OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 19 June 2003 [1]

I — Introduction

1. The Oberster Gerichtshof (Supreme Court) (Austria) has referred to the Court for a preliminary ruling a question concerning 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 'Directive 77/187' or 'the directive'). [2]

2. The main proceedings raise the question whether there is a transfer of an undertaking within the meaning of Directive 77/187 where an undertaking provides meals for patients and staff on behalf of a care establishment and these activities were previously exercised by another undertaking. The new undertaking makes use of facilities such as gas, water and energy and service premises and the necessary kitchen equipment that was used by the previous operator and is made available by the contracting authority. However, the new undertaking has taken over none of the operational resources — staff, stock, accounting material and menu, diet, recipe or general records — brought in by the old operator and does not intend to do so.

3. This case is connected with previous rulings of the Court in which the application of Directive 77/187 in relation to the contracting-out of services was the principal issue. Nevertheless, there are clear differences between the factual situations in judgments such as *Süzen* [3] and *Temco*. [4] For example, the new undertaking has taken over none of the staff of the old undertaking. Nor have the operational resources been transferred directly from the old undertaking to the new operator. Only some of the operational resources made available by the contracting authority are used both by the old and the new undertaking.

1 — Original language: Dutch.

2 — OJ 1977 L 61, p. 26.

3 — Case C-13/95 [1997] ECR I-1259.

4 — Case C-51/00 [2002] ECR I-969.

II — Legal background

A — *Community law*

4. The directive sets out the protection of employees to be provided for in the event of a change of employer, in particular, to ensure that their rights are safeguarded. Article 1 states that the directive is to 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.

5. Article 2(a) provides that for the purposes of this directive 'transferor' means 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. Under Article 2(b), for the purposes of the directive 'transferee' means 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. 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.

6. The directive has been amended twice. Council Directive 98/50/EC of 29 June 1998 clarified certain terms in particular in the light of the case-law of the Court. [5] In order to rationalise the wording the Council repealed Directive 77/187 on 12 March 2001 and replaced it with Council 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. [6]

7. Article 1(1) of the directive was renumbered Article 1(1)(a) pursuant to Directive 98/50. Directive 98/50 introduced a new Article 1(1)(b) which relates to the term 'transfer' and 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, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.'

5 — Council Directive 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). The period for implementation of Directive 98/50 was extended to 17 July 2001.

6 — OJ 2001 L 82, p. 16. Unless stated otherwise, reference is made below to the wording of the original directive.

8. According to the preamble to Directive 98/50, this clarification is provided for reasons of legal certainty and transparency but does not alter the scope of the directive as interpreted by the Court of Justice. [7]

B — *National law*

9. In Austria Directive 77/187 was implemented by the Arbeitsvertragsrechtsanpassungsgesetz (AVRAG). Paragraph 3 of the AVRAG provides that where, for example, a part of a business is transferred to another employer, the latter takes over, as the employer, all rights and obligations deriving from the employment relationships existing on the date of the transfer. According to the settled case-law of the Oberster Gerichtshof, that provision must be interpreted in conformity with the directive, having regard to the decisions of the Court of Justice on Directive 77/187, as amended.

7 — See the fourth recital in the preamble.

III — Facts in the main proceedings, procedure and question submitted for a preliminary ruling

10. As a result of the qualified way in which the Court has interpreted the conditions for application of Directive 77/187, the circumstances of the specific case are of great importance. The national court has established the facts in the present case as follows.

11. In 1990 the authority of an unspecified hospital (hereinafter 'the hospital authority') concluded with Sanrest, a canteen-kitchen operating company, an agreement under which the latter took over the management of catering services, consisting of full catering for patients and staff, at a price calculated on the basis of a day of catering per person. In addition, it was required to adhere to a specified range of meals (various dietary foods). The production of meals was to take place on the hospital's premises. The operations assigned to Sanrest included drawing up menus, purchasing, storage, production, portioning and transporting the portioned meals to the wards (but not distributing them to the patients), serving meals in the staff dining room and cleaning the dirty crockery and premises used. The premises themselves, as well as gas, water and energy and the necessary large and small equipment, were made available by the hospital authority. Any damage to that equipment was to be compensated for by Sanrest.

Special services were to be paid for separately. In addition, Sanrest took over the cafeteria which was also located in the hospital.

