

## **ADVISORY OPINION OF THE COURT**

19 December 1996\*

*(Council Directive 77/187/EEC – transfer of an undertaking)*

In Case E-2/96

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice from Inderøy herredsrett (the Inderøy County Court) for an advisory opinion in the case pending before it between

**Jørn Ulstein and Per Otto Røiseng**

and

**Asbjørn Møller**

on the 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,

THE COURT,

composed of: Bjørn Haug, President, Thór Vilhjálmsson (Rapporteur) and Carl Baudenbacher, Judges,

Registrar: Per Christiansen,

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\* Language of the request for an advisory opinion: Norwegian.

after considering the written observations submitted on behalf of:

- Mr Jørn Ulstein and Mr Per Otto Røiseng, represented by Ms Gunvor Bryn Haavik, Advocate, the Norwegian Confederation of Municipal Employees (Kommunalansattes Fellesorganisasjon), Oslo;
- Mr Asbjørn Møller, represented by Mr Per Solem, Advocate, Levanger;
- The Government of the United Kingdom, represented by Mr John E. Collins, Treasury Solicitor's Department, acting as Agent, and Mr Clive Lewis, Barrister;
- The EFTA Surveillance Authority, represented by Mr Håkan Berglin, Director of the Legal and Executive Affairs Department, acting as Agent, assisted by Mr Trygve Olavson Laake, Officer of that Department;
- The Commission of the European Communities, represented by Mr Hans Gerald Crossland and Ms Maria Patakia, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Jørn Ulstein and Mr Per Otto Røiseng, Mr Asbjørn Møller, the EFTA Surveillance Authority and the EC Commission, represented by Mr Crossland, assisted by Mr De Las Hiras, Member of its Legal Service, at the hearing on 15 October 1996,

gives the following

### **Advisory Opinion**

- 1 By an order dated 11 March 1996, registered at the Court on 29 March 1996, Inderøy herredsrett (the Inderøy County Court) in Norway made a request for an advisory opinion in a case brought before it by Mr Jørn Ulstein and Mr Per Otto Røiseng, plaintiffs, against Mr Asbjørn Møller, defendant.
- 2 The questions referred by the Norwegian court concern the interpretation of 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 (hereinafter "the Directive"). The Directive is referred to in point 23 of Annex XVIII to the Agreement on the

European Economic Area (“EEA”). The Directive is thus, according to Article 2(a) of the Agreement, to be considered as a part of that Agreement as the Directive has been adapted by way of Protocol 1 to it. According to Article 6 of the EEA Agreement and Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice the jurisprudence of the EC Court of Justice (“the ECJ”) is therefore relevant when interpreting the provisions of the Directive.

3 The following questions were referred to the EFTA Court:

*“1 Is Council Directive 77/187/EEC to be interpreted in such a way that the expression "transfer of an undertaking, business or part of a business" only covers situations where there is some kind of contract between the transferor and the transferee?”*

*2 Is the mentioned Council Directive to be interpreted in such a way that the expression quoted under point 1 above implies that the transferee must take over property or moveables from the transferor?”*

*3 Will it make any difference and, if so, how, for the interpretation of the above-mentioned Council Directive if some, but not all, employees of the transferor are employed by the transferee?”*

*4 Will it make any difference and, if so, how, for the interpretation of the above-mentioned Council Directive if an assignment is awarded according to the rules governing tender and the provision of the service is limited in time?”*

4 The first and second recital of the Directive’s preamble reads:

“Whereas economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of businesses to other employers as a result of legal transfers or mergers;

Whereas it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded;”

5 Article 1(1) of the Directive provides:

“1. This Directive shall 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.”

6 Articles 3(1) and 3(2) of the Directive provides:

“1. The transferor’s rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

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.

2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions, with the proviso that it shall not be less than one year.”

7 Article 4(1) of the Directive provides:

“1. 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 organizational reasons entailing changes in the workforce.

Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal.”

*Facts*

8 Nord-Trøndelag fylkeskommune (the Nord-Trøndelag County Municipality) (hereinafter “the County”) operates two hospitals, one in the town of Levanger, the other in the town of Namsos. Earlier, the ambulance services were organised by a central governmental body. The county of Nord-Trøndelag was divided into 14 ambulance service districts, each serviced by independent enterprises performing the ambulance services under contracts with the central administration. The former employer of the plaintiffs, Hammer Syketransport, had such contracts for two districts, for the district of Levanger since 1971 and for the district of Steinkjer since 1968.

9 By an amendment of 1 March 1985 of the Norwegian Hospital Act of 19 June 1969, in force from 1 January 1986, the responsibility for the ambulance services was transferred to the county municipalities. According to a transitory provision, those who held contracts should have the right to continue for ten years, or until they reached the age of 67. Accordingly, Hammer Syketransport held contracts for ambulance services with the County until 31 December 1995 for the two districts mentioned.

