OPINION OF ADVOCATE GENERAL LENZ

delivered on 11 July 1996 *

A — Introduction

1. In this case, the Cour du Travail (Higher Labour Court), Liège (Belgium), has referred to the Court of Justice questions on the application and interpretation of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses [1] ('the Directive'), in particular the question whether the Directive applies to the transfer of an undertaking which is undergoing liquidation.

2. The action before the national court is between Mr Dassy and Sovam SPRL, his former employer, on the one hand, and Jules Dethier Équipement SA, on the other.

3. Mr Dassy had been employed by Sovam SPRL since the beginning of 1974 as head of its after-sales service department. At the beginning of the 1990s, the company got into financial difficulties and suffered a substantial reduction in turnover. In March 1991, an auditor's report revealed that the value of the company's net assets had fallen below the amount of its share capital. Since the shareholders could not agree on the course to be followed, the company in the end applied to be wound up by the court. The Tribunal de Commerce (Commercial Court), Huy, accordingly made an order on 15 May 1991 putting the company into liquidation under supervision of the court and appointed a liquidator.

4. According to the national court and the Commission, liquidation of a company under Belgian law must be taken to mean all the steps which, following dissolution of a commercial company, are aimed at paying creditors out of the corporate assets and distributing any balance to the members. That procedure applies to all commercial companies with legal personality. The reason for the company's dissolution does not matter. During the liquidation, the company acts through the liquidator. He is an organ of the company and represents it *vis-à-vis* third parties. Under the law, liquidators are appointed either in the articles of association or by general meeting. If the general meeting does not agree on a candidate by the requisite majority, a liquidator is appointed by the court. In the latter event, the liquidation is one conducted under court supervision, as in

* Original language: German.

1 — OJ 1977 L 61, p. 26.

this case. The only difference from voluntary liquidation is that the procedure for appointing a liquidator is different.

5. On 5 June 1991, the liquidator appointed by the court in this case terminated Mr Dassy's contract of employment.

6. By an agreement of 27 June 1991, the company in liquidation was transferred by the liquidator to Jules Dethier Équipement SA. On 10 July 1991, the Tribunal de Commerce confirmed that transfer of assets. The referring court and the Commission both agree that this endorsement by the court was not necessary. In any event, it is not required under the liquidation procedure.

7. On 22 May 1992, Mr Dassy brought an action against Jules Dethier Équipement SA, which on the basis of a contractual transfer of the undertaking he considered to be jointly and severally liable for payment of the sums due from Sovam SPRL (in liquidation). The Tribunal de Commerce fixed the sum payable by the company in liquidation at BFR 1 643 726 and held that Jules Dethier Équipement SA was jointly and severally liable for payment of that sum.

8. With the Cour du Travail, Liège, which has made this reference, Jules Dethier Équipement SA has now lodged appeal. The Belgian court takes the view that, in this case, an undertaking has been transferred for the purposes of the Directive. However, it is not sure whether the Directive can apply because it is open to doubt whether the transfer of a company in liquidation is a contractual transfer ('cession conventionelle') [2] of an undertaking for the purposes of Article 1(1) of the Directive.

9. Article 1(1) of the Directive states:

'This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as the result of a legal transfer [2] or merger.'

10. The safeguarding of employees' rights in the event of transfer of an undertaking is dealt with in Article 3(1):

'The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the

2 — Translator's note: 'cession conventionelle' in the French text.

date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

...'

11. In order to prevent circumvention of that provision, Article 4 prohibits dismissals effected solely on the grounds of transfer of an undertaking. Article 4(1) states:

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

12. Finally, Article 7 allows Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees.

13. According to the national court, the Directive was transposed into Belgian law by Collective Agreement No 32 *bis*, as amended by Collective Agreement No 32 *quater*. That agreement safeguards employees' rights whenever there is a change of employer resulting from the contractual transfer of an undertaking. It also guarantees certain rights for employees who are taken on in the case of a takeover of assets following insolvency or of a court-approved arrangement with creditors. Collective Agreement No 32 did not apply to insolvency or similar proceedings. The progenitors of Collective Agreement No 32 *bis* considered, however, that employees of an undertaking adjudged insolvent or the subject of a court-approved arrangement were in a similar position to employees of an undertaking that has been transferred and that they, therefore, also deserved a minimum degree of protection.

