interpreted as meaning that all contracts of employment or employment relationships existing on the date of the transfer of an undertaking between the transferor and the workers employed in the undertaking transferred are automatically transferred to the transferee by the mere fact of the transfer. That transfer is binding on both the transferor and the transferee and on the employees' representatives, who may not agree different arrangements in an agreement with the transferor or the transferee and on the employees themselves, save that the employees may freely decide not to continue the employment relationship with the new employer after the transfer.

2. Article 1(1) of Council Directive 77/187 does not apply to transfers of undertakings made as part of a creditors' arrangement procedure of the kind provided for in the Italian legislation on compulsory administrative liquidation to which the Law of 3 April 1979 on special administration for large undertakings in critical difficulties refers. However, that provision of that directive does apply when, in accordance with a body of legislation such as that governing special administration for large undertakings in critical difficulties, it has been decided that the undertaking is to continue trading for as long as that decision remains in force.

REPORT FOR THE HEARING
in Case C-362/89 *

I — Facts and procedure

1. *The Community legislation applicable*

Council Directive 77/187 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) is applicable, according to Article 1(1), 'to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger'.

The first subparagraph of Article 3(1) of the directive 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'.

It should also be noted that Article 4(1) provides that: 'The transfer of an under-

* Language of the case: Italian.

taking, 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 organizational reasons entailing changes in the workforce'.

2. *The national legislation applicable to the case before the national court*

The first paragraph of Article 2112 of the Italian Civil Code provides that: 'Where an undertaking is transferred, contracts of employment shall continue to be valid as against the transferee unless the transferor has given the required notice and employees shall retain the rights flowing from the seniority acquired before the transfer'.

However, derogations from that rule were introduced by Decree-Law No 19 of 6 February 1987, Article 3 of which provides that: 'In the event of transfers of businesses or parts of businesses in implementation of programmes for undertakings under special administration . . . the first paragraph of Article 2112 of the Civil Code shall not apply solely to staff not transferred at the time of the transfer . . . '.

The special administration procedure for large undertakings in a crisis situation was created by Decree-Law No 36 of 30 January 1979 which, with some amendments, was converted into Law No 95 of 3 April 1979. It applies, to the exclusion of cases of bankruptcy, to large undertakings which the judicial authorities have determined to be in a state of insolvency or to have failed to pay salaries during a period of three months. The procedure is set in motion by ministerial decree and conducted by one or three auditors, appointed and supervised by ministerial authority. The decree which sets the procedure in motion may allow the undertaking to continue to trade during a limited period of time, subject to the interests of creditors. The auditor prepares a programme which may provide for a restructuring of the undertaking. Subject to any contrary provisions contained in the Decree-Law of 30 January 1979, the special administration procedure is governed by the provisions of Italian law on the compulsory administrative winding-up of undertakings.

According to the national court which has made the reference, the special administration procedure for large undertakings in critical difficulty has a distinct nature in relation to the distinguishing criteria existing between the procedures having winding-up as their purpose and those intended to safeguard the debtor's assets and to enable the undertaking to continue its activities. The main purpose of the procedure is to restructure the undertaking, particularly with a view to safeguarding jobs; however, the applicable rules were drafted as a variant of a typical liquidation procedure, which is what compulsory administrative liquidation is. The aspects which characterize the 'protective' purpose of the procedure in question are as follows:

— as the report on Decree-Law No 26/1979 indicates, the function of the procedure is to save the parts of an undertaking or group of undertakings which are basically sound, by transferring ownership of the undertaking, but not its debts, from the insolvent transferor to a new undertaking;

— the undertaking under special administration may obtain from credit institutions sums of money which are reimbursed by the State, which acts as guarantor, for the purpose of resuming activities and supplementing plant, land and buildings and industrial equipment;

— the degree of protection accorded to the interests of creditors is less than in other liquidation procedures; in particular, creditors are not allowed to interfere with decisions relating to continued trading by the undertaking and they have no guarantee that such decisions will correspond to their interests;

— the continued operation of the undertaking is given such priority by the law that it does not deal with the converse, but theoretically possible, situation, nor does it mention the consequences of the restructuring plan proving to be impracticable after the continuance of trading has been ordered.

3. *The facts of the case before the national court*

The plaintiffs are employees of the company Ercole Marelli Elettromeccanica Generale SpA (hereinafter referred to as 'EMG') which is under special administration. They have been laid off since 1985 and receive benefits from the Cassa Integrazione Guadagni Straordinaria (Wage Supplement Fund, hereinafter referred to as 'CIGS'), calculated at the full working rate.