12. After disagreements had arisen between the hospital authority and Sanrest in the middle of 1998, the hospital authority, by letter of 26 April 1999, terminated the contract with Sanrest, giving the required six-month period of notice. The hospital then put out a call for tenders for a new service contract. In the middle of October 1999, Sanrest, which had also participated in the tender for the new contract, was informed that the catering operation was being taken over by Sodexho.

13. Sanrest decided that this was a case of a transfer of part of a business. However, Sodexho's manager refused to take over Sanrest's materials, stock and employees. It also received no accounting data, menu plans, diet plans, recipe collections or general records. The only items which it took over from Sanrest's other customers were some 6 to 10 menus for the nursery situated near the hospital.

14. The plaintiffs in the main proceedings, who were recruited by Sanrest in the catering operation or in the cafeteria in the hospital, seek a declaration of the continuing existence of their employment relationship with Sodexho. They base their claim, in which they are supported by Sanrest, on the argument that the takeover of the catering operation and the cafeteria constitutes a transfer of a business within the meaning of Paragraph 3(1) of the AVRAG and Article 1(1) of Directive 77/187. It is claimed that Sodexho took over tangible and intangible assets and consequently a stable economic entity with the same customer. That entity was a production business with elements of a commercial and service business. The plaintiffs submit that the business transfer is not decisive, but rather that decisive importance should be attached to the change in the person responsible for the management of the business. The transfer of the workforce is a consequence of, and not a prerequisite for, the transfer of a business.

15. This view is disputed by Sodexho. In brief, it bases its view on the fact that it did not take over from Sanrest any tangible or intangible assets such as stock, menu plans, diet plans, recipe collections, accounting data or general records, or any part of the workforce. The service premises, together with the equipment, which alone were taken over, did not constitute a work organisation unit for the purposes of a transfer of a business. In some cases the equipment taken over from the hospital even had to be supplemented. It manages the kitchens on the basis of its own organisation, accounting and know-how, and also draws up its own meal plans. Consequently, there has been, in its view, merely a change of contractor.

16. The first-instance court dismissed the plaintiffs' claim and concluded that there was no transfer of a business. The court hearing the appeal did not share this view and amended the judgment accordingly.

17. In the appeal on points of law the Oberster Gerichtshof referred the following question to the Court for a preliminary ruling by order of 25 June 2001 and pursuant to Article 234 EC:

'Is there a transfer of part of a business within the meaning of Article 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 where a hospital authority, which has previously employed a catering undertaking to supply meals and beverages to patients and hospital staff at a price based on a day of catering per person, and to that end has made available to that undertaking water and energy as well as its service premises (hospital kitchen) together with the necessary equipment, transfers, after giving notice of termination of that contract, those operations and the assets previously made available to that first catering undertaking to a second catering undertaking which does not take over the assets (staff, stock, accounting material and menu, diet, recipe or general records) brought in by the first catering undertaking itself?'

IV — Observations of the parties

18. Written observations were submitted to the Court by Sodexho, the defendant in the main proceedings, the Commission of the European Communities and the United Kingdom Government. A hearing was held in this case on 15 May 2003.

19. Sodexho takes the view that there is no transfer of an undertaking. It argues that there was no direct contact with the former operator of the kitchens and the cafeteria and that it did not take over any tangible or intangible assets from that operator.

20. Sodexho does not dispute the fact that the hospital kitchens and cafeteria are an organised grouping of persons and tangible and intangible assets facilitating the exercise of an economic activity.

21. In the view of Sodexho there is no transfer of an undertaking within the meaning of Directive 77/187 because the entity in question does not retain its identity.

22. Sodexho did not take over the staff, the management staff, the way in which work is organised, the operating methods or the operational resources from Sanrest. Only the service premises and the necessary kitchen equipment made available by the contracting authority and facilities such as gas, water and energy were put to use by Sodexho. However, the facilities made available are not in themselves sufficient to conclude that the entity in question retains its identity. Nor does the mere fact that the services provided by the old and the new contractors are similar support the conclusion that an economic entity has been transferred. Mere succession in respect of function does not constitute transfer of a business.

23. Sodexho draws a distinction between the various sectors under which the dining room and the cafeteria could come. They are the sectors in which manpower is the principal factor, the sectors in which tangible assets are the decisive factor, and sectors in which both these factors are of equal importance to the activity concerned. Sodexho itself does not go on to state to which sector, in its view, the hospital dining room and cafeteria belong.

