OPINION OF ADVOCATE GENERAL LENZ
delivered on 11 June 1996 *

A — Introduction

1. This case is the first request for a preliminary ruling from the new German *Länder*. It has been made by the Arbeitsgericht (Labour Court) Halberstadt pursuant to Article 177 of the EC Treaty and refers questions to the Court 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. [1]

2. In the main proceedings, Mrs Henke has brought an action against the municipality of Schierke [2] and the 'Brocken' Verwaltungsgemeinschaft. The applicant had been the secretary to the Mayor of the Municipality of Schierke since May 1992. As counsel for the applicant explained at the hearing, she was employed as a secretary and senior official dealing with industrial development and tourism. As her counsel further stated, she was not the sole employee of the municipal administration, as may be inferred from the fact — mentioned in the documents — that there was a staff council at the municipality of Schierke.

3. On 1 July 1994, the municipality of Schierke and other municipalities in the region banded together to form the 'Brocken' Verwaltungsgemeinschaft (administrative collectivity). This possibility is provided for by Paragraph 75 et seq. of the Gemeindeordnung (local government law) for the Land of Saxony-Anhalt of 5 October 1993 [3] ('the GO LSA'). An administrative collectivity formed in this way by agreement under public law has, as a corporation governed by public law, its own legal personality and is entitled to appoint officials (Dienstherrenfähigkeit). Such a collectivity is formed in order to improve the administrative work of relatively small municipalities. Its activities include exercising the functions coming under the member municipalities' sphere of activity which have been transferred to it. However, the administrative collectivity may also carry out such functions belonging to member municipalities' sphere of activity as those municipalities transfer to it. Whether

* Original language: German.

1 — OJ 1977 L 61, p. 26.

2 — This local authority is the one mentioned by Goethe in Faust. Mephistopheles takes Faust to Walpurgis Night in the Harz mountains 'near Schierke and Elend'. See: Goethe, Faust, Part One, before line 3835. The municipality of Elend is also a member of the Verwaltungsgemeinschaft 'Brocken'.

3 — GVBl. LSA No 43/1993, p. 568 et seq.

such tasks are transferred to it and, if so, to what extent lies in the discretion of the municipalities.

4. In this case, all the tasks of the municipality of Schierke were transferred to the administrative collectivity. The municipal administration of Schierke was dissolved and its complete records passed to the administrative collectivity; in Schierke the mayor with executive functions was replaced by an honorary mayor.

5. The applicant was offered a post with the 'Brocken' administrative collectivity, which she turned down on the ground that she could only take on a post in Schierke itself, because she had to look after her child. She applied for a post at the local office of the administrative collectivity in Schierke, but was unsuccessful. According to information given by counsel for Mrs Henke at the hearing, work on industrial development and tourism — the tourist work chiefly for the municipality of Schierke itself — continue to be dealt with at Schierke.

6. On 5 July 1994, the municipality of Schierke terminated Mrs Henke's contract of employment. Thereupon, Mrs Henke brought proceedings in the Arbeitsgericht. She claimed that, upon the formation of the administrative collectivity, her contract of employment was transferred to it, which meant that the municipality of Schierke could not terminate her contract of employment.

7. The Arbeitsgericht Halberstadt then referred the following questions to the Court for a preliminary ruling:

1. Is there a transfer of an undertaking, business or part of a business within the meaning of Article 1(1) of Council Directive 77/187/EEC of 14 February 1977 if as a result of the formation of an administrative collectivity (Verwaltungsgemeinschaft) in accordance with Paragraph 75(1) of the Gemeindeordnung für das Land Sachsen-Anhalt (local government law for the Land of Saxony-Anhalt, 'the GO LSA') of 5 October 1993 (GVBl. LSA p. 568 et seq.) that administrative collectivity exercises the functions of the transferred sphere of activity of the member municipalities under Paragraph 77(1) of the GO LSA and carries out the functions of the member municipalities' own sphere of activity transferred in accordance with Paragraph 77(2) of the GO LSA?

2. If Question 1 is answered in the affirmative:

   Is the transfer based on a legal transfer within the meaning of Article 1(1) of Directive 77/187/EEC because the administrative collectivity has been formed by a public-law agreement?

B — Opinion

8. By its request for an interpretation of Article 1(1) of the directive, the national court raises the question as to the general scope of the directive.

Article 1(1) reads as follows:

'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.'

9. Consequently, there are three requirements in order for the directive to apply:

— There must be an undertaking within the meaning of the directive.

— The undertaking must have been transferred.

