

JUDGMENT OF THE COURT (Fifth Chamber)
10 December 1998 ^{*}

In Joined Cases C-173/96 and C-247/96,

REFERENCES to the Court under Article 177 of the EC Treaty by the Tribunal Superior de Justicia de Castilla-La Mancha (Spain) (C-173/96) and by the Arbeitsgericht Lörrach (Germany) (C-247/96) for a preliminary ruling in the proceedings pending before those courts between

Francisca Sánchez Hidalgo and Others

and

Asociación de Servicios Aser and

Sociedad Cooperativa Minerva (C-173/96),

and between

Horst Ziemann

and

Ziemann Sicherheit GmbH and

Horst Bohn Sicherheitsdienst (C-247/96),

^{*} Languages of the cases: Spanish and German.

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 (OJ 1977 L 61, p. 26),

THE COURT (Fifth Chamber),

composed of: J.-P. Puissechot (Rapporteur), President of the Chamber, P. Jann, J. C. Moitinho de Almeida, C. Gulmann and D. A. O. Edward, Judges,

Advocate General: G. Cosmas,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Asociación de Servicios Aser, by Aquilino Conde Barbero, of the Madrid Bar,
- Ziemann Sicherheit GmbH, by Detlef Heyder, Rechtsanwalt, Freiburg im Breisgau,
- the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Sabine Maass, Regierungsrätin z. A. in the same Ministry, acting as Agents (C-247/96),
- the French Government, by Jean-François Dobelle, Assistant Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Anne de Bourgoing, Chargé de Mission in the same directorate, acting as Agents (C-173/96),

- the United Kingdom Government, by John E. Collins, of the Treasury Solicitor's Department, acting as Agent, and Clive Lewis, Barrister (C-173/96),
- the Commission of the European Communities, by Maria Patakia and Isabel Martínez del Peral, of its Legal Service, acting as Agents (C-173/96), and by Maria Patakia and Peter Hillenkamp, Legal Adviser, acting as Agent, assisted by Gerrit Schohe and Mark Hoenike, of the Brussels Bar (C-247/96),

having regard to the Report for the Hearing,

after hearing the oral observations of Horst Ziemann, represented by Rudolf Buschmann, a member of the Federal Legal Service of the Deutscher Gewerkschaftsbund, acting as Agent; of the Spanish Government, represented by Rosario Silva de Lapuerta, Abogado del Estado, acting as Agent; of the French Government, represented by Jean-François Dobelle and Anne de Bourgoing; and of the Commission, represented by Peter Hillenkamp and Manuel Desantes, a national civil servant on secondment to its Legal Service, acting as Agent, at the hearing on 11 June 1998,

after hearing the Opinion of the Advocate General at the sitting on 24 September 1998,

gives the following

Judgment

- ¹ By orders of 25 April 1996 (C-173/96) and 28 November 1995 (C-247/96), received at the Court Registry on 20 May 1996 and 19 July 1996, the Tribunal Superior de Justicia (High Court of Justice), Castilla-La Mancha, and the Arbeitsgericht (Labour Court) Lörrach referred to the Court for a preliminary ruling under Article 177 of

the EC Treaty questions 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 (OJ 1977 L 61, p. 26).

2 The questions have been raised in the case of Francisca Sánchez Hidalgo and Others versus Asociación de Servicios Aser (hereinafter 'Aser') and Sociedad Cooperativa Minerva (hereinafter 'Minerva') and in the case of Horst Ziemann versus Ziemann Sicherheit GmbH (hereinafter 'Ziemann GmbH') and Horst Bohn Sicherheitsdienst (hereinafter 'Horst Bohn').

3 Following pronouncement on 11 March 1997 of the judgment in Case C-13/95 *Süzen* [1997] ECR I-1259, the procedure in these cases was suspended by decisions of the President of the Court of 18 March 1997 and the Court asked the national courts which had made the references to indicate whether they wished to maintain their questions in view of that judgment and of the judgment delivered on 14 April 1994 in Case C-392/92 *Schmidt* [1994] ECR I-1311. By letters of 20 May 1997 (C-173/96) and 5 June 1997 (C-247/96), those courts informed the Court that they wished to maintain their questions. By decisions of the President of the Court of Justice of 2 June 1997 (C-173/96) and 18 June 1997 (C-247/96), the procedure was resumed in the two cases.