14. The Collective Agreement also provides that the transferor and transferee are to be jointly and severally liable for the payment of debts existing at the date of the transfer and resulting from contracts of employment existing at that date.

15. Should the Directive be applicable to this case, the national court raises the further question of how termination of a contract of employment occurring immediately before the company is transferred is to be viewed under the Directive.

16. It has therefore referred the following questions to the Court for a preliminary ruling:

1. Does Council Directive 77/187 apply where the transfer is effected by a company in voluntary liquidation, a procedure whose aim, in the absence of continued trading, is liquidation by realisation of the assets? Is the answer the same where the transferor is being wound up by the court?

2. Where the contracts of employment of all the employees have been terminated by the liquidator and only some of those employees have been re-engaged for the purposes of the liquidation, may the dismissals of the employees not subsequently taken on by the transferee be regarded as having taken place for economic, technical or organisational reasons within the meaning of Article 4(1) of the directive? Must the power to dismiss such employees for such reasons be left, on the contrary, to the transferee alone?

   May staff not taken on by the transferee claim, as against him, merely because an economic entity was transferred shortly after their dismissal for economic, technical or organisational reasons, that the measure taken in their regard by the transferor was unlawful if the transfer agreement does not provide for their re-engagement?

B — Opinion

The first question

17. In the first question, the national court asks whether the Directive is applicable if the transfer is effected by a company in liquidation. It is apparent from the wording of the question and the rest of the preliminary reference that the national court considers that a transfer of an undertaking has occurred for the purposes of the Directive. It explains that the liquidator of Sovam SPRL and Jules Dethier Équipement SA entered into an agreement for transfer of the business assets. That agreement provided, *inter alia*, that the liquidator was to transfer, for a sum of BFR 2 000 000, the business assets (importation and distribution of domestic electrical appliances and equipping and fitting out buildings), which included:

— the goodwill, commercial name and logo;

— the office furniture, machines, tools and vehicles;

— all patents, franchises and licences vested in the transferor;

— the lease.

In addition to other provisions, the agreement also required the transferee to take over, on the same conditions, three members of staff designated by name and to inform the transferor of any other re-engagements. According to the national court, the agreement therefore covers the entire business of Sovam SPRL. It refers to the case-law of the Court of Justice and concludes that in this case an undertaking was transferred for the purposes of the Directive.

18. The Court of Justice has consistently held that it is for the national court to establish, on the basis of the criteria laid down by the Court, whether there is, in the case in point, a contractual transfer of an undertaking for the purposes of the Directive. [3]

19. However, since the transferred undertaking was in liquidation, the national court raises the question whether the transfer in this case was also a *contractual* transfer.

20. On that point reference should be made to the judgment of the Court of Justice in *Abels*. [4] In that case, the Court held that the scope of Article 1(1) of the Directive could not be appraised solely on the basis of a textual interpretation: this was precluded by the various language versions of the provision and the different meanings of the concept of contractual transfer in the insolvency laws of individual Member States. For that reason, the provision's meaning had to 'be clarified in the light of the scheme of the directive, its place in the system of Community law in relation to the rules on insolvency, and its purpose'. [5]

21. As regards the relationship between the Directive and insolvency law, the Court of Justice referred to the special procedures characterising insolvency law and intended to weigh up the various interests involved, in particular those of the various classes of creditors. Those special features were encountered in all the legal systems of the Member States and were also confirmed in Community law. The fact that insolvency law was the subject of specific rules in the legal systems of the Member States and in the Community legal order and that those

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

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

5 — Case 135/83 (cited in footnote 3), paragraphs 11, 12 and 13.

rules were very different in the various Member States led the Court to conclude that if the Directive had been intended to apply also to transfers of undertakings occurring in the context of such proceedings, an express provision would have been included for that purpose.

22. According to the Court, that interpretation also necessarily followed from consideration of the purpose of the Directive, namely to ensure that the restructuring of undertakings within the common market did not adversely affect the employees in the undertakings concerned. Since there were major differences of opinion with regard to the consequences, for the protection of employees, of applying the Directive to insolvency proceedings, a serious risk of general deterioration in working and living conditions of workers, contrary to the social objectives of the Treaty, could not be ruled out. Extending the scope of the Directive to insolvency proceedings might dissuade a potential transferee from acquiring an undertaking on conditions acceptable to its creditors, who would then have to sell the assets of the undertaking separately. That would entail the loss of all the jobs in the undertaking, detracting from the effectiveness of the Directive.