— There must have been a legal transfer or a merger.

10. The first two requirements have to be considered in the context of the national court's first question, whilst the second question is concerned with the third requirement.

The concept of an undertaking

11. I would first consider the concept of an undertaking within the meaning of Directive 77/187, since this case raises, among other things, the question of the general scope of the directive. It will have to be decided whether the directive may be applied to the sphere of the Member States' public law, specifically in this case to a municipal administration. In other words, the question is whether a municipality is capable of constituting an undertaking within the meaning of the directive.

12. There is no definition of the term 'undertaking' either in the directive itself or elsewhere in codified Community law, apart from Article 196 of the EAEC Treaty, which is not in point. However, there is an extensive body of case-law of the Court of Justice relating to the concept of an undertaking.

Here, a distinction must first be made between different concepts of the term. Some judgments deal with the concept in the context of freedom to provide services under Article 59 of the EC Treaty, others in the context of the competition provisions of Article 85 et seq. of the EC Treaty.

13. As far as the concept of an undertaking in Directive 77/187 is concerned, reference should first be made to the *Redmond Stichting* case. [4] In that case, the Court implicitly held that an intention of make profits was not necessary in order for an establishment to be regarded as an undertaking within the meaning of Directive 77/187. What was involved in that case was a foundation engaged in particular in providing assistance for drug addicts. Even though there was no intention to make a profit, the Court held that the foundation was an undertaking. That decision was confirmed in 1994, when, in Case C-382/92 *Commission* v *United Kingdom* [5] concerning the concept of an undertaking in the directive, the Court referred expressly to the judgment in *Redmond Stichting*.

14. In those two cases, however, the Court did not deal with the sphere of public administration and accordingly they do not contain any indication as to whether or not the directive applies in that sphere. Apart from indicating that there is no need for there to be an intention to make profits, those two judgments do not set forth any criteria for testing whether a body is an undertaking.

15. At the hearing, however, the United Kingdom argued that the case-law on Article 85 with regard to the concept of an undertaking could be transposed to Directive 77/187. In so doing, it relied on the judgment in *Commission* v *United Kingdom*. [6] In that case, the Court held with regard to whether operation with a view to profit was necessary that it had already accepted, at least implicitly, in the context of competition law or social law that that was unnecessary. The United Kingdom infers from this that the findings made in the case-law on the concept of an undertaking in Article 85 are also applicable to the concept of an undertaking in Directive 77/187.

16. It appears questionable to me whether such far-reaching consequences can be inferred simply from those words. Moreover, this would not take us much further in the instant case, since it has not been decided in the context of Article 85 whether part of the public administration, for instance, a municipality, is an undertaking with the meaning of Article 85. Admittedly, the *General Motors*

4 — Case C-29/91 *Dr Sophie Redmond Stichting* v *Bartol and Others* [1992] ECR I-3189.

5 — Case C-382/92 *Commission* v *United Kingdom* [1994] ECR I-2435, paragraph 44.

6 — Case C-382/92, cited in footnote 5.

case [7] was concerned with a private undertaking carrying out public-law duties. In that specific case, Article 86 was held to be applicable and hence the status of an undertaking was not ruled out. It should be noted that the question was not whether an organizational entity which normally carries out public-law functions is to be regarded as an undertaking, but precisely the converse. On this ground alone it seems to me to be of little assistance to fall back on the case-law on Article 85, *a fortiori* since the Court itself, as the Commission has rightly pointed out, has laid down the general rule that the definition of 'undertaking' should be given the meaning which is most appropriate having regard to the aim of the relevant Community rules and their practical effectiveness. [8] This means as far as the instant case is concerned that it has to be decided in the light of the directive itself whether it should or should not apply to a municipal administration.

17. The Federal German Government rejects such application of the directive outright. In its view, the directive does not cover acts of public authorities in the exercise of their powers, as were carried out in this case by the mayor with executive functions of the municipality of Schierke. It points out in this connection that the mayor was responsible for the grant of planning permission, financial and property management and dealing with legal disputes involving the municipality. Those functions form part of local government, and hence in any case the mayor acts (inter alia) in the exercise of powers of a public authority. According to the Court's case-law, however, the transfer of an undertaking must involve the transfer of an *economic* entity. This means that there must be a connection with the exercise of an economic activity.

18. As a further argument, the German Government points out that the directive is based on Article 100 of the EC Treaty. That provision is the legal basis for directives for the approximation of such laws, regulations or administrative provisions of the Member States 'as directly affect the establishment or functioning of the common market'. In contrast, in carrying out their functions in the exercise of public authority, municipalities do not take part in the common market. Furthermore, Article 3 of the EC Treaty does not mention the activity of municipalities as public authorities as being among the activities of the Community.