EMG, and other companies in the Marelli group, were placed under special administration by decree of the Minister for Industry of 26 May 1981, which authorized the undertaking to continue trading.

In 1985, after the affairs of all the other companies in the group had been rearranged, only EMG remained under the special administration procedure. In September 1985, it, too, was transferred to a specially constituted company, Ercole Marelli Nuova Elettromeccanica Generale SpA (hereinafter referred to as 'Nuova EMG') which was subsequently divided into two other companies, ABB Tecnomasio SpA and ABB Industria Srl.

Pursuant to the contract of transfer and in accordance with the union agreements to which the contract itself referred, 940 workers were transferred to the transferee company.

In the case of 518 workers for whom the transferor remained responsible, one of those union agreements provided for various arrangements, in addition to continued receipt of benefits from the CIGS, designed to find a permanent solution to the problem of surplus staff.

The plaintiffs, who are still employed by EMG, which is under special administration, and who have been laid off, sought from the Pretore di Milano a declaration that their employment relationship had continued with the transferee as from the date of the transfer of the industrial concern in which they were employed.

They contended that the rule laid down in the first paragraph of Article 2112 of the

Civil Code, and not the derogatory provision in Decree-Law No 835/1986, had to be applied to them.

In view of that argument, the Pretore di Milano considered that in order to dispose of the case an interpretation of Council Directive 77/187 was necessary.

Consequently, by order of 23 October 1989, the Pretore di Milano decided to stay the proceedings pending a preliminary ruling from the Court on the following questions:

'Does the first subparagraph of Article 3(1) of Directive 77/187 provide for the automatic transfer to the transferee of the employment relationships relating to the transferred undertaking and in existence at the time of its transfer?

Is the directive applicable to transfers of businesses made by undertakings under special administration?'

4. *The procedure before the Court*

The order of the Pretore di Milano was received at the Court on 17 November 1989.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by the plaintiffs in the main proceedings, represented by Alfonso Ognibene, of the Milan Bar, the defendants in the main proceedings, represented by Giacinto Favalli and Salvatore Trifirò, of the Milan Bar, the French Government, represented by Claude Chavance, Principal Attaché from Central Administration in the Directorate of Legal Affairs at the Ministry for Foreign Affairs, acting as Agent, the Italian Government, represented by Oscar Fiumara, Avvocato dello Stato, acting as Agent, and the Commission of the European Communities, represented by Giuliano Marenco, Legal Adviser, assisted by Karen Banks, a member of its Legal Service, acting as Agents.

By letter sent to the Court on 20 May 1990, the Italian Government requested, pursuant to Article 95 of the Rules of Procedure, that the case be heard by the whole court.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations submitted to the Court

The French and Italian Governments and the Commission of the European Communities consider that the first question referred for a preliminary ruling arises only in the event that the second question is answered in the affirmative and that, consequently, it is necessary to reply to that question before replying, if necessary, to the first question.

Given those views of the parties, the observations relating to the second question should be set out first.

The second question

1. The *plaintiffs in the main proceedings*, after presenting a detailed analysis of the Italian legislation and its history, submit that the purpose of Law No 19/87 is to safeguard the continuity of the undertaking and that all the economic and fiscal action provided for by the Law in respect of undertakings in critical difficulties also have that purpose. The management of an undertaking in difficulty is assumed by a public body, the special auditor, whose main aim is to restructure production and re-integrate the undertaking into the market.

It is true that the instrument chosen by the Italian legislature is, as far as possible, based on institutions typical of procedures instituted by creditors. But that fact has no relevance, given the case-law of the Court of Justice (judgment in Case 135/83 *Abels* [1985] ECR 469 and in Case 179/83 *Industriebond FNV* [1985] ECR 511).

In order better to explain the effects which the application of Law No 19/87 entails, the plaintiffs in the main proceedings state that the position of workers concerned by the transfer of an undertaking is as follows. Upon transfer, the whole undertaking (or an independent part of it) is transferred. Only some of the workers go with the undertaking which is transferred. The other workers remain the responsibility of the special auditor and their employment relationship is continued only in order to enable them to draw benefits from the CIGS. Since the special auditor has functions which are limited to returning the undertaking to the market, above all by means of a sale, the employment relationship of the non-transferred workers is a purely formal one. Since the transferred undertaking no longer exists, those workers cannot be re-employed in any production activity and they are made redundant when CIGS benefits can no longer be accorded to them. They accordingly suffer a definitive dismissal from the undertaking which is brought about precisely by the transfer, and this result is contrary to the provisions of the directive (judgment in *Abels*, cited above, paragraph 18).