24. In a labour-intensive sector a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity. Such an entity retains its identity where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task. If the dining room and the cafeteria belong to this sector, the only possible conclusion, in the view of Sodexho, is that there is no transfer of an undertaking because none of the old staff were taken over by the new undertaking.

25. If the hospital dining room and cafeteria belong to the sector in which the tangible assets contribute significantly to the performance of the activity, the absence of a transfer to a significant extent from the old to the new contractor of such assets, which are necessary for the proper functioning of the entity, must, in the view of Sodexho, lead to the conclusion that the entity does not retain its identity.

26. If the hospital dining room and cafeteria belong to the sector in which manpower and tangible assets are both regarded as factors important to the activity concerned, there can, in the view of Sodexho, likewise be no transfer of an undertaking because no staff and assets have been transferred from the previous to the present contractor.

27. The Commission takes the view that there is a transfer of an undertaking in the present case. It arrives at this conclusion on the basis of the arguments set out in brief below.

28. Like the other parties that have submitted observations, the Commission considers that this case concerns a stable economic entity whose activity is not limited to performing one specific works contract.

29. The Commission submits that the test for establishing the existence of a transfer is whether the economic entity in question retains its identity. In order to determine whether or not this is the case, it is necessary to consider all the facts characterising the transaction in question.

30. Firstly, it is necessary to examine the type of undertaking or business involved. In the view of the Commission, the present case is peculiar in that the products of this business are acquired mainly by one contracting authority, the business (or part thereof) is located in the contracting authority's buildings, and the contracting authority owns the essential tangible operational resources (fixed assets) which it makes available within the framework of the contract.

31. Secondly, in the view of the Commission the hospital kitchens and other facilities, which are regarded as tangible assets which contribute significantly to the performance of the activity, were taken over by Sodexho. However, the new undertaking took over none of the operational resources — stock, accounting material and menu, diet, recipe or general records — brought in by the old operator. However, the Commission considers that these assets are of less importance.

32. Thirdly, Sodexho did not take over the staff of the previous trader. However, in the view of the Commission this does not mean that there is no transfer of an undertaking. In the case of an undertaking in which tangible assets or particular operational methods contribute significantly to the performance of the activity, the entity in question can retain its identity despite the fact that the staff has not been taken over.

33. Sodexho's refusal to take over the staff is inconsistent with the protection which Directive 77/187 provides for employees, in particular where unskilled workers are concerned. Employers can circumvent the directive by not taking over staff so that they fall outside the scope thereof.

34. Fourthly, the fact that the customers are transferred supports the conclusion that the entity in question retains its identity, as does the fact that the activities carried on are similar and were not suspended.

35. The observations submitted by the United Kingdom Government show that it regards catering as a labour-intensive sector. In such a sector it is possible for a new contractor to evade application of the directive if it takes over very few assets or part of the staff of the old contractor. In such a labour-intensive sector it is generally the vulnerable employees with relatively few skills who are affected where it is decided that there is no transfer of an undertaking.

36. However, where a new contractor takes over very few of the assets or some of the employees of the old contractor, there is merely the provision of similar services by the new and the old contractor. If such a situation falls within the scope of Directive 77/187, there is a transfer of an undertaking where similar services are provided. Such a broad interpretation of the directive is also undesirable.

37. The United Kingdom Government puts forward three solutions to the abovementioned problem but fails to state which solution it prefers.

38. Where a new contractor does not take over significant tangible assets or a major part of the staff, there is no transfer of an undertaking as set out in the directive. The objective of the new contractor in taking over the staff or otherwise is not relevant to whether there is a transfer within the meaning of the directive. This answer provides legal certainty but consequently enables new contractors to circumvent the directive.

39. The Court could also rule that the intention of the new contractor to take over the employees or otherwise (in particular to evade application of the directive) is decisive as to whether or not there has been a transfer. The directive is applicable if (i) employees are not taken over by the new contractor, (ii) there would be a transfer if the employees had been taken over, (iii) the reason why the employees were not taken over was to evade application of the directive. This answer also provides legal certainty but could give rise to practical problems as regards establishing the true reasons why the new contractor did not take over the employees.

