

JUDGMENT OF THE COURT (Fifth Chamber)  
18 March 1986 \*

In Case 24/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden [Supreme Court of the Netherlands] for a preliminary ruling in the proceedings pending before that court between

**Jozef Maria Antonius Spijkers**

and

**(1) Gebroeders Benedik Abattoir CV,**

**(2) Alfred Benedik en Zonen BV**

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 (Fifth Chamber)

composed of: U. Everling, President of Chamber, R. Joliet, O. Due, Y. Galmot and C. Kakouris, Judges,

Advocate General: Sir Gordon Slynn

Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

Jozef Maria Antonius Spijkers, by J. Groen and J. A. Van Veen, Advocaten at The Hague,

\* Language of the Case: Dutch.

the Netherlands Government, by I. Verkade, Secretary-General at the Ministry of Foreign Affairs,

The United Kingdom, by S. J. Hay, of the Treasury Solicitor's Department, and by C. Symons, Barrister,

The Commission of the European Communities, by T. van Rijn and F. Grondman, members of its Legal Department,

after hearing the Opinion of the Advocate General delivered at the sitting on 22 January 1986,

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 a judgment of 18 January 1985, which was received at the Court on 25 January 1985, the Hoge Raad der Nederlanden referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions concerning the interpretation of Article 1 (1) of Council Directive No 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.
- 2 Those questions were raised in the course of proceedings brought by Jozef Maria Antonius Spijkers against Gebroeders Benedik Abattoir CV (hereinafter referred to as 'Benedik Abattoir') and Alfred Benedik en Zonen BV (hereinafter referred to as 'Alfred Benedik').

- 3 The Hoge Raad found that Mr Spijkers was employed as an assistant manager by Gebroeders Colaris Abattoir BV (hereinafter referred to as 'Colaris') at Ubach over Worms (The Netherlands), a company whose business consisted in the operation of a slaughter-house. The Hoge Raad also found that on 27 December 1982, by which date the business activities of Colaris 'had entirely ceased and there was no longer any goodwill in the business', the entire slaughter-house, with various rooms and offices, the land and certain specified goods, were purchased by Benedik Abattoir. 'Since that date, although in fact only since 7 February 1983', Benedik Abattoir has operated a slaughter-house for the joint account of Alfred Benedik and itself. All the employees of Colaris were taken over by Benedik Abattoir, apart from Mr Spijkers and one other employee. The Hoge Raad also states that the business activity which Benedik Abattoir carries on in the buildings is of the same kind as the activity previously carried on by Colaris and that the transfer of the business assets enabled Benedik Abattoir to continue the activities of Colaris, although Benedik Abattoir did not take over Colaris's customers.
  
- 4 By a judgment of the Rechtbank [District Court], Maastricht, of 3 March 1983, Colaris was declared insolvent. By a writ of 9 March 1983 Mr Spijkers summoned Benedik Abattoir and Alfred Benedik to appear in proceedings for interim relief before the President of the Rechtbank, Maastricht, and sought an order that they should pay him his salary from 27 December 1982, or at least from such date as the President thought fit, and should provide him with work within two days of the order. In support of his claims he contended that there had been a transfer of an undertaking within the meaning of the Netherlands legislation enacted in order to implement Directive No 77/187 and that this entailed, by operation of law, a transfer to Benedik Abattoir of the rights and obligations arising from his contract of employment with Colaris.
  
- 5 The application for interim relief was dismissed by the President of the Rechtbank, Maastricht, whose decision was confirmed on appeal by the Gerechtshof [Regional Court of Appeal], 's-Hertogenbosch. Mr Spijkers then appealed in cassation to the Hoge Raad der Nederlanden, which stayed the proceedings and referred the following questions to the Court of Justice:
  - '(1) Is there a transfer within the meaning of Article 1 (1) of Council Directive No 77/187 where buildings and stock are taken over and the transferee is thereby enabled to continue the business activities of the transferor and does in fact subsequently carry on business activities of the same kind in the buildings in question?

- (2) Does the fact that at the time when the buildings and stock were sold the business activities of the vendor had entirely ceased and that in particular there was no longer any goodwill in the business prevent there being a “transfer” as defined in Question 1?
- (3) Does the fact that the circle of customers is not taken over prevent there being such a transfer?