The plaintiffs in the main proceedings also point out that the Italian legislation does not regulate the transfer of workers and, in particular, is silent on the question of the criteria to be applied in the selection of the workers to be transferred; nor does it provide for prior consultation with trade-union organizations. Those circumstances lead the plaintiffs in the main proceedings to make two observations. The first, the fact that there is no obligation to consult trade-union organizations constitutes a breach of Article 6(1) and (2) of Directive 77/187 (judgment in Case 235/84 *Commission* v *Italy* [1986] ECR 2291). Secondly, the choice of the workers who are to enter the service of the new undertaking is left to the discretion of the transferor and the buyer. The workers left out are victims of a kind of disguised collective dismissal which cannot be regarded as equivalent to the collective dismissal provided for by Article 4(1) of the directive because there is no possibility of judicial review, either of the need to lay off staff or of the choice of the workers who are not transferred.

Thus, according to the plaintiffs in the main proceedings, the Italian legislation is contrary to the directive and the directive is applicable where the undertaking transferred is subject to the special administration procedure. It is futile for the Italian State to argue that the legislation is lawful on objective grounds relating to the present socio-economic situation of the country. Such an argument has already been dismissed by the Court of Justice (judgment in Case 131/84 *Commission* v *Italy* [1985] ECR 3531) with regard to non-observance of Council Directive 75/129 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).

In the result, the plaintiffs in the main proceedings request the Court to rule that Directive 77/187 applies to the transfers of undertakings made by undertakings subject to the special administration procedure under Law No 95 of 3 April 1979.

2. According to the *defendants in the main proceedings*, the interpretation given to the special administration procedure in the order for reference is wrong and misleading.

In their view, Italian legal writers are unanimous that it is a creditors' procedure having liquidation as its purpose. According to the most eminent specialists, the prime purpose of the procedure is liquidation; it is primarily a liquidating procedure and only its subsidiary purpose is to conserve. Although for a limited period of time liquidation goes on simultaneously with what is regarded as the normal continuation of the activity of the undertaking which is in difficulty, this is in order to save, not the undertaking, but all the production units with a view to transferring them to third parties. Thus, the aim is not to restructure the undertaking but, where possible and in so far as the desired objectives are achieved, simply to preserve businesses along with all that belongs to them.

In the view of the defendants in the main proceedings, such an interpretation of the Italian Law is supported by the wording of the law itself, since it expressly refers to the law on insolvency.

Consequently, the defendants in the main proceedings request the Court to reply in the negative to the second question.

3. The *French Government*, referring to the judgment in the *Abels* case, cited above, states that, although the Court has hitherto excluded from the scope of Directive 77/187 the transfer of an undertaking arising in the event of insolvency, it did not intend to exclude from it the preliminary insolvency procedures aimed at the resumption of activity, such as *redressement judiciaire* (Court-supervised composition or scheme of arrangement) in France or, so far as can be judged from the order for reference, the special administration procedure in Italy. The directive therefore applies to the transfer carried out pursuant to that procedure, since it is effected by contractual transfer or merger.

The French Government points out that its own national legislation has been supplemented in order to bring it into

conformity with Article 3(1) of the directive. Two exceptions to the principle that the employment relationships relating to the transferred undertaking and existing at the time of transfer are to be transferred to the transferee are provided for:

— the first relates to the triangular relationship in which a change of employer occurs without there being any agreement between the successive employers;

— the other concerns composition and judicial winding-up procedures. At the end of those procedures and having regard to the dismissals previously authorized by the Tribunal de Commerce, the new employer is bound by the obligations of the old employer with regard to employees whose contracts of employment are still in existence when the undertaking is transferred, if an agreement has been made between the old and new employers on a sale or a merger of the two undertakings.

Reasoning by analogy, the French Government takes the view that, whilst the Italian rules on the placing of companies under special administration do not in themselves bring such companies within the scope of the rules laid down by Directive 77/187, it must, however, be concluded that, where that legal situation leads to the contractual transfer or the merger of the undertaking in question, the provisions of the directive must apply.

The French Government therefore proposes the following reply:

'Directive 77/187 is not applicable to a transfer of an undertaking subject to court-supervised creditors' arrangements or special administration except where such a transfer is carried out by contractual transfer or a merger between the undertaking transferred and the transferee.'