4 By order of the President of the Fifth Chamber of 27 March 1998, the two cases were joined for the purposes of the oral proceedings and the judgment.

Case C-173/96

5 The Municipality of Guadalajara had contracted out its home-help service for persons in need to Minerva which, for this purpose, had been employing Mrs Sánchez Hidalgo and four other employees as home helps for several years.

- 6 On the expiry of the contract, the Municipality entrusted the service in question to Aser as from 1 September 1994. Aser then engaged Mrs Sánchez Hidalgo and her four colleagues on a part-time basis but did not recognise their period of service with the previous undertaking.
- 7 Taking the view that the refusal to take into account their previous service constituted an infringement of Article 44 of the Estatuto de los Trabajadores (Workers' Statute), which implements in Spanish law the provisions of Directive 77/187, the five employees brought proceedings before the Juzgado de lo Social (Social Court), Guadalajara, for a declaration that their employment relationship with Minerva had been taken over by Aser.
- 8 That court decided that the conditions for the transfer of an undertaking within the meaning of the national legislation were not met and dismissed their action by judgment of 6 July 1995.
- 9 Mrs Sánchez Hidalgo and her four colleagues appealed against that judgment to the Tribunal Superior de Justicia de Castilla-La Mancha.
- 10 In its order for reference, that national court states that, according to the case-law of the Tribunal Supremo (Supreme Court), the protection conferred on employees by Article 44 of the Estatuto de los Trabajadores is applicable only where material assets are transferred between the two succeeding undertakings or where the collective agreement applicable to the sector in question or the conditions governing tenders for the relevant contract so provide. The present case does not fit into any of those sets of circumstances. The national court observes, however, that the national provision in question must be interpreted in conformity with Directive 77/187 which it is intended to transpose. The position would appear to be that the Court accepts that the directive applies where there is merely a succession in the performance of an activity, regardless of any transfer of material elements or assets (see, in particular, Case C-29/91 *Redmond Stichting* [1992] ECR I-3189 and *Schmidt*, cited above).

- 11 Taking the view that, in those circumstances, the outcome of the case depended on the interpretation of Directive 77/187, the Tribunal Superior de Justicia de Castilla-La Mancha decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Where an undertaking ceases to provide, for a municipality which had awarded it a contract for this purpose, a home-help service for certain persons in need, and which then awards a new contract for that service to a different undertaking, without there being any transfer of material assets and without there being, either in the collective agreement or in the tendering conditions, any provision pursuant to which the new undertaking must be subrogated to the employment relationship between the workers and the previous undertaking to which the contract had been awarded, is this case to be regarded as falling within the scope of Article 1(1) of Directive 77/187 of 14 February 1977?’

Case C-247/96

- 12 From 1979 to 1995 Mr Ziemann had been continuously employed as a guard at a medical supplies depot of the Bundeswehr (Federal Armed Forces) at Efringen-Kirchen. During that period he was employed by five companies in turn, which each successively obtained the contract for maintaining surveillance of the depot. Most recently, from 1990 to 1995, he was employed by Ziemann GmbH.
- 13 On 30 September 1995, the Bundeswehr terminated the surveillance contract with Ziemann GmbH and, after the contract had been put out to tender, it was awarded to Horst Bohn. This undertaking took on the watchmen of Ziemann GmbH serving in the depot, with the exception of three, one of whom was Mr Ziemann. Ziemann GmbH, which employs around 160 persons at various other locations some of which, are, however, far away from Efringen-Kirchen, then terminated Mr Ziemann’s employment contract with effect from 30 September 1995.