19. The German Government further argues that the activities of municipalities are governed exclusively by national laws and accordingly cannot form part of the Community's economic system and may also not be regulated by the Council.

7 — Case 26/75 *General Motors Continental* v *Commission* [1975] ECR 1367.

8 — Case C-7/90 *Vandevenne* [1991] ECR I-4371, paragraph 6.

20. In the German Government's view, the wording of the directive also suggests that it should not apply in this case. The directive refers to 'undertaking', 'business', 'parts of a business' and 'change of employer' (the wording is 'Inhaberwechsel', change of proprietor, in the German version: translator). Consequently, expressions are used which are not applicable to the instant case.

21. In addition, the German Government considers that it was unnecessary to provide for an exception in the directive for the sphere of employees of the public administration, since it was concerned from the outset only with the transfer of economic entities and the directive should therefore not apply to the sphere of public administration from the point of view of its legislative aim.

22. It seems to me to be incorrect generally to decline to hold that the directive applies to the instant case, in accordance with the German Government's view. It is not contested — even by the German Government — that a municipality can certainly carry out economic activities. Counsel for the applicant gave some examples at the hearing of functions of a municipality which are of a business character. These are the sale, renting or leasing of municipally-owned land, houses or flats, the letting of the municipal chamber to private organizers of festivities, activities to promote tourism as a type of advertising management and many services provided for consideration, such as day nurseries, cultural offerings, the operation of car parks and local public transport. The traditional areas of waste disposal and water management should also be mentioned in this connection. This means that, even if exercise of an economic activity were to be regarded as a precondition for the application of the directive, a municipality could definitely be treated as being an undertaking within the meaning of the directive. It is therefore questionable whether the municipality and its employees should be excluded from the scope of application of the directive simply because the municipality also acts in the exercise of powers of a public authority. This is all the more questionable — as counsel for the applicant argued at the hearing — given that under the Gemeindeordnung and the Constitution of the *Land* of Saxony-Anhalt municipalities do not exercise functions in the exercise of powers of a public authority in the stricter sense (police, execution of sentences, military).

23. Application of the directive to the sphere of activity of municipalities also cannot be rejected — as the Federal Government claims it can — on the ground that the Council has no competence to regulate this area. The starting point of the directive is not that it is a Council directive for the public sector, but a directive for the protection of employees which may extend to cover the area of the public administration. It will have to be considered later — if indeed this proves necessary — whether extending the directive in this way is covered by the legal basis of the directive, namely Article 100 of the EC Treaty.

24. Cogent arguments can also be found against the German Government's argument relating to the exemption of this sphere. The Commission considers, for instance, that the directive does apply to the sphere of the public administration precisely because that sphere was not expressly exempted. As an example, it refers to the directive on collective redundancies, [9] which expressly provides that it is not to apply to the sphere of the public administration. Directive 77/187 itself provides for only one exemption in Article 1(3), which refers to sea-going vessels. For that reason, the Commission is of the view that the directive is applicable in principle to the sphere of the public administration.

25. Nevertheless the Commission, too, distinguishes certain areas, depending on whether or not activity in the exercise of powers as a public authority within the meaning of the Court's case-law is involved. In the Commission's view, only functions which relate purely to the exercise of public powers, for example, those of the mayor, the police or prison staff, do not fall within Directive 77/187. In contrast, areas of the administration are subject to the directive where it carries out economic activities in the classic sense, for instance, municipal undertakings, such as waste disposal, waterworks and transport undertakings; but areas involving functions in the exercise of public powers are covered as well, namely where the activities are carried out by persons who, under the provisions of national employment law, are protected as employees (in the Commission's view, a mayor's secretary with the status of an employee (Angestellte), for example, falls into this category) or where the activities are performed by persons who, according to the Court's case-law, do not carry out duties involving the exercise of public powers and whose activities could in principle be carried out by a private undertaking on a profit-making basis. The Commission cites as an example the activities of the secretary of the mayor who has the status of an official (Beamte), whose work could also be performed by an outside office-services undertaking.

26. The Commission considers that the directive will apply even where an activity involving the exercise of public authority is unquestionably involved if the area is organized on a private-law basis. The Commission's example is the privatization of State prisons.