23. The Court concluded that the Member States were not obliged to extend the rules laid down in the Directive to transfers of undertakings, businesses or parts of businesses occurring in the context of insolvency proceedings. The Member States were, however, at liberty independently to apply the principles of the Directive, wholly or in part, on the basis of their national law alone. [6]

24. The Court then had to rule on the question whether the Directive applied to judicial leave to suspend payment of debts. To do that, it compared that procedure with insolvency proceedings. It established first that the procedure to obtain court leave to suspend payment of a debt was also of a judicial nature, although the supervision exercised by the court was more limited than in the case of insolvency. That is to say the special rules applicable to insolvency either did not apply or applied only to a limited extent.

25. As a further criterion, it looked at the purpose of the procedure and found that it served primarily to safeguard the assets of the undertaking and, where possible, enable the business to carry on, with a view to reaching an arrangement ensuring that it would be able to continue trading in the future. The Court concluded that the reasons for not applying the Directive in the context of insolvency proceedings did not apply to procedures for judicial leave to suspend payment of debts. The fact that such procedures can lead to the debtor's being adjudged insolvent does not matter because it is clear that they take place at a stage prior to insolvency. [7]

6 — Case 135/83 (cited in footnote 3), paragraphs 23 and 24.
7 — Case 135/83 (cited in footnote 3), paragraphs 28 and 29.

26. In a further important case, *D'Urso*, [8] the Court had to consider whether the Directive applied to transfers of undertakings effected by undertakings under special administration.

27. The Court first applied the criterion of the extent of court supervision, which it had also mentioned in *Abels*. In view of the differences between the legal systems of the Member States, to which reference had already been made in *Abels*, the scope of the concept of contractual transfer could not be determined according to the kind of supervision exercised by the administrative or judicial authority over transfers of undertakings in the course of a specific creditors' arrangement procedure. The Court concluded: 'Given all the considerations set out in the judgment in the *Abels* case, the decisive test is therefore the purpose of the procedure in question.' [9]

28. The special administration procedure at issue was applied by a decree which had, or could have, two kinds of effects. On the one hand, it had to be assimilated to the decree ordering compulsory administrative liquidation, which had effects identical in substance to those of bankruptcy proceedings. On the other hand, the decree could also authorise the undertaking to continue trading for a specified period under the supervision of an auditor. The auditor had the power to draw up a programme which had to contain a restructuring plan.

29. According to the Court, application of the Directive was dependent on whether or not the undertaking was authorised to continue trading. If no decision was taken on authorising the undertaking to continue trading or the period of validity of such authorisation had expired, 'the aim, consequences and risks of a procedure such as the compulsory administrative liquidation procedure are comparable to those which led this Court to conclude, in its judgment in the *Abels* case, that Article 1(1) of the Directive did not apply to transfers of an undertaking, business or part of a business in a situation in which the transferor had been adjudged insolvent. Like insolvency proceedings, that procedure is designed to liquidate the debtor's assets in order to satisfy the body of creditors, and transfers effected under this legal framework are consequently excluded from the scope of the Directive'. Without that exclusion, the risk of a deterioration in the living and working conditions of workers could not be ruled out. [10]

30. However, if the decree authorised the undertaking to continue trading under the supervision of an auditor, the primary purpose of that procedure was to give the undertaking some stability allowing its future activity to be safeguarded. 'The social

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

9 — Case C-362/89 (cited in footnote 7), paragraphs 25 and 26.

10 — Case C-362/89 (cited in footnote 7), paragraph 31.

and economic objectives thus pursued cannot explain nor justify the circumstance that, when all or part of the undertaking is transferred, its employees lose the rights which the Directive confers on them under the conditions which it lays down.' [11]

31. Consequently, the essential criterion for the Court is the purpose of the procedure in question. The objective of the Directive itself and the arrangement of the particular procedure are further criteria.

