JUDGMENT OF THE COURT
7 February 1985 [1]

In Case 135/83

REFERENCE to the Court under Article 177 of the Treaty by the Raad van Beroep [Social Security Court], Zwolle, for a preliminary ruling in the proceedings pending before that court between

H. B. M. Abels

and

The Administrative Board of the Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie [Professional and Trade Association for the Metal and Electrotechnical Industries],

on the interpretation of Council Directive No 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 (Official Journal 1977 L 61, p. 26),

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and C. Kakouris (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot and R. Joliet, Judges,

Advocate General: Sir Gordon Slynn
Registrar: H. A. Rühl, Principal Administrator

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1 — Language of the Case: Dutch.

* after considering the observations submitted on behalf of

the plaintiff Abels by Mr J. van der Hel,

the defendant Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie by Mr J. H. Meijs, in the written proceedings, and by Mr W. M. Levelt-Overmars, in the oral proceedings,

the Netherlands Government by Mr I. Verkade in the written proceedings, and by Mr A. Bos, acting as Agent, in the oral proceedings, the latter being assisted by Mr L. A. D. Keus,

the Danish Government by Mr L. Mikaelsen, acting as Agent,

the French Government by Mr G. Boivineau, acting as Agent,

the Commission of the European Communities by Mr M. Beschel, acting as Agent, assisted by Mr F. Herbert,

after hearing the Opinion of the Advocate General delivered at the sitting on 8 November 1984,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By order dated 28 June 1983, which was received at the Court on 11 July 1983, the Raad van Beroep, Zwolle, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions as to the interpretation of Articles 1 (1) and 3 (1) of Council Directive No 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 (Official Journal 1977 L 61, p. 26).

2 Those questions were raised in proceedings instituted by H. B. M. Abels against the Administrative Board of the Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie.

3 The plaintiff in the main proceedings was employed by the private limited company Machinefabriek Thole BV (hereinafter referred to as 'Thole'), Enschede, when, by successive decisions of the Arrondissementsrechtbank [District Court] Almelo, Thole was granted a 'surséance van betaling' [judicial leave to suspend payment of debts], first provisionally, on 2 September 1981, and then definitively on 17 March 1982, before being put into liquidation on 9 June 1982. It was during the liquidation proceedings that, pursuant to an agreement concluded by the liquidator, Thole's business was transferred with effect from 10 June 1982 to the private limited company Transport Toepassing en Produktie BV (hereinafter referred to as 'TTP'), Enschede, which continued to operate the undertaking and took over most of its work-force, including Mr Abels.

4 Since Mr Abels had not received his wages for the period from 1 to 9 June 1982 from either Thole or TTP, or any payment for his accrued holiday entitlement during the year in question or a proportional part of his end-of-year allowance, he sought payment of those sums from the Bedrijfsvereniging, which, in his view, was subsidiarily liable to pay them to him under Netherlands legislation.

5 His request was rejected on the ground that under Articles 1639 (aa) and 1639 (bb) of the Netherlands Civil Code, which were inserted therein by the Law of 15 May 1981 to implement Directive No 77/187, TTP was required to fulfil Thole's obligations towards its workers under the contract of employment and it was therefore inappropriate for the Bedrijfsvereniging to intervene.

6 Directive No 77/187, which was adopted by the Council on the basis of, in particular, Article 100 of the Treaty, is intended, in the terms of its preamble, 'to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'. For that purpose, Article 3 (1) thereof provides that: 'The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer . . . shall, by reason of such transfer, be transferred to the transferee'. Article 4 (1) provides for the protection of the workers concerned against dismissal by the transferor or the transferee, but does not stand in the way of 'dismissals that may take place for economic, technical or organizational reasons entailing changes in the work-force'. In addition, Article 6 of the directive requires the transferor and the transferee to inform and consult the representatives of the workers affected by the transfer. Finally, Article 7 provides that the directive is not to 'affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees'.

7 Mr Abels appealed against the Bedrijfsvereniging's negative decision to the Raad van Beroep, Zwolle, which, considering that the judgment to be given depended on the interpretation of certain provisions of Directive No 77/187, stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Does the scope of Article 1 (1) of Directive No 77/187/EEC extend to a situation in which the transferor of an undertaking is adjudged insolvent or is granted a "surséance van betaling"?