10 The ambulance services were administered jointly from Mr Hammer’s offices in Levanger. The Steinkjer branch had two ambulance vehicles and employed 10 persons, and the Levanger branch also had two ambulance vehicles and employed 9 persons besides the owner. Although Hammer Syketransport had its

office on the premises of Levanger hospital, the ambulance services were operated as an independent enterprise.

- 11 In the autumn of 1994 the County decided to invite tenders on all 14 ambulance service contracts as of 1 January 1996.
- 12 Hammer Syketransport participated in the tender procedure but did not obtain new contracts. One contract for the Levanger district was entered into with Mr Møller, the defendant before the national court, and the contract for the Steinkjer district went to a third person. As a consequence thereof, on 27 June 1995, Hammer Syketransport issued letters of termination to all its personnel, effective 31 December 1995, and the entire business terminated on that day.
- 13 Mr Møller did not enter into any agreement with Hammer Syketransport or take over any of its assets. Office space was no longer available on the hospital premises and had to be found elsewhere. He bought his ambulance vehicles elsewhere. He had previously been employed by Hammer Syketransport and later worked with other ambulance services. He did not advertise the vacancies, but invited some potential candidates to send in applications. He also posted an announcement in the ward room of Hammer Syketransport in Levanger. He received a total of 14 applications, including applications from the two plaintiffs in the case before the referring court. On the basis of these individual applications and further individual appraisals, a total of seven persons were employed, four of whom had been previously employed in the Levanger branch and one in the Steinkjer branch of Hammer Syketransport, while two were recruited from elsewhere. The other employees of Hammer Syketransport, including the two plaintiffs, were not offered employment.
- 14 The plaintiffs in the main proceedings claim that there has been a transfer of an undertaking within the meaning of the Directive and that the defendant is obliged, pursuant to Article 4(1) of the Directive, to employ them as ambulance personnel.
- 15 The facts of the case and the proceedings before Inderøy herredsrett are further described in the Report for the Hearing.

#### *General remarks*

- 16 The questions presented to the Court in the request for an advisory opinion all concern the concept of transfer of an undertaking, business or part of business as a result of a legal transfer within the meaning of Article 1(1) of the Directive.
- 17 As pointed out by the EFTA Court in the *Eidesund* case (Case E-2/95, not yet reported, hereinafter "*Eidesund*"), the ECJ has dealt with the concept of transfer in Article 1 of the Directive in numerous cases. Although none of these cases deal directly with the situation where an independent service provider is replaced

by another, the general principles of interpretation of the Directive seem to be well established through the ECJ case law, and the decisions of the ECJ can give considerable guidance with respect to the present case.

- 18 In particular, three aspects of this case law should be recalled:
- 19 First, the ECJ has consistently referred to the stated purpose of the Directive and given the concept of transfer a wider and more flexible interpretation than would usually be understood as the scope of the expressions “merger” and “transfer”.
- 20 Secondly, the question whether or not a given transaction constitutes a transfer of an undertaking, business or part of a business must be determined based on an appraisal of all the facts characterising the transaction, in which all the relevant circumstances are merely individual factors in the overall assessment which must be made.
- 21 Thirdly, it is for the national court to make the necessary factual appraisal, in light of the criteria for interpretation specified by the ECJ, in order to establish whether or not there is a transfer in the above sense.
- 22 With reference to the case law of the ECJ, the EFTA Court has adopted the same general approach for interpreting Article 1(1) of the Directive: see the advisory opinion in *Eidesund*.
- 23 It will thus often be the case that an individual factor may generally be of considerable weight and importance in the overall assessment, but at the same time that the absence of that individual factor does not necessarily exclude the application of the Directive if an overall assessment of the circumstances leads to a finding that a transfer of an undertaking, business or part of a business within the meaning of the Directive has taken place.

#### *The first question*

- 24 By its first question the referring court seeks in essence to ascertain whether there has to be a direct contractual relationship between the transferor and the transferee for the Directive to be applicable, pursuant to its Article 1(1).
- 25 The *plaintiffs*, the *Government of the United Kingdom*, the *EFTA Surveillance Authority* and the *EC Commission* submit that the absence of a direct contractual relationship between the first and the second service provider in a case such as the one at hand does not preclude the application of the Directive. The plaintiffs, the *EFTA Surveillance Authority* and the *EC Commission* further submit that the change of a service provider, such as in the case at hand, can be said to have taken place in the context of contractual relations and therefore may constitute a transfer for the purposes of the Directive. At the oral hearing, the representative of the Commission clarified his position by stating that he considered the

Commission's approach to be that in the absence of any special factors, the mere fact that the contractor service is awarded to a second person after the service contract has been terminated with the first person does not normally constitute a transfer of an undertaking. The *defendant* submits that it is a precondition for the application of the Directive that there has been some kind of contract between the transferor and the transferee.

