may for example provide that the contract of employment should be maintained with the transferor.[47]

75. In the present case there is disagreement as to whether or not the four trade-union delegates voluntarily decided not to transfer to Temco. In its order for reference the Cour du travail states that in the period leading up to their dismissal by GMC in December 1995 the four never claimed to have entered into the service of Temco. Since they considered that they enjoyed special protection against dismissal, they demonstrated by their conduct up to their dismissal that they were still members of the staff of GMC.

76. However, these matters are contested by GMC-BMV and the four trade-union delegates. They assert that in the period from 9 January 1995 to 11 December 1995 the four were indeed still on the payroll and continued to receive part of their pay from GMC without having to perform any work in return, but that this situation was created by Temco's refusal to take them over. Consequently, there could be no question of them deciding voluntarily not to transfer.

44 — See Case C-305/94 *Rotsart de Hertaing* [1996] ECR I-5927, paragraphs 16 to 20.

45 — *Rotsart de Hertaing*, cited in footnote 44, paragraph 24.

46 — Case 105/84 *Danmols Inventar* [1985] ECR 2639, paragraph 16.

47 — Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others* [1992] ECR I-6577, paragraphs 35 and 36.

77. The observations submitted and the explanations given by the parties at the hearing do not really make it possible to establish whether or not the four voluntarily by their conduct renounced their rights under the directive. Therefore, it must be left to the national court to make a final judgment in the light of the actual circumstances. In that regard, account must be taken of the fact that the trade-union delegates enjoyed special legal protection based on national law which could explain a certain reluctance on their part to transfer to Temco. Since the obligations legally devolve to the transferee at the time of the takeover, I consider that the national court must take as a basis the conduct of the employees concerned during the period in which the transfer took place, that is to say around 9 January 1995. The principle of legal certainty in respect of the transferee and the transferor also requires that this be the case.

VI — Conclusion

78. In light of the foregoing, I propose that the Court answer the questions referred by the Cour du Travail, Brussels, 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 does not apply in a situation where undertaking A contracts with undertaking B for the cleaning of its industrial plants and undertaking B entrusts that work to undertaking C, which, following loss of the contract by undertaking B, dismisses all its staff, except for four persons, whereupon undertaking D is awarded the contract by undertaking A, employs a proportion of the staff of undertaking C under a collective labour agreement but takes over none of the assets of undertaking C, which latter undertaking continues to exist and to pursue the objects for which it was incorporated.

(2) The second question need not be answered.