(2) If the answer to Question 1 is in the affirmative, must Article 3 (1) of Directive No 77/187/EEC be interpreted as meaning that the transferor's obligations which are assigned to the transferee by reason of the transfer of the undertaking also include the debts which arose from the contract of employment or the employment relationship before the date of the transfer within the meaning of Article 1 (1)?'

The first question

Determination of the scope of the directive

8 It should be observed in the first place, with regard to the first question, that under Article 1 (1) of Directive No 77/187, which determines the scope of the directive *ratione materiae*, 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'. It follows that the directive applies only to transfers resulting from a legal transfer or merger, the latter not being relevant to this case. The question is intended to determine whether that definition includes cases where the transferor of the undertaking has been adjudged insolvent or has been granted a 'surséance van betaling' and the undertaking in question forms part of the assets of the insolvent transferor or is covered by the 'surséance van betaling'.

9 According to the plaintiff in the main proceedings, the Netherlands Government and the Commission, the term 'overdracht krachtens overeenkomst' in the Dutch-language version of the directive indicates that its scope is confined to transfers effected on the basis of agreements entered into voluntarily, to the exclusion of any transfer resulting from legal proceedings whose purpose is the collective and compulsory liquidation of the debtor's assets or the overcoming of the debtor's financial difficulties in order to prevent such liquidation. Those procedures, it is maintained, are excluded, even in cases of sales by private agreement since the essential factor of contractual autonomy is lacking by virtue of the fact that the transfer involves the intervention of the Court and that the form and the subject-matter of the sale are determined by weighing up the various interests involved in such procedures.

10 The Bedrijfsvereniging and the Danish Government, on the other hand, claim that the provision at issue, interpreted textually, contains no factor on which to base the assumption that the directive does not cover transfers made as the result of a sale by a liquidator or by a debtor to whom a 'surséance van betaling' has been granted.

11 A comparison of the various language versions of the provision in question shows that there are terminological divergencies between them as regards the transfer of undertakings. Whilst the German ('vertragliche Übertragung'), French ('cession conventionnelle'), Greek ('συμβατική εκχώρηση'), Italian ('cessione contrattuale') and Dutch ('overdracht krachtens overeenkomst') versions clearly refer only to

transfers resulting from a contract, from which it may be concluded that other types of transfers such as those resulting from an administrative measure or judicial decision are excluded, the English ('legal transfer') and Danish ('overdragelse') versions appear to indicate that the scope is wider.

12 Moreover, it should be noted that the concept of contractual transfer is different in the insolvency laws of the various Member States, as has become apparent in these proceedings. Whilst certain Member States consider that in certain circumstances a sale effected in the context of liquidation proceedings is a normal contractual sale, even if judicial intervention is a preliminary requirement for conclusion of such a contract, under other legal systems the sale is in certain circumstances regarded as taking place by virtue of a measure adopted by a public authority.

13 In view of those divergencies, the scope of the provision at issue cannot be appraised solely on the basis of a textual interpretation. Its meaning must therefore 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.

The relationship between the directive and insolvency law

14 As is apparent from the above-mentioned recitals in the preamble to Directive No 77/187, the directive is intended to protect workers in order to safeguard their rights when an undertaking is transferred.

15 Insolvency law is characterized by special procedures intended to weigh up the various interests involved, in particular those of the various classes of creditors; consequently, in all the Member States there are specific rules which may derogate, at least partially, from other provisions, of a general nature, including provisions of social law.

16 The specificity of insolvency law, encountered in all the legal systems of the Member States, is confirmed in Community law. Article 1 (2) (d) of Council Directive No 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (Official Journal 1975 L 48, p. 29), which, like Directive No 77/187, was adopted to attain the objectives of Article 117 of the Treaty, expressly excludes from its scope workers affected by termination of an establishment's activities 'where that is the result of a judicial decision'. Moreover, the specificity of insolvency law was also reflected in the

adoption of Council Directive No 80/987 of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (Official Journal 1980 L 283, p. 23). That directive creates a system to ensure the payment of outstanding claims relating to pay which applies equally to undertakings which have been adjudged insolvent.

17 In addition, the rules on liquidation proceedings and analogous proceedings are very different in the various Member States. For that reason, and in view of the fact that insolvency law is the subject of specific rules both in the legal systems of the Member States and in the Community legal order, it may be concluded that if the directive had been intended to apply also to transfers of undertakings in the context of such proceedings, an express provision would have been included for that purpose.