27. The United Kingdom expressed a similar view at the hearing. In so doing, it did not strictly distinguish between the concept of an undertaking and the concept of the transfer of an undertaking, but it can be inferred from its submissions that a department which carries out essentially or only government activities, that is to say, activities

9 — Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1975 L 48, p. 29), most recently amended by Council Directive 92/56/EEC of 24 June 1992 (OJ 1992 L 245, p. 3).

which, by their nature, are not economic activities, should not fall within the scope of the directive. Also its reference to the *Eurocontrol* case [10] shows, in its view, that a distinction should be made between activities involving the exercise of public powers and activities not involving the exercise of such powers. In that judgment, activities relating to the control and supervision of air space were regarded as typically powers of a public authority which are not of an economic nature.

28. It should be pointed out in this connection that that judgment was concerned with the concept of an undertaking within the meaning of Article 85. Whether that concept may be transposed to cover the directive is questionable, as I have already explained. Nevertheless, it should still be noted that in the United Kingdom's view the application of the directive should turn on whether an economic activity is exercised or an activity which is typically that of a public administration.

29. It seems to me that the criterion of activity in the exercise of public powers or of activity typically of the public administration is not the proper starting point for determining the concept of an undertaking within the meaning of Directive 77/187. To my mind, this is clear simply on grounds of practical considerations. Apart from the classic area of municipal undertakings and the sphere of functions involving only the exercise of public powers, it seems to me that in particular it will be difficult and not always possible to draw the distinction in a particular case. Even in the area of activities involving the exercise of public powers, there has been a huge change in recent years. Activities which a few years ago were still regarded as purely for the public authorities are now being carried out by private undertakings. I would refer for example to the Deutsche Bundespost, which has since been privatized (Telekom, Post-Bank, Post-AG), although it was still assumed until a few years ago that the Bundespost exercised purely activities of a public authority. The Commission itself cites a further example, the privatization of prisons. This means that the criterion of activity in the exercise of public powers is very difficult to pin down, since it is subject to constant change. What is today regarded as purely public may, in even only a few years, be carried out by a private undertaking with a view to profit. It also cannot be ruled out that functions carried out by a private undertaking will not be regarded after a time as being again functions of the public authorities. It is therefore scarcely possible to justify the employees carrying out these activities being covered at one time by the protection of the directive and then, following a change of view as to the public character of their activities, no longer enjoying that protection. In addition, it is questionable how an employee carrying out both activities in the

10 — Case C-364/92 *SAT Fluggesellschaft* v *Eurocontrol* [1994] ECR I-43.

exercise of public powers and economic activities would have to be classified.

30. On that ground, a different approach seems to me to be more appropriate. In my view, it is more meaningful to check in the light of the purpose of the directive whether a municipality is or is not capable of being an undertaking within the meaning of the directive. As the Court has already held, [11] the preamble to Directive 77/187 indicates that its purpose is to ensure that the restructuring of undertakings within the common market does not adversely affect the workers in the undertakings concerned. This means that employee protection is the central concern. That the directive has significance in social law can be seen from the fact that — as the Commission has also pointed out — it was announced in the Council resolution concerning a social action programme. [12]

31. Admittedly, it is stated in the fourth recital in the preamble to the directive that differences between Member States as regards the protection of employees have a direct effect on the functioning of the common market. However, it does not follow from this that the purpose of the directive is only to secure the functioning of the common market. Instead, the chief aim is to protect employees in the event of transfers of undertakings.

11 — Case 135/83 *Abels* [1985] ECR 469, paragraph 18.

12 — OJ 1974 C 13, p. 1.

The fifth recital in the preamble to the directive refers to Article 117 of the Treaty. That provision reads as follows:

'Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained.'

Article 117 has a dual — economic and social — purpose. The social purpose is to improve living and employment conditions. It also aims — and this is its economic purpose — to prevent the differing stage of development of employment and social legislation in the Member States from resulting in competitive disadvantages for undertakings in Member States with a high standard of protection or even less in major disturbances to the functioning of the common market. It is clear from this too that the protective purpose of the directive is to safeguard employees in the event of transfers of undertakings. Against this background, it seems sensible to rely, as regards the applicability of the directive, on the circle of persons whom it is intended to protect, namely employees. The Commission, too, has referred to such an approach in its observations.

32. If it is assumed that the aim and purpose of the directive is to protect employees in the event of transfers of undertakings, that protection must benefit all employees who are protected by national provisions as employees. In the final analysis, however, that means that the directive must apply whenever persons working in an undertaking or an organizational entity who are protected by national provisions as employees. Conversely, this means that the directive is applicable to organizational entities which employ workers within the meaning of national protective provisions. This ensures that all employees warranting protection under national provisions also enjoy the protection of the directive.