- 14 On 9 October 1995, Mr Ziemann brought an action in the Arbeitsgericht Lörrach to have his dismissal declared unlawful. He claimed that the loss of the contract for the surveillance of the Efringen-Kirchen depot by Ziemann GmbH and the award of that contract to Horst Bohn amounted to a transfer of part of a business within the meaning of Directive 77/187 and Paragraph 613a of the Bürgerliches Gesetzbuch (German Civil Code), which transposes the directive into German law. Ziemann GmbH had therefore dismissed him for reasons related to that transfer, in breach of the German legislation.
- 15 Ziemann GmbH and Horst Bohn argued that no transfer of a business could have occurred in this case because there were no legal relationships between them.
- 16 According to the Arbeitsgericht, it appears from the case-law of the Court, in particular the judgment in *Schmidt*, cited above, that Directive 77/187 is applicable whenever an undertaking continues or takes on, as in this case, the activity carried on until that time by another undertaking. It points out in this regard that the activity carried on by the various succeeding companies as regards the surveillance of the medical supplies depot at Efringen-Kirchen was exactly the same. The organisation and performance of the surveillance work are largely determined by the Bundeswehr which is involved in the choice of guards and lays down in detail their obligations, the nature of their tasks, the extent of their operations, their number, their qualifications and their training in the use of weapons and prescribes their equipment.
- 17 Moreover, surveillance tasks must be carried out in accordance with the Gesetz über die Anwendung unmittelbaren Zwanges und die Ausübung besonderer Befugnisse durch Soldaten und zivile Wachpersonen (Law concerning the Use of Direct Force and the Exercise of Special Powers by Soldiers in the Bundeswehr and Civil Surveillance Personnel). Finally, the employment contracts concluded by the various surveillance companies with their employees are practically identical in so far as they are essentially governed by the collective agreement applying to this sector.

- 18 Taking the view that the outcome of the case depended on the interpretation of Directive 77/187, the Arbeitsgericht Lörrach decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘1. Do Article 1(1) and Article 4(1) of Council Directive 77/187/EEC also apply to the transfer of part of a business, such as the task of guarding a military installation, where there is no direct legal transfer between successor contractors (surveillance undertakings)?
2. Is that at any rate the case if, on termination of the contract, the part of the business reverts to the body awarding the contract, which then immediately enters into a contract for services with a successor which contains essentially the same standard conditions?
3. Is there at any rate a transfer of a business within the meaning of Article 1(1) of Directive 77/187/EEC if essentially the same employees continue to perform the same surveillance duties on essentially the same terms, which are determined to a large extent by the body awarding the contract?’

The questions referred for a preliminary ruling

- 19 By the questions, which should be examined together, the national courts seek to ascertain whether, and under which conditions, Directive 77/187 applies to a situation in which a public body which had contracted out its home-help service for people in need or awarded a contract for the surveillance of some of its premises to a first undertaking decides, on expiry of or after termination of the contract which

it had with the first undertaking, to contract out that service or award that contract to a second undertaking.

- 20 According to Article 1(1) of Directive 77/187, Directive 77/187 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.
- 21 The aim of Directive 77/187 is to ensure continuity of employment relationships within an economic entity, irrespective of any change of ownership. The decisive criterion for establishing the existence of a transfer within the meaning of the directive is, therefore, whether the entity in question retains its identity, as indicated *inter alia* by the fact that its operation is actually continued or resumed (Case 24/85 *Spijkers* [1986] ECR 1119, paragraphs 11 and 12, and, most recently, *Süzen*, cited above, paragraph 10).
- 22 Whilst the absence of any contractual link between the transferor and the transferee, or, as in these cases, between the two undertakings successively entrusted with the task of providing a home-help service or the task of maintaining surveillance at a medical supplies depot, may be evidence that no transfer within the meaning of the directive has occurred, it is certainly not conclusive.
- 23 Directive 77/187 is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the undertaking. Thus, there is no need, in order for the directive to be applicable, for there to be any direct contractual relationship between the transferor and the transferee: the transfer may also take place in two stages, through the intermediary of a third party such as the owner or the person putting up the capital (see, in particular, Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253, paragraphs 28 to 30, and *Süzen*, cited above, paragraph 12).