32. Those criteria must now be applied to the liquidation under examination in this case. The national court explains that liquidation of a company must be taken to entail all the steps which, following dissolution of a commercial company, are aimed at paying creditors out of the corporate assets and distributing any balance to the members. According to legal writers, liquidation is to be preferred to commencement of insolvency proceedings because it allows the optimal, or least disadvantageous, realisation of the assets, and all or part of the economic activities which are still viable can be safeguarded.

33. The Commission states that the tasks of a liquidator are to realise the assets, settle debts and distribute any balance to the members. The objective, therefore, is liquidation by means of the realisation of assets. Liquidation occurs for the benefit of the company, whereas in insolvency proceedings the administrator acts exclusively for the benefit of the creditors. The assets must be realised at the best possible price. According to the Commission, the Belgian legislature has here made use of a fiction. Although a commercial company's legal personality is necessarily brought to an end by dissolution, it is treated as continuing to exist for the purposes of liquidation. A company in liquidation has legal personality solely for the purposes of realising the assets, settling debts and distributing any balance. Pursuing the activity of the dissolved company *per se* is no longer permitted, save, exceptionally, in so far as it helps to achieve the new object of the company — liquidation — which has replaced the company's previous economic activity. According to the Commission, a company in liquidation can, therefore, only conclude business already started. It may not begin new business, even if it falls within the scope of its previous corporate activity (except if it serves the purposes of the liquidation). It is often necessary for the company to continue trading on such a temporary basis in order to prevent the value of the economic entity to be transferred from depreciating. The entity must continue to trade in order to facilitate the subsequent transfer. In that case the liquidator can also enter upon new transactions without special authorisation. However, he must remain aware that continued trading is permitted only on a temporary basis and with a view to subsequent realisation of the company assets under the best possible conditions. According to the Commission, the liquidator is personally liable for losses if he continues to trade without restriction. There is no need to

11 — Case C-362/89 (cited in footnote 7), paragraph 32.

prove negligence in his management of the company.

34. The decision that the company is to continue trading for the time being is adopted by the requisite majority at a general meeting. It does not require authorisation by the court.

35. The Commission also states in its observations that voluntary liquidation is never an alternative to insolvency. If the conditions for instituting insolvency proceedings are satisfied, liquidation is no longer possible. The only exception is if the company is in temporary difficulties or unable for the time being to determine whether the value of its assets exceed its liabilities. The guarantees enjoyed by creditors in insolvency proceedings are much more extensive than in liquidation proceedings. Furthermore, in the former the creditors are directly represented by the administrator. That could suggest that in liquidation proceedings the objective of satisfying the creditors' claims is not as central as in insolvency proceedings.

36. The fact remains, however, that the purpose of liquidation is also to realise the assets, a purpose almost identical to that of insolvency. Nevertheless, it appears to me that winding up the company's affairs is more central to liquidation proceedings, whereas, in insolvency proceedings, only satisfaction of the creditors' claims is important. However, whether that in itself is sufficient for the Directive to be applied to this case, as the Belgian Government suggests, seems to me to be questionable.

37. The Commission also considers that the purposes of insolvency and liquidation are almost identical, but in arriving at its proposed solution to this case it relies almost exclusively on the judgment in *D'Urso*. That is to say, it looks to see only whether or not a decision to continue trading was adopted. The Commission considers it irrelevant that trading is continued not in order to permit the company to survive but so as to be able to achieve more fully the purposes of the liquidation. In its view, the undertaking must retain its identity and, while trading continues, must be able to continue the same type of business. It also relies on the protective purpose of the Directive, which would preclude the protection of employees from being removed by a resolution in general meeting that the company go into liquidation.

38. In the Commission's view, the Directive does not apply, however, if the company in liquidation resolves to cease business in order to sell the assets. Discontinuing trade definitively in that way stops the Directive from applying. The sole purpose of the liquidation is then to sell the assets and bring the existence of the undertaking to an end. If

the Directive were to apply in such a case, the employees would be exposed to an even greater risk. Furthermore, if trading is discontinued for too long, it can no longer be assumed that the same entity continues to exist and that the business is being continued.

39. In my view, the distinction drawn by the Court in *D'Urso* cannot simply be transposed to the case of liquidation. In *D'Urso*, the business was continued with a view to reconstruction, so as to ensure that it could also trade in the future. The same was true of the proceedings for judicial leave to suspend payment of debts in *Abels*. In this case, however, trading is being continued solely with the aim of dissolving the company. Trading is not directed towards the future, but is being continued only until the undertaking is sold.