40. The Court could, thirdly, rule that the intention of the new contractor not to take over any employees is one of the factors to be taken into consideration in determining whether or not there is a transfer. However, the national court must examine all the factors in assessing whether or not there is a transfer.

41. The second question which must be considered arises from the fact that the new contractor puts to use significant fixed assets (such as kitchen equipment and facilities) which were used previously by the old contractor but in both cases these facilities were made available by the contracting authority.

42. As regards how it should be determined whether the new contractor has taken over tangible assets which were used previously by the old contractor but in both cases were made available by the contracting authority, the United Kingdom Government considers that there is conflicting case-law. [8]

8 — In the view of the United Kingdom Government the conflicting case-law arises from Case C-234/98 *Allen and Others* [1999] ECR I-8643, paragraph 30, and Case C-172/99 *Liikenne* [2001] ECR I-745, paragraph 42. In the former case the Court held that: '... The fact that ownership of the assets required to run the undertaking did not pass to the new owner does not preclude a transfer... . In the circumstances, the fact that there was no transfer of assets between ACC and AMS is not of decisive importance.' In the latter the Court held that: 'However, in a sector such as scheduled public transport by bus, where the tangible assets contribute significantly to the performance of the activity, the absence of a transfer to a significant extent from the old to the new contractor of such assets, which are necessary for the proper functioning of the entity, must lead to the conclusion that the entity does not retain its identity.'

43. The United Kingdom Government considers that this inconsistency should be defined as follows. Where essential assets are transferred directly from the old contractor to the new contractor, this is a decisive factor as to whether or not there is a transfer. However, where essential assets are made available to the new contractor by the contracting authority and it is customary for the most important assets necessary for the performance of the activity to be provided by it, such an arrangement is not decisive as to whether or not there has been a transfer.

44. The United Kingdom Government asks the Court to rule on how this conflict is to be resolved in the present case.

V — Appraisal

A — *Case-law of the Court concerning the scope of Article 1(1) of Directive 77/187*

45. In the light of the facts of the main proceedings it is appropriate first to set out the most important principles of Community case-law concerning the scope of Article 1 of Directive 77/187. This also concerns the Court's view of the application of the directive in respect of trans-

actions relating to the contracting-out of services. In my view, this steadily expanding case-law provides a significant basis for answering the question submitted for a preliminary ruling.

46. It is clear from the wording of Article 1(1) of the directive that its applicability is subject to three conditions: the transfer must result in a change of employer; it must concern an undertaking, a business or part of a business; and it must be the result of a contract. [9]

47. It should be noted from the outset that according to the established case-law of the Court 'the purpose of Directive 77/187 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. The directive is therefore 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.'

48. Furthermore, the Court has repeatedly ruled that: 'The decisive criterion for establishing the existence of a transfer within the meaning of the directive is whether the entity in question retains its identity, as indicated *inter alia* by the fact that its operation is actually continued or resumed.' [10] Thus, two fundamental conditions must be satisfied for there to be a transfer of an undertaking, business or part of a business.

49. Firstly, the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract. The term 'entity' thus refers to an organised grouping of persons and tangible and intangible assets facilitating the exercise of an economic activity which pursues a specific objective. [11]

50. Secondly, the question whether or not the undertaking is taken over must be determined on the basis of a number of facts. It is this part of the assessment on which the present case turns. In this regard the Court has laid down a number of factors which the national court must take

9 — *Temco*, cited in footnote 4 above, paragraph 21.

10 — See *Süzen*, cited in footnote 3 above, paragraph 10; Case 24/85 *Spijkers* [1986] ECR 1119, paragraphs 11 and 12; and, most recently Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253, paragraph 16.

11 — See, as regards case-law, *Temco*, cited in footnote 4 above, paragraph 23.

into consideration. This concerns all the facts characterising the transaction in question, including in particular:

(a) the type of undertaking or business;

(b) whether or not its tangible assets, such as buildings and movable property, are transferred;

(c) the value of its intangible assets at the time of the transfer;

(d) whether or not essential staff are taken over by the new employer;

(e) whether or not its customers are transferred;

(f) the degree of similarity between the activities carried on before and after the transfer; and

(g) the period, if any, for which those activities are suspended.

51. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore, in the view of the Court, be considered in isolation. [12]

B — *Must the change of contractor be regarded as the transfer of an undertaking?*

52. Before considering whether or not the entity in question retains its identity, I would first like to draw attention to the circumstances under which one contractor was replaced by another.