- 26 The Court has, with reference to the stated purpose of the Directive and the wide and flexible interpretation given to the concept of transfer in the case law of the ECJ, on an earlier occasion held that the Directive may be applicable in a situation where one fixed-term contract for the provision of catering services, is upon its expiry, succeeded by another fixed-term contract concluded with another service provider on the basis of a tender award procedure: see the advisory opinion in *Eidesund*, where reference is made to relevant judgments of the ECJ. The Court held that a transfer can be effected in two stages and that there is no requirement that there is a direct contractual relationship between the first and the second employer.
- 27 However, although the absence of a direct contractual relationship between the transferor and the transferee does not exclude the application of the Directive, a mere succession of two contracts for the provision of the same or similar services will not, as a rule, be sufficient for there to be a transfer of an undertaking, business or part of a business. As pointed out by the Court in its advisory opinion in *Eidesund*, at paragraph 31, the decisive criterion for establishing whether there has been a transfer of an undertaking, business or part of a business for the purposes of the Directive is whether the business in question is transferred as a going concern, with its own identity, and whether it retains this identity after the transfer. This would be indicated, *inter alia*, by the fact that the operation of the entity in question is actually continued or resumed by the new employer, with the same or similar economic activities; see, in particular, the judgment of the ECJ in Case 24/85 *Spijkers v Benedik* [1986] ECR 1119, at paragraphs 11 and 12. The case law of the ECJ also presupposes that the transfer relates to a stable economic entity. See the judgment in Case C-48/94 *Rygaard v Strø Mølle Akustik* [1995] ECR I-2745, where the ECJ held that an activity limited to performing one specific works contract falls outside the scope of the Directive.
- 28 In order to determine whether those conditions are met, it is necessary to consider all the facts characterising the transaction in question, including the type of undertaking or business concerned, whether or not tangible assets, such as buildings and moveable property, or intangible assets, such as patents or know-how, are transferred, the value of the assets at the time of the transfer, whether or not most of the personnel is taken over by the new employer, whether or not customers are transferred, and the degree of similarity between the activities carried on before and after the transfer and the period of any suspension of those activities. All of these circumstances are, however, only individual factors in the overall assessment to be made and cannot therefore be considered in isolation. The elements to be considered were set out in *Spijkers v Benedik*, paragraph 13,

and have consistently been invoked and referred to by the ECJ. It is for the national court to perform this overall assessment with respect to the case before it.

- 29 As to the individual factors in the overall assessment to be made by the national court, some further remarks with regard to assets and employees will be made in reply to the second and the third question, see paragraph 31 et seq.
- 30 The answer to the first question must therefore be that Article 1(1) of the Directive is to be interpreted so that the absence of a direct contractual relationship between the transferor and the transferee does not exclude the applicability of the Directive if other factors result in an assessment of the transaction as constituting a transfer within the meaning of the Directive.

*The second question*

- 31 In its second and third questions the referring court singles out some of the factors for assessing whether there has been a transfer of an undertaking, business or part of a business. The second question asks whether the Directive, properly construed, only applies in situations where property or moveables are taken over by the transferee.
- 32 It follows from the above that the taking-over of assets is one of the factors to be taken into account by the national court to enable it, when assessing the transaction as a whole, to decide whether an undertaking, business or part of a business has in fact been transferred. As stated by the Court in *Eidesund*, the taking-over of assets may, depending on the circumstances, be an important or even decisive factor in the assessment of whether an undertaking, business or part of a business has in fact been transferred.
- 33 Consequently, the answer to the second question must be that whether the transferee takes over property or moveables from the transferor is a factor which must be taken into account in the overall assessment referred to above, and which, depending on the circumstances, may be an important or even decisive factor. However, even in the absence of this factor, the applicability of the Directive is not excluded, provided that other factors result in an assessment of the transaction as constituting a transfer within the meaning of the Directive.

*The third question*

- 34 By its third question, the referring court seeks to establish what relevance it has for the interpretation of the Directive that some, but not all, of the employees of the transferor are re-employed by the transferee.