40. In *D'Urso*, the undertaking was in fact transferred in the end, but, having regard to the protective purpose of the Directive, that transfer could be treated differently from the transfer in this case. In *D'Urso*, an undertaking which had been, or was being, reconstructed was transferred, and a purchaser is perhaps more easily found for such an undertaking than for one which is in liquidation. In that respect, applying the Directive would have no disadvantages for the employees. That is not so — as the Court held in *Abels* — in the case of insolvency proceedings: in this event, applying the Directive might have an adverse effect on the employees.

41. In *D'Urso*, however, the sole criterion applied by the Court was whether the undertaking continued to trade: the Directive applied so long as trading was continued, since there was no reason why employees should not enjoy the protection of the Directive if the undertaking continued to trade. If it ceases to trade, however, the same criteria met in insolvency proceedings apply and the Directive ceases to be applicable from that point. In other words, despite the applicability of criteria comparable to those met in the case of insolvency, the Directive applies solely because the company continues trading.

42. In this case, therefore, the Directive should apply, *a fortiori*, if trading is continued. It is not a condition, for an undertaking to be put into liquidation, that liabilities must exceed assets. Indeed, the conditions signalling insolvency must not be satisfied, since otherwise liquidation would no longer be permitted. Liquidation may be a stage preceding insolvency, but it can also occur — as the Belgian Government points out — if the members no longer wish to work together. In other words, the company does not necessarily have to be in financial difficulties. The Directive should accordingly apply in the case of liquidation if the undertaking continues to trade.

43. It does not matter that liquidation may be a stage preliminary to insolvency. In *Abels*, the Court held that the Directive applied in the case of judicial leave to suspend payment of debts precisely because it was only such a preliminary stage. [12] The Court also held in *Danmols Inventar* that the Directive also applied to a transfer 'which is effected in the course of a procedure, or at a stage, prior to the commencement of [insolvency] proceedings'. [13]

44. Finally, I would like to refer to a further judgment, in which the Court ruled on the applicability of the Directive to the transfer of undertakings declared to be in critical difficulties. [14] In that case, the Court held:

'Consequently, an undertaking found to be in critical difficulties is subject to a procedure which, far from being aimed at the liquidation of the undertaking, is designed on the contrary to promote the continuation of its business *with a view to its subsequent recovery*.' [15]

This case is no different, however. If an undertaking in liquidation continues to trade, this happens — as mentioned above — with a view to the undertaking's subsequent recovery. In this case, therefore, with the undertaking in liquidation continuing to trade, one can likewise neither explain nor justify 'the circumstance that, when all or part of the undertaking is transferred, its employees lose the rights which the Directive confers on them'. [16]

45. So, the Directive would be applicable to cases of liquidation if the business of the undertaking is continued in the course of the liquidation.

46. The same result is arrived at if liquidation procedure is compared with insolvency proceedings. According to the national court, the special rules that result in the Directive not applying in the case of insolvency do not exist where liquidation is concerned. Thus, it is the general meeting which decides on liquidation, appoints the liquidators and defines their powers. In insolvency proceedings, on the other hand, the company can itself file a declaration of insolvency, but it can also be declared insolvent on application by a creditor or on the basis of the investigation committee's work, whereupon the administrator is appointed by the court and his powers are determined by law.

12 — Case 135/83 (cited in footnote 3), paragraph 29.

13 — Case 105/84 *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar* [1985] ECR 2639, paragraph 10.

14 — Case C-472/93 *Spano and Others* v *Fiat Geotech and Fiat Hitachi* [1995] ECR I-4321.

15 — Case C-472/93 (cited in footnote 13), paragraph 28, emphasis added.

16 — Judgments in Case C-472/93 (cited in footnote 13), paragraph 30, and Case C-362/89 (cited in footnote 7), paragraph 32.

47. On insolvency, there is a special procedure supervised by the court for establishing liabilities. That is not so on liquidation. The liquidator can acknowledge the existence of a liability without having to refer the matter to anybody else or have his decision confirmed by court judgment.