53. In the present case the hospital contracted out to a catering undertaking the catering which it is required to provide for the staff as an employer and for the patients as a care establishment. The hospital is the recipient of services and must therefore be classified as the customer of the caterer. To receive the services it makes essential operational resources available to the service provider. In such a situation there is a one-on-one relationship with the contractor. Following the termination of the contract with the old contractor, a new contract was concluded with Sodexho after a call for tenders. Sanrest continued to exist as a business.

12 — *Spijkers*, cited in footnote 10 above, paragraph 13; *Süzen*, cited in footnote 3 above, paragraph 14; and *Temco*, cited in footnote 4 above, paragraph 24.

54. In these circumstances there is only the loss of a contract by the original service provider and the acquisition of a contract by the new service provider. A catering business will provide services to several customers at various locations. Therefore, I consider that the loss of only one customer cannot be equated with the transfer of an undertaking.

55. As will be demonstrated below, there is support for this view also in the case-law of the Court. In this case-law the Court places a broad interpretation on the term 'transfer' but also restricts the scope thereof.

56. The directive is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person responsible for carrying on the business and entering into the obligations of an employer towards employees of the undertaking.

57. An undertaking must be transferred and 'as a result of a legal transfer or merger' (Article 1(1)(a)). The fact that this term is not to be construed as meaning that the transfer must be effected pursuant to a legal agreement is already clear from the Court's previous case-law.

58. A unilateral legal transaction, such as the termination of a lease agreement, is also effected within the context of a legal agreement and can therefore fall within the scope of the directive. In *Redmond Stichting* [13] a Netherlands municipality decided to change its policy on subsidies for the provision of assistance to drug addicts. The municipality withdrew its subsidy from one foundation and then awarded it to another. In assessing the applicability of Directive 77/187 the Court attached importance to the fact that the new and the old foundation arranged the transfer of the patients, accommodation, knowledge and resources by mutual agreement. In that judgment the Court held that the requirement of a legal agreement had been satisfied in that case: 'In that connection, it is inappropriate to take account of the nature of the subsidy, which is granted by a unilateral act coupled with certain conditions in some Member States and by subsidy contracts in others. In every case, the change in the recipient of the subsidy is carried out in the context of contractual relations within the meaning of the directive... .'

59. In *Merckx and Neuhuys* [14] the old and the new motor vehicle dealers had reached, by amending a dealership agreement, a mutual settlement on the costs incurred in transferring staff which confirmed the existence of a legal transfer within the meaning of the directive. In *Collino and Chiappero* [15] the transfer was based on the law. In this case too the Court found that

13 — Case C-29/91 [1992] ECR I-3189.

14 — Cited in footnote 10 above.

15 — Case C-343/98 [2000] ECR I-6659.

the requirement relating to a legal agreement had been satisfied. By a simple reference to *Redmond Stichting* the Court held that the circumstance that transfer results from unilateral decisions of the public authority rather than from an agreement does not render the directive inapplicable.

60. Therefore, it is not necessary for there to be direct contractual relations between the transferor and the transferee. Where the transfer is based on a decision, the requirement is satisfied, irrespective of whether it is in the form of an agreement, a unilateral legal transaction, a court judgment or a law. The transfer can also be effected in two stages via a third party such as the owner or lessor. Therefore, the directive can be applicable also where the transfer is effected in two stages via a third party.

61. However, the Court has also stated that the scope of the term 'transfer of an undertaking' is not without limitation. The lower limit of this broad interpretation is formed by the Court's ruling in *Süzen*: [16] '[t]he mere fact that the service provided by the old and the new awardees of a contract is similar does not therefore support the conclusion that an economic entity has been transferred.... The mere loss of a service contract to a competitor cannot therefore by itself indicate the existence of a transfer within the meaning of the directive. In those circumstances, the service undertaking previously entrusted with the contract does not, on losing a customer, thereby cease fully to exist, and a business or part of a business belonging to it cannot be considered to have been transferred to the new awardee of the contract.'

62. Consequently, it is not possible to speak of a transfer where there are two competing service providers which have no relationship with one another other than the fact that they have concluded successive contracts with the same customer.