The purpose of the directive

18 That interpretation of Directive No 77/187 also follows necessarily from a consideration of its purpose. The preamble to the directive indicates that the directive's aim of affording protection to workers in the event of transfers of undertakings is to be seen against the background of 'economic trends' and the need referred to in Article 117 of the Treaty 'to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained'. As the Commission has correctly explained, the purpose of the directive is therefore to ensure that restructuring of undertakings within the common market does not adversely affect the workers in the undertakings concerned.

19 The parties are divided as to whether, if the directive were held to be applicable to liquidation or similar proceedings, the resulting social and economic effects would be favourable or prejudicial to the interests of employees.

20 The Bedrijfsvereniging and the Danish Government consider that the directive is applicable to such a situation on the ground that employees whose employer has been adjudged insolvent are precisely those who are most in need of protection; moreover, where such protection is provided, both the workers and the liquidator are normally more inclined to ensure that the undertaking continues to operate until a transfer takes place.

21 On the other hand, the Netherlands Government and the Commission refer to certain economic consequences which would detract from the protection of

workers if the directive were to be applied to transfers of undertakings in the event of insolvency or a 'surséance van betaling'. In their opinion, such an extension of the scope of the directive might dissuade a potential transferee from acquiring an undertaking on conditions acceptable to the creditors thereof, who, in such a case, would prefer to sell the assets of the undertaking separately. That would entail the loss of all the jobs in the undertaking, detracting from the usefulness of the directive.

22 That difference of opinion shows that, at the present stage of economic development, considerable uncertainty exists regarding the impact on the labour market of transfers of undertakings in the event of an employer's insolvency and the appropriate measures to be taken in order to ensure the best protection of the workers' interests.

23 It is apparent from the foregoing considerations that a serious risk of general deterioration in working and living conditions of workers, contrary to the social objectives of the Treaty, cannot be ruled out. It cannot therefore be concluded that Directive No 77/187 imposes on the Member States the obligation to extend the rules laid down therein to transfers of undertakings, businesses or parts of businesses taking place in the context of insolvency proceedings instituted with a view to the liquidation of the assets of the transferor under the supervision of the competent judicial authority.

24 It must nevertheless be made clear that, even though, in view of the considerations set out above, transfers of that kind do not fall within the scope of the above-mentioned directive, the Member States are at liberty independently to apply the principles of the directive, wholly or in part, on the basis of their national law alone.

The application of the directive to cases of 'surséance van betaling'

25 Although in this case the transfer of the undertaking was effected in liquidation proceedings, the question submitted by the national court relates also to the case of a transfer taking place in proceedings such as a 'surséance van betaling' (judicial leave to suspend payment of debts).

26 The parties disagree as to whether such a transfer must conform to the same rules, as far as the application of Directive No 77/187 is concerned, as a transfer effected as a result of a sale by a liquidator. In that respect, the Netherlands Government and the Commission take the view that the reasons for not extending

the scope of the directive to transfers of undertakings occurring in liquidation proceedings also militate against its application to a case where a court has given the transferor leave to suspend payment of debts.

27 On the other hand, the Bedrijfsvereniging and the Danish Government appear to consider that Directive No 77/187 should apply where the transferor has obtained leave to suspend payment of debts, even if the directive is not applicable to a transfer effected in liquidation proceedings. Otherwise, leave to suspend payment of debts might be applied for specifically with a view to a transfer, to the detriment of the rights of the workers.

28 It is to be noted that proceedings such as those relating to a 'surséance van betaling' have certain features in common with liquidation proceedings, in particular inasmuch as the proceedings are, in both cases, of a judicial nature. They are, however, different from liquidation proceedings in so far as the supervision exercised by the Court over the commencement and the course of such proceedings is more limited. Moreover, the object of such proceedings is primarily to safeguard the assets of the insolvent undertaking and, where possible, to continue the business of the undertaking by means of a collective suspension of the payment of debts with a view to reaching a settlement which will ensure that the undertaking is able to continue operating in the future. If no such settlement is reached, proceedings of this kind may, as in the present case, lead to the debtor's being put into liquidation.