48. In insolvency proceedings, a creditor can only have the amount of his claim determined; in liquidation the position is somewhat different inasmuch as a creditor can obtain judgment against the company in liquidation. A judgment can also be enforced against a company in liquidation. The liquidator can oppose enforcement only if it would prejudice the rights of other creditors. In insolvency proceedings, on the other hand, such enforcement actions are prohibited because the management and liquidation of the assets destined to satisfy the creditors' claims are matters regulated by law.

49. A liquidator is an organ of the company, whereas an administrator in insolvency proceedings, who represents the creditors, is a third party *vis-à-vis* the company.

50. An administrator in insolvency proceedings disposes of the assets under the supervision of the insolvency judge, while a company liquidator performs that task under the supervision of the general meeting so that transfer of the undertaking does not need the court's endorsement.

51. There are therefore many differences compared with insolvency proceedings. In particular, it is clear that the court has much less influence where liquidation is concerned and that there is no special procedure such as that applicable on insolvency.

52. The Directive must accordingly be found to apply to the transfer of an undertaking where the undertaking is in liquidation but the general meeting has resolved that trading is to continue. It does not matter whether the undertaking is being wound up voluntarily or by the court. The only difference between the two forms of liquidation is that, in the case of winding up by the court, the general meeting, acting by the requisite majority, may not appoint the liquidators. In that case, they are appointed by the court.

53. Whether the Directive or its provisions are in any event applicable to liquidations by virtue of national law, pursuant to Collective Agreement No 32 *bis*, must be considered separately. As the Court held in *Abels*, [17] the Member States are at liberty to apply all or part of the Directive independently, on the basis of their national law alone. The national court must decide whether this is also the position in the case of liquidation.

17 — Case 135/83 (cited in footnote 3), paragraph 24.

The second question

54. In the first part of the second question, the national court seeks to ascertain whether dismissals by a liquidator may be regarded as having taken place for economic, technical or organisational reasons within the meaning of Article 4(1) of the Directive. In other words, the question is whether the power to dismiss employees for such reasons belongs only to the transferee, or to the transferor as well.

55. That uncertainty arises from the wording of Article 4(1) of the Directive. It prohibits dismissals on the ground of the transfer alone. That prohibition expressly applies to both the transferor and the transferee. The second sentence, which permits dismissals for economic, technical or organisational reasons entailing changes in the workforce, does not indicate whether that right is conferred on the transferor, on the transferee or on both.

56. Both the Commission and the Belgian Government consider — in my view rightly — that that possibility must be open to the transferor as well. The Belgian Government relies here on the judgment in *Bork*. [18] In that case, the Court referred to its earlier judgment in *Ny Mølle Kro* [19] in which it held that the Directive could be relied on solely by employees whose contract of employment or employment relationship was in existence at the time of the transfer. Whether such a contract or relationship existed at that time had to be assessed on the basis of national law, subject, however, to compliance with the mandatory provisions of the Directive concerning protection of employees from dismissal as a result of the transfer.

'Accordingly, the employees of the undertaking whose contract of employment or employment relationship was terminated with effect from a date prior to that of the transfer, contrary to Article 4(1) of the directive, must be regarded as still in the employ of the undertaking on the date of the transfer, with the result, in particular, that the employer's obligations towards them are automatically transferred from the transferor to the transferee in accordance with Article 3(1) of the directive. In order to determine whether the employees were dismissed solely as a result of the transfer, contrary to Article 4(1), it is necessary to take into consideration the objective circumstances in which the dismissal took place and, in particular, in a case such as this, the fact that it took effect on a date close to that of the transfer and that the employees in question were taken on again by the transferee.' [20]

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

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

20 — Case 101/87 (cited in footnote 17), paragraphs 17 and 18.

57. The judgment in *Bork* likewise does not indicate whether the transferor may dismiss employees for economic, technical or organisational reasons. In my view, such a right follows, however, from this consideration: according to the judgment in *Bork*, Article 4(1) prohibits the dismissal of employees where the sole reason is the transfer. It follows from the words 'solely as a result of the transfer' that the transferor can dismiss employees on other grounds. As a minimum, these should be those specified in the second sentence of Article 4(1) and be available to the transferor as well.

58. If one considers the liquidation in this case, still other — economic — reasons support that interpretation. It gives the liquidator the possibility of implementing rationalisation measures prior to the sale. Potential purchasers will then be more willing to take over the company in liquidation. If the transferor is allowed to dismiss employees for economic, technical or organisational reasons, the liquidation itself will also be facilitated, jobs at the undertaking in liquidation will be made safe and worker protection will thereby be enhanced.