63. In the light of *Süzen* I therefore conclude that there is no transfer of an undertaking in the present case because there is only the loss of a contract. The position can be different only if it is nevertheless clear that the undertaking in question retains its identity. This is so if the contract between, in this case, the hospital and the new contractor lays down certain conditions, such as *inter alia* the obligation to take over the staff, or other factors show that (part of) the undertaking has been transferred.

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

C — *Retention of identity*

64. It is established that no conditions relating to the staff were laid down in the contract between the hospital and Sodexho. Therefore, it is necessary to examine whether other factors show whether the undertaking in question retains its identity. This is decisive as to whether, despite my earlier finding, it is nevertheless possible to speak of the transfer of an undertaking. Whether or not identity is retained is assessed on the basis of two fundamental conditions (see points 49 to 51 above). The first of these two fundamental conditions is not in dispute. In this case the national court concludes that the catering operation and the cafeteria concern an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective. The national court states the purpose of the undertaking as 'to provide meals for patients and staff at specified prices'. This view is essentially uncontested and therefore not at issue in these proceedings.

65. As stated above, this case turns on the second condition, that is to say whether it is possible to determine from other facts whether or not the undertaking in question retains its identity and is thus continued (see point 50 above). I will consider below the factors which the Court takes into consideration in determining whether or not there is the transfer of an undertaking. I should also point out that these factors must be considered jointly. [17]

Type of undertaking or business

66. The market for catering operations is characterised by an end product that is a combination of the supply of goods — the meals themselves — and the delivery of certain forms of service, *inter alia* provision of manpower, serving meals in the works canteen, drawing up menus, transporting food, and cleaning operations. As is clear from the order for reference, what is involved is a series of actions, that is to say drawing up menus, purchasing, storage, transporting, serving meals (but not directly to the patients), and cleaning.

67. It is conceivable that catering for a care establishment such as a hospital also meets a number of particular quality specifications on account of the specific health requirements imposed at the workplace. They can consist of extra attention to matters of hygiene and specific requirements placed on meals for particular groups of patients (diets etc.). Nor can the

17 — *Spijkers*, cited in footnote 10 above, paragraph 13; *Süzen*, cited in footnote 3 above, paragraph 14; and *Temco*, cited in footnote 4 above, paragraph 24.

possibility be ruled out that the staff will have to satisfy additional requirements in terms of knowledge and skills in the field of health.

68. The national court refers explicitly to the importance of operational resources to operational methods in the present case. It notes that the hospital kitchen and equipment must be regarded as assets essential to the purpose of the undertaking, that is to say to provide meals for patients and staff at specified prices. Identity is formed by a combination of operational resources and the staff form part thereof. The present case concerns the contracting-out of skilled services.

69. According to case-law, the retention of identity in cases in which services are contracted out is linked to a very large degree to the transfer of staff or the transfer of assets. This depends on the type of entity in question. However, the present situation differs from that in previous cases before the Court.

70. The case-law, which is based on the sectors in which an economic unit is able to function almost exclusively on the basis of its staff and thus without significant tangible or intangible assets, is not readily applicable to the present case. In such a labour-intensive sector a group of workers engaged in a joint activity on a permanent basis constitutes an economic entity. It must be recognised that 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 their numbers and skills, of the employees specially assigned by his predecessor to that task. In respect of a security or a cleaning firm 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. [18]

71. If the characteristics of catering in hospitals are compared with those of, for example, the cleaning and security sectors, it would appear that the 'manpower' factor in the hospital catering sector is of less importance than in the cleaning and security sectors and its activities are in no way essentially based thereon. As an activity, hospital catering differs in two respects from cleaning and security operations. Firstly, the tangible operational resources

18 — See *Süzen*, cited in footnote 3 above, paragraph 21; Joined Cases C-127/96, C-229/96 and C-74/97 *Hernández Vidal and Others* [1998] ECR I-8179, paragraph 27; and *Temco*, cited in footnote 4 above, paragraph 26.

are, in addition to the labour factor, of greater importance. Secondly, skills, knowledge, planning and organisation are considerably more important than in the case of cleaning and security operations.

72. In view of the particular characteristics of catering it is necessary primarily to consider the intangible assets, the tangible assets and the staff in order to demonstrate that identity is retained.

Intangible assets

73. In the present case Sodexho has taken over from Sanrest. In that connection there was no transfer of work organisation, know-how, recipe collections, stock, accounting material, menu records or diet directions. They constitute significant intangible assets for a specialist catering business. I therefore conclude that there was no transfer of intangible assets.