4. After having outlined the main characteristics of the procedure for placing large undertakings in critical difficulties under special administration, the *Italian Government* states that the legislation pursues clear objectives of economic and social policy. It is a question of saving as far as possible the sound parts of undertakings or groups of undertakings and transferring them to a new undertaking, so as to limit the economic and social damage caused by the cessation of activities of major undertakings to the detriment of the sector in question, the level of employment, sub-contracting undertakings and, more generally, the whole national economy.

According to the case-law of the Court (judgments in the *Abels* and *Industriebond FNV* cases, cited above), the rules laid down by Directive 77/187 are not to be extended to transfers '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'. On the other hand, they must be applied in the case of transfers effected in the course of a procedure in which the supervision by the court is more limited and whose object 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'.

In the view of the Italian Government, the special administration procedure should, for the purposes of the application of the directive, be treated like bankruptcy proceedings for the following reasons: the transfer does not take place pursuant to the free will of the parties but in the course of, and pursuant to, a creditors' procedure (it is immaterial whether the procedure is supervised by the administrative authority or by the court); the transfer which takes place is not one which is intended merely to restructure the undertaking but one which is necessitated by the undertaking's state of insolvency; the procedure is decided on as a substitute for, and to the exclusion of, liquidation and not in order to safeguard the assets of the undertaking but for wider interests of economic and social policy.

According to the Italian Government, the following answer should therefore be given to the question:

'Directive 77/187 of the Council of 14 February 1977 does not impose on the Member States the obligation to extend the rules which it contains to transfers of undertakings, businesses or parts of businesses carried out as part of a creditors' arrangement procedure such as the special administration procedure provided for by Italian Law No 95 of 3 April 1979'.

The Italian Government accepts, however, that Member States have the right to apply the principles of the directive autonomously in their legislation.

5. The *Commission* points out that, during the pre-litigation procedure which led to the judgment in Case 235/84, cited above, in which Italy was found to be in breach of its obligations, it had accepted that the Italian legislation could derogate from Directive 77/187 provided that the derogation was strictly limited to undertakings declared to be 'in a state of crisis', that is was justified by the overriding requirement of protecting jobs as against the rights acquired by workers with regard to the transferor, and that it was accompanied by the guarantee deriving from the necessity for the prior agreement of the trade-union organizations.

The Commission also points out that in its observations in the *Abels* case, cited above, it followed the same argument by proposing that the directive should be interpreted so as to leave out of its scope a relatively wide range of situations concerning liquidation proceedings and procedures for preventing liquidation. But the Court followed that argument only in respect of liquidation proceedings and went on to declare the directive applicable to procedures for the suspension of payments.

The Commission observes, finally, that it has begun infringement proceedings against Italy with regard to Article 3 of Law No 19 of 6 February 1987. It takes the view that, in so far as the special administration procedure provides for continued production, the directive is applicable to it and that the provision which allows only some of the employees whose contract is still running on the date of transfer to be transferred is thus incompatible with the directive.

After mentioning the factors referred to by the national court which, in its view, illustrate the protective purpose of the

special administration procedure, the Commission states that it will attempt to suggest an answer to a question which is rendered difficult by the complex and ambiguous nature of that procedure.

Certain aspects of the procedure make it resemble liquidation. For example, in order for it to be set in motion a court decision finding that the undertaking concerned is in a state of insolvency or has failed to pay at least three instalments of salary is required; the ministerial decree ordering the procedure is like the decision ordering compulsory administrative winding-up; more generally, that procedure is in principle subject to the rules governing compulsory administrative winding-up, which is a creditors' liquidation procedure.

In other respects, it is difficult to extend to the special administration procedure the principle laid down by the Court that liquidation proceedings are to be excluded from the scope of the Community directive: the special administration procedure is decided on by the government and its conduct is not placed under the supervision of a judicial authority but of an administrative authority; far from necessarily being subject to liquidation, the undertaking must be given a restructuring plan and it may be authorized to continue its activities for a period of four years. The special administration procedure has in fact a dual aim: if possible, to keep the undertaking in existence and only if that proves impossible to wind it up whilst protecting the creditors.