- 35 It follows from the above that the employment of the transferor's employees is one of the various factors to be taken into account by the national court to enable it, when assessing the transaction as a whole, to decide whether an undertaking, business or part of a business has in fact been transferred.
- 36 As held by the Court in *Eidesund*, in cases where a high percentage of the personnel is taken over, and where the business of the first service provider is characterised by a high degree of expertise of its personnel, the employment of that same personnel by the second service provider may support a finding of identity and continuity of the business. If the work to be performed does not require any particular expertise or knowledge, the taking-over of personnel becomes less indicative of the identity of the undertaking.
- 37 It may also be a matter for consideration whether the taking-over of personnel is caused by a desire to carry on the same business as before, or merely represents a convenient way for the new service provider to fill its increased need for employees to service the new contract. It may be an indication of the former if the taking-over of employees is a condition for the transfer, while a filling of vacancies based on individual applications and free competition and on the new contractor's terms may be an indication of the latter. For this reason, the procedures and the basis for the employment may be of significance for the total assessment to be made.
- 38 The answer to the third question must therefore be that whether the transferee employs some of the employees of the transferor is a factor that must be taken into account in the overall assessment of the situation to be made by the national court.

*The fourth question*

- 39 In the fourth question, the referring court essentially asks whether it affects the scope of the Directive if a contract is awarded after a tender procedure and if the provision of the service is limited in time.
- 40 The *defendant* submits that the Directive is not applicable when a contract is awarded in accordance with rules governing tender. The defendant points out that tender situations are not mentioned in the Directive and the preparatory work relating to the Directive, and additionally points out the inconvenient consequences this would have for competition-dependent industries.
- 41 The *plaintiffs* submit that both the wording and the objective of the Directive indicate that tender situations should also be covered by the Directive. The plaintiffs further submit that the application of the Directive in tender situations does not impede free competition any more than other statutory provisions concerning protection of worker's rights. The *EFTA Surveillance Authority* and the *EC Commission* emphasise the general applicability of the Directive,

according to its wording, as well as the purposive interpretation of the Directive by the ECJ, in support of the conclusion that rules governing tenders have no effect on the applicability of the Directive.

- 42 As pointed out by the EFTA Surveillance Authority, it is not clear from the request whether the question in the case at hand concerns tender procedures in general or whether it relates specifically to situations where such procedures are required under EEA rules concerning public procurement. At the oral hearing counsel for both of the parties to the case before the requesting court confirmed that the tender award procedure in the present case was not instituted in order to comply with any national legislation implementing EEA rules concerning public procurement. Therefore, the Court does not find it necessary to express its views on the situation where the tender procedures are following from EEA rules. However, in a situation where tender procedures are chosen for other reasons the application of the Directive cannot be seen as being limited.
- 43 The Court accepts the submissions of the EFTA Surveillance Authority and the EC Commission to the effect that the fact that a service contract is awarded for a limited period of time, as in the case at hand, does not as such exclude the application of the Directive. As the EC Commission points out, fixed-term contracts have been held by the ECJ not to fall outside the scope of the Directive, provided that a stable economic entity passes from one employer to another and retains its identity (judgment in Case 287/86 *Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro* [1987] ECR 5465 and *Rygaard v Strø Mølle Akustik* (cited above)). The same view was expressed by the EFTA Court in its advisory opinion in *Eidesund*.
- 44 The answer to the fourth question must therefore be that the fact that a contract for the provision of services is awarded under tender procedures which do not follow from EEA rules does not exclude the applicability of the Directive. Nor is it decisive for the application of the Directive that the provision of the service is limited in time.

#### *Costs*

- 45 The costs incurred by the Government of the United Kingdom, the EFTA Surveillance Authority and 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, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by Inderøy herredsrett by an order of 11 March 1996, hereby gives the following advisory opinion:

1. **Article 1(1) of the Act referred to in point 23 of Annex XVIII to the EEA Agreement (Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses) is to be interpreted so that the absence of a direct contractual relationship between the transferor and the transferee does not exclude the application of the Directive if other factors result in an assessment of the transaction as constituting a transfer within the meaning of the Directive.**
2. **Whether the transferee takes over property or moveable assets from the transferor is a factor which must be taken into account in the overall assessment of the situation to be made by the national court. The fact that no property or moveables are transferred, does not as such exclude the applicability of the Directive, provided that other factors result in an assessment of the transaction as constituting a transfer within the meaning of the Directive.**
3. **Whether the transferee employs some of the employees of the transferor is a factor that must be taken into account in the overall assessment of the situation to be made by the national court.**
4. **The fact that a contract for the provision of services is awarded under tender procedures which do not follow from EEA rules does not exclude the applicability of the Directive. Nor is it decisive for the application of the Directive that the provision of the service is limited in time.**

Bjørn Haug

Thór Vilhjálmsson

Carl Baudenbacher

Delivered in open court in Luxembourg on 19 December 1996.

Per Christiansen  
Registrar

Bjørn Haug  
President