74. Precisely in the catering business it must be concluded that such intangible assets are decisive as regards the identity of an undertaking and constitute an important competition factor on this market.

Tangible assets

75. The operational resources made available by the contracting authority are, together with the intangible assets, important to the performance of the activity concerned.

76. In this connection the national court seeks to ascertain in particular the significance of the fact that water, gas, energy and service premises, including equipment, were made available by the contracting authority.

77. In its observations the Commission argued that the hospital kitchens and the other facilities regarded as tangible assets contributing significantly to the performance of the activity were taken over by Sodexho. I consider that this argument is based on an incorrect assessment of the factual situation. The operational resources made available by the contracting authority are available to the operator of the kitchens only for the duration of the contract between the contracting authority and the

operator. Since the contracting authority owns the operational resources, it will itself regain these resources in full once the contract has expired. Therefore, in the present situation there is no takeover of these assets.

Staff

78. The third point concerns whether or not essential staff were taken over by the new trader. In this case Sodexho took over no members of staff from Sanrest. Strictly speaking, that indicates, in the light of the Court's case-law, the absence of any transfer. However, certain additional remarks are appropriate in this respect.

79. According to the Court's case-law, the takeover or otherwise of the staff is a factor which the national court must take into consideration in assessing the transaction concerned. However, in this respect there are two problems which, moreover, are closely associated with one another. The purpose of Directive 77/187 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'. However, the case-law assumes that there is a transfer of an undertaking where a major part of the staff are taken over. The present case illustrates the discrepancy between the legislation and case-law. Employees play not only a subjective role in a transfer, as holders of rights and obligations, but also an objective role, namely that of transferred or non-transferred 'assets'. This means that employees can, as 'assets', be of decisive importance as to whether or not there is a transfer and thus as regards the safeguarding of their rights.

80. The second problem lies in the possibility of abuse cited by the United Kingdom Government and the Commission. New contractors can circumvent application of the directive in labour-intensive sectors by not taking over the staff of the old contractor. I concur with the view of the United Kingdom Government and the Commission that if particular importance is attached to whether or not the new contractor intended to take over the staff of the old contractor, in order to be able to determine whether or not there is a transfer, the protection afforded by the directive will essentially depend on the intentions of the parties concerned.

81. This is contrary to the objective of the Community legislature which seeks to protect workers in the event that the owner of an undertaking changes. However, it must

not be the case that the employer is obliged to take over the employees in all cases. That is contrary to the principles of free competition, in particular in a sector such as catering in which the quality of the employees is a significant factor in the quality of the service provision. Where a new caterer is brought into a works canteen, for example because there was dissatisfaction with the service provided by the staff, the new contractor is faced with the staff with whom the contracting authority was dissatisfied.

82. Therefore, in my view the criterion of whether or not the staff were taken over by the new contractor cannot be taken into account as a decisive factor, firstly, because this case does not concern a sector which is shaped solely by the use of staff but a sector in which, as the national court has found, *inter alia* tangible assets and intangible assets are essential to the activity to be performed and, secondly, because the question of whether the staff should have been taken over is precisely what is at issue in the proceedings before the national court.

83. Therefore, it is necessary to use objective grounds to establish whether the entity in question retains its identity. In this connection the takeover of the staff cannot be a 'prerequisite' for the transfer of an undertaking because if it is concluded that the directive is applicable in this case the takeover of the staff is the logical consequence.

84. In its written observations the United Kingdom Government argued that account might have to be taken of the intention of the new contractor. However, it is very difficult to ascertain the objectives of the new contractor (or the old contractor). Furthermore, the use of such a subjective criterion could quickly lead to circumvention of the directive. Therefore, the intention of the party concerned cannot be regarded as a criterion for determining whether or not there is the transfer of an undertaking.

Other factors

85. A further criterion which the Court uses as a possible indication of the transfer of an undertaking is the takeover of the customers. Sodexho entered into a contractual obligation to operate the hospital dining room and cafeteria. On the one hand, the hospital is Sodexho's customer in that it has contracted out to Sodexho certain services for its staff and patients. On the other hand, the final customers of the dining room and cafeteria are the hospital staff and patients. Therefore, there is a closed group of customers. These customers remain the same before and after the transfer.