- 24 Similarly, the fact that the service or contract in question has been contracted out or awarded by a public body cannot exclude application of Directive 77/187 if neither the activity of providing a home-help service to persons in need nor the activity of providing surveillance involves the exercise of public authority (see, to this effect, Case C-298/94 *Henke* [1996] ECR I-4989). Furthermore, Directive 77/187 covers any person who is protected as an employee under national labour law (see Case 105/84 *Danmols Inventar* [1985] ECR 2639, paragraph 27, and *Redmond Stichting*, cited above, paragraph 18) and it is not contested that such is the case with the employees concerned in these cases.
- 25 In order for Directive 77/187 to be applicable, however, the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract (Case C-48/94 *Rygaard* [1995] ECR I-2745, paragraph 20). The term 'entity' thus refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective (*Süzen*, cited above, paragraph 13).
- 26 Whilst such an entity must be sufficiently structured and autonomous, it will not necessarily have significant assets, material or immaterial. Indeed, in certain sectors, such as cleaning and surveillance, these assets are often reduced to their most basic and the activity is essentially based on manpower. Thus, an organised grouping of wage earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity.
- 27 The presence of a sufficiently structured and autonomous entity within the undertaking awarded the contract is, in principle, not affected by the circumstance, which occurs quite frequently, that the undertaking is subject to observance of precise obligations imposed on it by the contract-awarding body. Although the influence which the contract-awarding body has on the service provided by the undertaking concerned may be extensive, the service-providing undertaking nevertheless normally retains a certain degree of freedom, albeit reduced, in organising and performing the service in question, without its task being capable of being interpreted as simply one of making personnel available to the contract-awarding body.

- 28 It is for the national courts which have made the references to determine, in the light of the criteria set out above, whether the home-help service for persons in need available in the Municipality of Guadalajara and the surveillance of the medical supplies depot of the Bundeswehr at Efringen-Kirchen were organised in the form of an economic entity within the first undertaking to which provision of the service in question was contracted out or the contract in question awarded.
- 29 In order to determine whether the conditions for the transfer of an entity are met, it is necessary to consider all the facts characterising the transaction in question, including in particular the type of undertaking or business, whether or not its 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, 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. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (see, in particular, *Spijkers* and *Süzen*, paragraphs 13 and 14 respectively).
- 30 So, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract holder is similar does not justify the conclusion that there has been a transfer of an economic entity between the successor undertakings. Such an entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it (*Süzen*, cited above, paragraph 15).
- 31 As pointed out in paragraph 29 of this judgment, the national court, in assessing the facts characterising the transaction in question, must take into account among other things the type of undertaking or business concerned. It follows that the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of the directive will necessarily

vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business. Where in particular an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets (*Süzen*, cited above, paragraph 18).

32 Since, in certain labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, it must be recognised that such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task. In those circumstances, the new employer takes over a body of assets enabling him to carry on the activities or certain activities of the transferor undertaking on a regular basis (*Süzen*, cited above, paragraph 21).

33 It is for the national courts which have made the references to determine, in the light of the criteria set forth above, whether a transfer has occurred in the cases now before them.

34 The answer to be given to the questions submitted to the Court must therefore be that Article 1(1) of Directive 77/187 is to be interpreted as meaning that the directive applies to a situation in which a public body which had contracted out its home-help service for persons in need or awarded a contract for maintaining surveillance of some of its premises to a first undertaking decides, upon expiry of or after termination of the contract which it had with the first undertaking, to contract out that service or award that contract to a second undertaking, provided that the operation is accompanied by the transfer of an economic entity between the two undertakings. The term 'economic entity' refers to an organised grouping of persons and assets enabling an economic activity which pursues a specific objective to be exercised. The mere fact that the service successively provided by the old and

the new undertaking to which the service is contracted out or the contract is awarded is similar does not justify the conclusion that a transfer of such an entity has occurred.

Costs

- 35 The costs incurred by the German, Spanish, French and United Kingdom Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national courts, the decision on costs is a matter for those courts.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Tribunal Superior de Justicia de Castilla-La Mancha and by the Arbeitsgericht Lörrach by orders of 25 April 1996 and 28 November 1995, hereby rules:

Article 1(1) 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 is to be interpreted as meaning that the directive applies to a situation in which a public body which had contracted out its home-help service for persons in need or awarded a contract for maintaining surveillance of some of its premises to a first undertaking decides, upon expiry of or after termina-

tion of the contract which it had with that first undertaking, to contract out that service or award that contract to a second undertaking, provided that the operation is accompanied by the transfer of an economic entity between the two undertakings. The term 'economic entity' refers to an organised grouping of persons and assets enabling an economic activity which pursues a specific objective to be exercised. The mere fact that the service successively provided by the old and the new undertaking to which the service is contracted out or the contract is awarded is similar does not justify the conclusion that a transfer of such an entity has occurred.

Puissochet

Jann

Moitinho de Almeida

Gulmann

Edward

Delivered in open court in Luxembourg on 10 December 1998.

R. Grass

J.-P. Puissochet

Registrar

President of the Fifth Chamber