OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 9 February 1988 *

Mr President,
Members of the Court,

1. By two judgments delivered on 1 May 1987 the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) seeks an interpretation by the Court of various provisions 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, (Official Journal 1977, L 61, p. 26).

The facts are as follows. In February and March 1982 Mr Berg and Mr Busschers were engaged by Mr Besselsen to work in his discothèque Besi Mill in Ermelo, one as manager and the other as a part-time employee. On 15 February 1983, under a lease-purchase agreement (in other words a sale by deferred payment without immediate transfer of ownership) Besselsen sold the business to Summerland BV, a commercial partnership owned by Mr Manshanden and Mr Tweehuijzen. Some months later, the two employees brought an action before the Kantonrechter de Harderwijk, for an order requiring the transferor and the transferees to pay in full the monthly salary owed to them for the period 15 February to 25 November 1983. On the same day, on an application by Besselsen, the Kantonrechter declared the contract terminated on the ground of the purchasers' non-performance.

On appeal the decision ordering payment of the salaries was varied. Berg and Busschers appealed against this decision to the Hoge Raad, which, pursuant to the third paragraph of Article 177 of the EEC Treaty, referred to the Court the following questions:

(a) Must Article 3 (1) of Directive 77/187/EEC be interpreted as meaning that, in so far as it is not otherwise provided in the directive or by the Member States, after the date of transfer the transferor is no longer liable for the obligations arising from the employment contract? If so, is the consent of the employee required for the transferor to be released from his liability? If not, can that effect be prevented by objections by the employee, with the result that the latter must be regarded as being in the employment of the transferor?

(b) Does a lease-purchase agreement constitute a transfer of an undertaking for the purposes of Article 1 (1) of the directive and does the termination of that agreement by judicial decision in its turn result in a transfer, with the consequence that the obligations of the purchaser by lease-purchase which arise from the contract of employment existing at the time of the termination are transferred by that transfer to the vendor?

Written observations were submitted by the parties to the main proceedings, the Commission of the European Communities, the Netherlands and Portuguese Governments and the United Kingdom. Only the Commission presented oral argument.

* Translated from the Italian.

2. Under Article 1 (1), Directive 77/187/EEC 'shall apply to the transfer of an undertaking . . . to another employer as a result of a legal transfer or merger'. In such cases, 'the transferor's rights and obligations arising from a contract of employment . . . existing on the date of a transfer . . . shall, by reason of such transfer, be transferred to the transferee. Member States may (however) provide that after the date of transfer . . . and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship' (Article 3 (1), first and second subparagraphs).

With regard to the first question, Berg and Busschers maintain that, in the event of a transfer, the transferor is released from his liability *vis-à-vis* the employees of the undertaking only if the latter consent thereto. On the other hand, the view taken by the other participants in the proceedings is that such release from liability does not depend on the will of the employees and, even if they object, this does not have the effect of keeping them in the employment of the transferor.

I prefer the second view. It is well known that in the legal systems of many Member States transfer of contract is regarded as a multilateral contract and therefore requires the agreement of the third party. It should however be noted that, in drawing up the provisions of Directive 77/187/EEC, the Community legislature took this fact into account. Thus the Member states retain the right to provide that, after the transfer of the undertaking, the transferor is to continue to be liable, *jointly with the transferee*, for the obligations arising from the employment contracts transferred (Article 3 (1), second subparagraph). Moreover, the safeguard thus imposed on that contracting party is not a condition for the effectiveness of the transfer — which produces its effects when the agreement is concluded — but is *in addition* to the liability which attaches to the transferee by reason of the transfer under the first subparagraph of this provision.

As the Court has held, these provisions 'show that the directive is intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the transferee under the same conditions as those agreed with the transferor. They are intended to ensure, . . . , that the employment relationship continues unchanged with the transferee . . . ' (see judgment of 7 February 1985 in Case 135/83 *Abels* v *Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 469, paragraph 18, and of 11 July 1985 in Case 105/84 *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar* [1985] ECR 2639, paragraph 15).

The position could not have been stated more clearly. In this case it can therefore be said (a) that under Community law the transferor of an undertaking is released from his obligations *vis-à-vis* the employees of the transferred undertaking, subject to derogations provided for in the applicable national legislation and (b) that the transferee assumes these obligations irrespective of the will of the employees of the transferred undertaking, whose objection to this is immaterial. Indeed if this were not the case the purpose of the directive — which is to facilitate mobility of undertakings while protecting the rights of their staff — would be frustrated by the necessity of obtaining the consent of all the employees concerned.