86. In cases such as this, in which a catering contract is concluded between a contracting authority and a contractor for the provision of catering services contracted out by an undertaking, it is inherent in the nature of such catering services that the customers remain the same.

87. Finally, in the present case it is not disputed that the former and the new contractor provide similar or even identical services. Sodexho has taken over from Sanrest the performance of catering operations in a hospital. Nor does the possible suspension of activities require further consideration since there has been no such suspension.

D — *Summary*

88. At point 63 above, I concluded that there is no transfer of an undertaking in this case unless it is clear from other facts and circumstances that the undertaking in question retains its identity.

89. The case-law concerning transfer within the meaning of Article 1(1) of the directive shows that the Court places a broad interpretation on the retention of the identity of the economic entity but the identity must display a certain degree of organisation and stability and cannot stem solely from a contract with only one customer. Identity must also emerge 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 tangible and intangible assets available to it. [19] Therefore, the mere loss of a service contract to a competitor cannot by itself indicate the existence of a transfer within the meaning of the directive. [20]

90. Account must be taken of among other things the type of undertaking or business concerned. It follows that the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of the directive will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business. Where in particular an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets. [21]

91. In the present case the facts do not lead to the conclusion that there is the transfer of an undertaking. It is clear from the facts

19 — See *Süzen*, cited in footnote 3 above, paragraph 15; Case C-175/99 *Mayeur* [2000] ECR I-7755, paragraph 49; and my Opinion in *Temco*, cited in footnote 4 above, point 55.

20 — *Süzen*, cited in footnote 3 above, paragraphs 15 and 16, and *Liikenne*, cited in footnote 8 above, paragraph 34.

21 — *Süzen*, cited in footnote 3 above, paragraph 18; *Temco*, cited in footnote 4 above, paragraph 25; and *Hernández Vidal and Others*, cited in footnote 18 above, paragraph 26.

of the main proceedings that intangible assets such as menus, accounting material and specific know-how were not transferred. Nor were the tangible assets transferred. The contracting authority made these assets available to the new caterer but they constitute only one factor relevant to the conclusion of the contract. Finally, the staff were not transferred either. I have already stated that in the present case the criterion of whether or not the staff were taken over by the new contractor cannot be taken into account as a decisive factor. This case does not concern a sector which is shaped solely by the use of the staff but a sector in which, as the national court found, *inter alia* tangible and intangible assets are essential to the activity to be performed. Furthermore, this criterion cannot be used in a situation such as the present because the question of whether the staff should have been taken over is precisely what is at issue in the proceedings before the national court.

92. Nor do the other facts and circumstances lead to another conclusion. Only the contract to provide certain services has been transferred and that is in no way comparable to the transfer of a going concern. The identity of the operator of the dining room and cafeteria has changed considerably. Following the termination of the contract with Sanrest, Sodexho took over operations as the new contractor of the hospital.

93. Termination of a contract in respect of one undertaking and the subsequent award thereof to another undertaking, such as in the present case, do not constitute a transfer. The mere continuation of an activity previously performed by another undertaking, without the transfer of goods or rights, provides insufficient bases on which to distinguish one case from another. The loss of a contract cannot therefore by itself indicate the existence of a transfer within the meaning of the directive.

94. This opinion based on existing case-law is, in my view, also satisfactory. I have already set out in greater detail my view that the Court should, both for legal and economic reasons, exercise restraint in applying Directive 77/187 to sectors in which contractual relations are generally of a temporary nature and can change, as has happened in the present case. [22]

22 — Opinion in *Temco*, cited in footnote 4 above. See, in particular, paragraphs 33 to 40.

VI — Conclusion

95. On the basis of the foregoing, I propose that the Court should answer the question submitted by the national court as follows:

Article 1 of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses is to be interpreted as meaning that there is no transfer of an undertaking where a hospital authority, which has previously employed a catering undertaking to supply meals and beverages to patients and hospital staff at a price based on a day of catering per person, and to that end has made available to that undertaking water and energy as well as its service premises (hospital kitchen) together with the necessary equipment, transfers, after giving notice of termination of that contract, those operations and the assets previously made available to that first catering undertaking to a second catering undertaking which does not take over the assets (staff, stock, accounting material and menu, diet, recipe or general records) brought in by the first catering undertaking itself.