59. By the second part of the second question, the national court asks whether staff dismissed for economic, technical or organisational reasons may claim, as against the transferee, that their dismissal was unlawful for the simple reason that shortly after their dismissal an economic entity was transferred, even if the transfer agreement does not provide for their re-engagement.

60. As the Commission rightly points out, this question is wrongly put. If the dismissals were carried out for economic, technical or organisational reasons, they cannot — as already established above — be unlawful, so that neither the transferor nor the transferee can be accused of acting unlawfully. The fact that an economic entity was transferred shortly after their dismissal does not alter that conclusion. If the dismissal was not carried out solely on account of the transfer, it is not rendered invalid by the transfer.

61. This last question could, however, be understood and construed differently. It clearly refers to the phrase in the judgment in *Bork* cited above, as it contains both the criteria mentioned in the judgment: dismissals being close in time to the transfer of an economic entity and re-engagement after the transfer of the business. Those criteria were held in *Bork* to be evidence that the sole reason for the dismissals was the transfer and that they were therefore contrary to Article 4(1) of the Directive. In this case, only one of those criteria is satisfied: the dismissal effected by the transferor was close in time to the transfer of the business. There was no re-engagement after the transfer. The question referred by the national court could,

then, be understood as seeking to ascertain whether fulfilment of just one of the criteria specified in *Bork* is sufficient for the dismissal to be regarded as resulting solely from the transfer and, therefore, as being unlawful.

62. In order to answer that question, reference must again be made to precisely the judgment in *Bork*. There the Court states that, in order to determine whether a dismissal is unlawful, it is necessary first to take into account the objective circumstances in which it took place. As examples for the case which resulted in that reference, it gives the two criteria of closeness in time to the transfer of the undertaking and re-engagement after the transfer. Since, in this case, the facts of the action before the national court are different, that court must reach its decision on the basis of other factors. It is true that in this case the dismissal took effect shortly before the undertaking was transferred. However, another important point is that the undertaking was in liquidation at the time of the dismissal. That circumstance is indicative of a dismissal for organisational reasons. The Commission also considers that this makes it easier for the employer to prove that the dismissal was for economic, technical or organisational reasons.

63. The answer to the last question must therefore be that in this case a dismissal cannot be alleged to be unlawful merely because, shortly after it was carried out, the company was transferred: the national court must take into consideration all objective circumstances relating to the dismissal, in this case, above all, the fact that the company was in liquidation.

64. I would add only for the sake of completeness that, should an employee be dismissed unlawfully by the transferor, that unlawful action can be pleaded as against the transferee in so far as the contract of employment is regarded as continuing to exist and is thereby transferred to the transferee as a result of the transfer. Accordingly, the employee can assert his rights under the contract of employment against the transferee.

65. It does not matter whether the individual Member States impose sanctions in this situation. The Belgian Government pointed out that in Belgian law there is no provision whereby a dismissal is rendered void, so that the contract of employment cannot be maintained.

66. The answer to the second question referred by the national court must therefore be that termination of contracts of employment by the transferor can be regarded as dismissals for economic, technical or organi-

sational reasons within the meaning of Article 4(1) of the Directive and that this power does not belong only to the transferee. Dismissals for economic, technical or organisational reasons are not unlawful merely because, shortly after they are carried out, an economic entity is transferred. The national court must take into consideration all the objective circumstances relating to the dismissal, in this case above all the fact that the company was in liquidation.

C — Conclusion

67. In the light of the foregoing, I propose that the answer to the questions submitted by the national court should be:

(1) Council 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 applies to a transfer effected by a company in voluntary liquidation, but only on condition that the undertaking continues to trade in that context. This applies irrespective of whether the liquidator is appointed by the court or by the general meeting.

(2) The liquidator, too, has the right to dismiss employees for economic, technical or organisational reasons.

Staff not taken on by the transferee may not claim, as against him, that their dismissal was unlawful merely because shortly after their dismissal the business was transferred as an economic entity.

When assessing the legality of dismissals on the basis of the criteria laid down by the Court of Justice, the national court must, however, take into consideration all the objective circumstances relating to the dismissals, in this case above all the fact that the company was in liquidation.