29 It follows that the reasons for not applying the directive to transfers of undertakings taking place in liquidation proceedings are not applicable to proceedings of this kind taking place at an earlier stage.

30 For all those reasons, the reply to the first question must be that Article 1 (1) of Council Directive No 77/187 of 14 February 1977 does not apply to the transfer of an undertaking, business or part of a business where the transferor has been adjudged insolvent and the undertaking or business in question forms part of the assets of the insolvent transferor, although the Member States are at liberty to apply the principles of the directive to such a transfer on their own initiative. The directive does, however, apply where an undertaking, business or part of a business is transferred to another employer in the course of a procedure such as a 'surséance van betaling'.

The second question

31 The second question is intended essentially to determine whether Article 3 (1) of Directive No 77/187 must be interpreted as extending to the obligations of a

transferor resulting from an employment contract or employment relationship and arising prior to the date of the transfer.

32 The first subparagraph of Article 3 (1) provides that: '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) shall, by reason of such transfer, be transferred to the transferee'. The second subparagraph states, however, that 'Member States may provide that, after the date of transfer within the meaning of Article 1 (1) 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'.

33 The Bedrijfsvereniging and the Commission maintain that the provision in question covers all obligations attaching to the transferor by reason of a contract of employment or an employment relationship, including claims of workers already enforceable against the previous employer. That follows from the purpose of the directive, which is intended to protect workers and, more particularly, to safeguard their rights upon a change of employer.

34 On the other hand, the Netherlands Government considers that the provision must be interpreted as not entailing the transfer of debts arising before the transfer of the undertaking, since by virtue of a recognized principle of contract law a debtor cannot transfer his debts to a third party without the concurrence of his creditors. The national legislature is, however, free to declare the new employer to be liable for those debts, together with the old employer, in order to eliminate the risk to which workers might be exposed if the transferor disappeared after the transfer.

35 The Danish Government, for its part, distinguishes between the transfer of an undertaking following a normal sale, including cases where the payment of debts has been suspended, and the transfer of an undertaking by a liquidator. Whereas in the first case the transferee becomes subject to all the obligations of the transferor arising from an employment relationship, in the second case the transferee is not obliged to take over the existing liabilities attaching to the insolvent transferor by virtue of the legislation relating to insolvency.

36 It should be borne in mind that the first subparagraph of Article 3 (1) of Directive No 77/187 refers in general terms and unreservedly to the 'transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer'. The second subparagraph thereof, which authorizes the Member States to provide that the transferor is to continue to be liable 'after the date of the transfer', in addition to the transferee, indicates

that it is the transferee who is primarily liable for bearing the burdens resulting from employees' rights existing at the time of the transfer.

37 That interpretation is confirmed by the fact that Article 3 (3) expressly excludes from the scope of paragraph (1), the provision at issue, 'employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States'. The existence of such a specific clause, limiting the scope of the basic rule, leads to the conclusion that Article 3 (1) relates to all the rights of employees which are not covered by that exception, whether those rights arose after or before the transfer of the undertaking.

38 The reply to the second question must therefore be that Article 3 (1) of Directive No 77/187 must be interpreted as covering obligations of the transferor resulting from a contract of employment or an employment relationship and arising before the date of the transfer, subject only to the exceptions provided for in Article 3 (3).

Costs

39 The costs incurred by the Netherlands and Danish Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in reply to the questions submitted to it by the Raad van Beroep, Zwolle, by order of 28 June 1983, hereby rules:

(1) Article 1 (1) of Council Directive No 77/187/EEC of 14 February 1977 does not apply to the transfer of an undertaking, business or part of a business where the transferor has been adjudged insolvent and the undertaking or business in question forms part of the assets of the insolvent transferor, although the Member States are at liberty to apply the principles of the directive to such a transfer on their own initiative. The directive does, however, apply where an undertaking, business or part of a business is transferred to another employer in the course of a procedure such as a 'surséance van betaling' (judicial leave to suspend payment of debts).

(2) Article 3 (1) of Directive No 77/187 must be interpreted as covering obligations of the transferor resulting from a contract of employment or an employment relationship and arising before the date of the transfer, subject only to the exceptions provided for in Article 3 (3).

Mackenzie Stuart Bosco Due Kakouris

Koopmans Everling Bahlmann Galmot Joliet

Delivered in open court in Luxembourg on 7 February 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President