After considering those various factors in the light of the Court's judgment in the *Abels* case, cited above, the Commission makes the following points:

— first, the cumulative application of the criteria for holding the directive inapplicable, based on judicial supervision and the purpose of the liquidation, have the effect of making subject to the directive not only the special administration procedure but also compulsory administrative winding-up, the latter not being subject to judicial supervision but to administrative supervision. Compulsory administrative winding-up is a procedure alternative to liquidation and should therefore be treated in the same way for the purposes of the directive. In order to achieve that result, it must be concluded that in the event of conflict between the criterion of judicial supervision and the criterion based on the purpose of the winding-up, the latter should prevail;

— secondly, if one applies to the special administration procedure the criterion according to which transfers carried out in procedures aimed at keeping undertakings in existence and not those arising in procedures aimed at bringing the existence of undertakings to an end are covered by the directive, it must be concluded that it is impossible to find a workable solution for all the stages of the procedure. On the one hand, that procedure is commenced in the hope of restructuring the undertaking, which justifies the provision for authorizing the temporary continuance of its activities, and is thus similar to the supervised administration procedure, which, in view, in particular, of the suspension of the debts for which it provides, is itself akin to the procedure for the suspension of the payments which, according to the judgment in *Abels* cited above, is subject to the application of the directive, on the other hand, a restructuring is merely a possibility under the special adminis-

tration procedure and authorization to continue trading may be refused, expire or be revoked.

According to the Commission, these two possible procedural stages should be distinguished:

(a) If the undertaking is authorized to continue trading and so long as it remains so authorized, transfers should be entirely subject to the principles laid down by the directive;

(b) If, on the other hand, the undertaking is not authorized *ab initio* to continue trading or if the original authorization expires or is revoked, the undertaking is subject to the rules governing compulsory administrative winding-up, which is a procedure akin to liquidation. In that case, tranfers are not within the scope of the directive.

According to the Commission, that solution is invulnerable to the argument that the derogation from the automatic transfer of contracts, allowing redundancies to be avoided and workers to maintain benefits under the CIGS scheme, is ultimately favourable to employment. That argument is to be rejected for the following two reasons: first, the Member States may not replace the scheme of the directive by another, even if it is more in conformity with the aims pursued; and, secondly, relations with workers registered with CIGS may be transferred to the transferee as they are and such a transfer certainly does not constitute, for the transferee, an economic burden capable of jeopardizing the transfer.

Finally, the Commission proposes the following answer:

'Directive 77/187 applies to transfers of undertakings, businesses or parts of businesses which takes place in the course of a procedure such as the special administration procedure so long as the undertaking is authorized to continue trading. It does not apply, however, where such authorization does not exist, expires or is revoked'.

The first question submitted for a preliminary ruling

1. The *applicants in the main proceedings* submit that the answer to the first question can only be in the affirmative.

The Court has already given a ruling to that effect, in particular in its judgment in Case 324/86 *Daddy's Dance Hall* [1988] ECR 739. Moreover, the very wording of the provisions in question of Directive 77/187 leave no room for a different interpretation since if one argues that the rights and obligations arising from an existing employment relationship are transferred by the vendor to the buyer following the transfer, this simply means that the employment relationship continues without interruption.

2. According to the *defendants in the main proceedings*, Directive 77/187 is not to be interpreted in such a way that the employment relationships relating to the transferred undertaking and existing at the time of transfer of that undertaking are automatically transferred from the transferee to the transferor.

According to the case-law of the Court of Justice (judgments in Case 324/86, *Daddy's Dance Hall* cited above; Joined Cases 144/87 and 145/87 *Berg* [1988] ECR 2559; Case 287/86 *Ny Molle Kro* [1987] ECR 5465, the aim of the directive is to avoid a situation in which, following the transfer of an undertaking, the worker's employment conditions with the transferee are more unfavourable than those with the transferor, and not to require all workers in the transferor's employ to be transferred automatically to the transferee.

Any other interpretation of the directive would entail an infringement of all the principles of the freedom to carry on business and even individual liberty by imposing, in all cases of transfers of undertakings, the automatic transfer of all employment relationships from the transferor to the transferee. Furthermore, there would be an unacceptable and unjustified interference with the autonomy of trade unions and with trade-union agreements, which, as in the case before the national court, have as their purpose the regulation, in the general interest of the transfer arrangements and the number of staff to be transferred from one undertaking to another. Finally, the potential transferee would be dissuaded from acquiring the undertaking if he had to take over all the employment relationships: this would risk the loss of all the jobs.

Thus, in accordance with the very wording and rationale of the directive, the first question should be answered in the negative.