6 In order to understand the purpose of those questions, it is necessary to consider them in the light of Directive No 77/187. That directive, which was adopted on the basis, *inter alia*, of Article 100 of the Treaty, is intended, according to 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) of the directive provides for the transfer of the transferor’s rights and obligations arising from a contract of employment or from an employment relationship, and Article 4 (1) provides for the protection of the workers concerned against dismissal by the transferor or the transferee solely by reason of the transfer. Article 1 (1), which the Court has been requested to interpret in this case, defines the scope of the directive; it provides that the 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’.

7 It therefore appears that by its questions the Hoge Raad seeks a ruling on the scope of and the criteria for applying the expression ‘transfer of an undertaking, business or part of a business to another employer’ in Article 1 (1) of the directive in relation to a case such as that described in the Hoge Raad’s judgment. The questions must therefore be considered together.

8 Mr Spijkers maintains that there is a transfer of an undertaking within the meaning of Article 1 (1) where the undertaking’s assets and business are transferred as a unit from one employer to another; it is immaterial whether at the time of the transfer the business activities of the transferor have ceased and the goodwill has already disappeared.

- 9 The Netherlands and United Kingdom Governments and the Commission, on the other hand, consider that the question whether there is a transfer of an undertaking for the purposes of Article 1 (1) must be considered in the light of all the circumstances characterizing the transaction, such as whether or not the tangible assets (buildings, movable property and stocks) and the intangible assets (know-how and goodwill) were transferred, the nature of the activities engaged in and whether or not those activities had ceased at the time of the transfer. However, none of those factors is in itself decisive.
- 10 The United Kingdom Government and the Commission suggest that the essential criterion is whether the transferee is put in possession of a going concern and is able to continue its activities or at least activities of the same kind. The Netherlands Government emphasizes that, having regard to the social objective of the directive, it is clear that the term 'transfer' implies that the transferee actually carries on the activities of the transferor as part of the same business.
- 11 That view must be accepted. It is clear from the scheme of Directive No 77/187 and from the terms of Article 1 (1) thereof that the directive is intended to ensure the continuity of employment relationships existing within a business, irrespective of any change of ownership. It follows that the decisive criterion for establishing whether there is a transfer for the purposes of the directive is whether the business in question retains its identity.
- 12 Consequently, a transfer of an undertaking, business or part of a business does not occur merely because its assets are disposed of. Instead it is necessary to consider, in a case such as the present, whether the business was disposed of as a going concern, as would be indicated, *inter alia*, by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities.
- 13 In order to determine whether those conditions are met, it is necessary to consider all the facts characterizing the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the

new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation.

14 It is for the national court to make the necessary factual appraisal, in the light of the criteria for interpretation set out above, in order to establish whether or not there is a transfer in the sense indicated above.

15 Consequently, in reply to the questions submitted it must be held that Article 1 (1) of Directive No 77/187 of 14 February 1977 must be interpreted as meaning that the expression 'transfer of an undertaking, business or part of a business to another employer' envisages the case in which the business in question retains its identity. In order to establish whether or not such a transfer has taken place in a case such as that before the national court, it is necessary to consider whether, having regard to all the facts characterizing the transaction, the business was disposed of as a going concern, as would be indicated *inter alia* by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities.

### Costs

16 The costs incurred by the Netherlands and United Kingdom 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 proceedings pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden by a judgment dated 18 January 1985, hereby rules:

Article 1 (1) of Directive No 77/187 of 14 February 1977 must be interpreted to the effect that the expression 'transfer of an undertaking, business or part of a business to another employer' envisages the case in which the business in question retains its identity. In order to establish whether or not such a transfer has taken place in a case such as that before the national court, it is necessary to consider whether, having regard to all the facts characterizing the transaction, the business was disposed of as a going concern, as would be indicated *inter alia* by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities.

Everling

Joliet

Due

Galmot

Kakouris

Delivered in open court in Luxembourg on 18 March 1986.

P. Heim

U. Everling

Registrar

President of the Fifth Chamber