3. The first part of the second question does not give rise to any difficulties. The agreement which is the subject of the

question to the Court is merely a subcategory of sale, whereby the purchaser acquires ownership of the object upon payment of the last instalment of the purchase price, although he bears the risk from the moment of delivery. There are therefore no grounds for doubting that, where such sale involves an undertaking, this constitutes a transfer within the meaning of Directive 77/187/EEC.

The second part of this question is more interesting. It seeks to ascertain whether this is also the case where the same contract is terminated by judicial decision because of the purchaser's non-performance. In this respect, I would refer the court to its judgment of 17 December 1987 in Case 287/86 (*Ny Mølle Kro* [1987] ECR 5465). The Court held that 'where the owner of a leased undertaking takes over its operation following a breach of the lease by the lessee' that transfer must be regarded as a 'legal transfer' within the meaning of Article 1 (1) of the directive because 'such a takeover also occurs on the basis of the lease' (paragraph 14).

That observation is decisive for the reply to be given to the Netherlands court. The inference to be drawn from it is that, in accordance with a view which is widely held by academic writers in the field of the civil law, the Court considers non-performance as an anomaly which has occurred within the context of a bilateral contract and thereby identifies the remedy (termination) offered by the legal system to the party which has complied with the terms of the contract as a derivative of the contract. It follows that for the purposes of the present case the means used by the party in question to secure the termination is entirely immaterial. It makes no difference whether, as in *Ny Mølle Kro*, this is done by unilateral declaration of repudiation on the basis of an express termination clause or, as in the present case, by judicial decision. The (re)transfer of the undertaking — and thus the process whereby the owner 'takes over its operation' again — which is the result of the termination of the agreement remains contractual in origin.

That is not all. The diversity of the solutions adopted in this area by the national legal systems also militates in support of this view. Certain laws — such as French, Belgian and, in principle, Netherlands law — only provide for termination by judicial decision, whereas others — such as the German legal system — make provision for unilateral rescission ('Rücktritt'). Still others — such as Italian law — allow the contracting party in question to choose between instituting proceedings in court and calling upon the other party to perform his obligations within a specified period, on the expiry of which the contract will be deemed to have been terminated. Such solutions are based on practical grounds (rescission and notice to perform being quicker and cheaper, while the intervention of the courts makes it possible for the party who has failed to perform to defend himself and provides greater certainty for the plaintiff). It is nevertheless clear that these solutions are based on a common view of the principle of termination and indeed confirm, for our purposes in these proceedings, the fact that the means used by the contracting party who has performed his obligations is a matter of indifference in substantive terms.

Having said this, I would repeat what I stated in my Opinion in *Ny Mølle Kro*. In that case I argued that for the purposes of Article 1 (1) of Directive 77/187/EEC, the terms legal transfer and merger are cited purely as examples. As the Commission acknowledged in the hearing, the emphasis in the provision is on the term 'transfer', which is non-technical and which, construed in the light of the objectives pursued by the

legislature, refers to any legally relevant act (contract, will, administrative provision, judicial decision) whereby the ownership of the undertaking is modified. The only condition to which the protection provided by the directive to employees is subject consists then in the capacity of the economic entity transferred to retain its own identity, that is to remain in operation and viable. Ultimately, the only cases to which Article 1 is always and indisputedly inapplicable are those involving an undertaking which is bankrupt or a company which is in liquidation.

4. For all the foregoing reasons, I propose that in reply to the questions referred to the Court by the Hoge Raad by its judgments of 1 May 1987 in the actions brought by Mr Berg and Mr Busschers against Mr Besselsen, the Court should rule as follows:

(a) Article 3 (1) of Directive 77/187/EEC is to be interpreted as meaning that, after the transfer of the undertaking, the transferor is released from his obligations *vis-à-vis* the employees of the transferred undertaking, subject to the derogations provided for in the applicable national legislation. In this connection, the consent or objection of the employee in question is immaterial.

(b) Article 1 (1) of the directive is to be interpreted as meaning that it applies to the transfer of an undertaking effected by means of a lease-purchase agreement or resulting from the judicial termination of such an agreement, provided that the economic entity thus transferred retains its own identity.