3. The *French Government* considers that, under the directive, the transfer to the transferee of an employment relationship relating to the transferred undertaking and existing at the time of the transfer is compulsory only in the event of a merger or a contractual transfer.

In French law, the provisions of Article L 122-12 of the Code du Travail (Employment Code), which is intended to ensure job stability, is a matter of public policy and apply to successive employees and employers.

Nevertheless, an employee may be made redundant before the change of employer if this is made necessary by the reorganization which the future employer has decided to carry out during the period of provisional administration. During the *redressement judiciaire* procedure (court-supervised composition or scheme of arrangement), dismissals may take place only under the supervision of the court.

Consequently, according to the French Government, as long as the legal position of the undertaking under special administration is not changed, it may dismiss its employees. However, once the undertaking in question has been transferred or merges with another undertaking, Article 3(1) of the directive applies and the transfer of contracts of employment is compulsory.

The French Government proposes that the Court should give the following answer:

'The first subparagraph of Article 3(1) of Directive 77/187 applies in the event of a contractual transfer or the merger of an undertaking under special administration'.

4. The *Italian Government* considers that, given the answers which it proposes to give to the second question, an answer to the first question is unnecessary.

Nevertheless, it considers it useful to submit the following considerations.

The rule contained in Article 3(1) of Directive 77/187 must be read and considered in conjunction with Article 4(1). Thus, the directive does not contain an absolute requirement that all the employees employed in the transferred undertaking should be automatically transferred to the employ of the transferee since it does not rule out the possibility that the transfer of the undertaking may be accompanied by dismissals justified on the grounds set out in those provisions.

According to the Italian Government, Article 3 of Decree-Law No 835/86 lays down the following rules with regard to employees in the transferring undertaking: if they are transferred at the same time, they enter the transferee's service whilst maintaining their rights; if they are not transferred at the same time because there are too many of them for a restructuring of the undertaking transferred, they remain in the employ of the transferor and continue to draw benefits under the CIGS scheme and when their period of entitlement under that scheme comes to an end they may be dismissed on the same grounds as those stated in Article 4(1) of the directive. Thus, the intention of the Italian legislature was to prevent workers who are not transferred at the same time as the undertaking because there are too many of them losing their jobs as a result of a collective redundancy which would otherwise be conceivable and indeed inevitable; by remaining in the employment of the transferred undertaking, those employees can receive the social advantages laid down by the national legislation in respect of undertakings in critical difficulties. The national legislation is therefore more favourable to employees than the directive.

According to the Italian Government, the answer to be given to the first question should therefore be as follows:

'Council Directive 77/187 of 14 February 1977 allows a Member State to provide in legislation that in the event of the transfer of an undertaking within the meaning of Article 1(1) of that directive only some of the employees whose contracts are running at the date of transfer are to be transferred if that limitation enables redundancies on economic, technical or organizational grounds entailing changes in employment to be avoided or delayed'.

5. The *Commission* considers that in referring to the 'automatic' transfer to the transferee of the employment relationships existing with the transferred undertaking, the national court is not raising the question of the direct effect of Directive 77/187. What it wishes to know is whether the intention of the directive is that the transfer of the employment relationships should be automatic, in the sense that any express wishes of the parties in this regard are irrelevant.

According to the Commission, the Court has already made it clear in its judgment in *Daddy's Dance Hall*, cited above, that Article 3(1) of the directive concerns a matter of public policy, that it cannot therefore be ignored and that any contrary wishes of the parties are irrelevant. That

ruling was confirmed in the judgment in *Berg and Besselsen*, cited above.

The Commission adds that the automatic transfer of employment relationships is limited to contracts existing at the date of the transfer (judgments in Case 19/83 *Wendelboe* [1985] ECR 457 and in Case 186/83 *Botzen* [1985] ECR 519), which is a question primarily governed by national law (judgments in Case 19/83 *Wendelboe*, cited above, and Case 105/84 *Mikkelsen* [1985] ECR 2639), and to employees employed by the part of the undertaking which is transferred (judgment in *Botzen*, cited above). But those factors did not appear to be a source of doubt for the national court, which expressly refers to the employment relationships with the undertaking transferred and existing at the time when the undertaking is transferred.

According to the Commission, the first question should therefore be answered as follows:

'The first subparagraph of Article 3(1) of the directive requires that the employment relationships with the transferred undertaking existing at the time of the transfer of the undertaking are to be automatically transferred to the transferee and any contrary wish expressed by the parties in this regard is of no effect'.

F. Grévisse
Judge-Rapporteur