33. If regard is had to the protective purpose of the directive, it cannot be seen why employees of the public administration — as the German Government has submitted — should be excluded from the protective ambit of the directive merely because their authority acts *also* in the exercise of public authority. To my mind, this would clearly be at odds with the protective purpose of the directive. Consequently, no distinction should be made between activities which are or are not in the exercise of public authority in so far as the concept of an 'undertaking' is concerned, but reliance should be placed solely on the concept of 'employees'. Moreover, a distinction should not be made between employees in the public service and employees in the sphere of private law. This would produce results which would conflict with the protective purpose of the directive, especially since such a distinction does not exist in all the Member States (in the United Kingdom, for instance, no distinction is made depending on whether an employee works in the public service or in the private sector).

It is also worth mentioning in this context that in the Federal Republic of Germany collective agreements governed by private law may even be applied to the employment relationships of employees in the sphere of the public service.

34. This means that it will be possible to have a uniform application of the directive within the Community in accordance with its protective purpose only if the basis taken is the concept of the employee. The difficulties I adverted to above as regards distinguishing activities involving the exercise of public authority from those not involving its exercise (section 29) would then not even arise.

35. This view was also put forward by Advocate General Van Gerven in his Opinion in the *Redmond Stichting* case. [13] He came to the conclusion that the concept of an undertaking within the meaning of the directive had to be interpreted widely and that, in order to answer the question whether a particular natural or legal person was an undertaking within the meaning of a directive which, like that at issue in these proceedings, pursued a clearly social aim, decisive importance should be attached to

13 — Opinion in Case C-29/91 [1992] ECR I-3189, at I-3196.

whether one or more persons had the status of an employee vis-à-vis that natural or legal person under a contract of employment or an employment relationship within the meaning of Article 3(1) of the directive. He further stated that, unlike the interpretation of the term 'worker' contained in Article 48 of the EEC Treaty, the term 'employee' in this case covered any person who, in the Member State concerned, was protected as an employee under national employment law.

36. Moreover, the Court made the latter finding as long ago as 1985, [14] confirming it in 1986. [15] The judgment in *Danmols Inventar* was concerned with the meaning of the term employee in Directive 77/187. The Court referred in this connection to the preamble, according to which the directive was intended to ensure that employees' rights were safeguarded in the event of a change of employer. According to the Court, it followed that the directive was intended to achieve only partial harmonization essentially by extending the protection guaranteed to workers independently by the laws of the individual Member States to cover the case where an undertaking was transferred. Its aim was therefore to ensure, as far as possible, that the contract of employment or the employment relationship continued unchanged with the transferee so that the employees affected by the transfer of the undertaking were not placed in a less favourable position solely as a result of the transfer. It was not however intended to establish a uniform level of protection throughout the Community. The Court concluded from this that the directive might be relied upon only by persons who were, in one way or another, protected as employees under the law of the Member State concerned.

37. Alongside the determination of the meaning of the term employee in the directive, it appears from the judgment in *Danmols Inventar* that the protective purpose of the directive is to safeguard employees in the event of a transfer of their undertaking and to ensure, as far as possible, that the contract of employment continues unchanged. As I have already mentioned, this will be possible only if the question of the applicability of the directive is based solely on the concept of an employee.

38. To determine the concept of an undertaking on the basis of the workers employed there is not precluded by the fact that the directive is based on Article 100 of the EC Treaty. This refers, as I have already mentioned, to the functioning of the common market. However, the employment market in the Community and/or the situation of workers is a partial aspect of the common market. There is a close connection between the common market and the situation of employees. Economic developments and restructuring are liable to entail disadvantages for workers (the intention and purpose of Directive 77/187 is precisely to prevent this), irrespective as to whether they are employed in the private sector or in the public administration. Those disadvantages are liable to affect the employment markets of the Member States concerned or part of them. As a result of the free movement of

14 — Case 105/84 *Danmols Inventar* [1985] ECR 2639, paragraph 28.

15 — Case 237/84 *Commission* v *Belgium* [1986] ECR 1247, paragraph 13.

workers, the employment markets of the Member States are connected with each other, with the result that the situation of workers in the Member States and the differing arrangements may have cross-frontier effects. [16] It can be seen from this that a municipality which employs workers subject to national standards of protection may also influence the functioning of the common employment market and hence that of the common market.

39. On the other hand, differing standards of employee protection in the individual Member States may lead to distortions of competition. At the hearing, the representative of the United Kingdom denied that this was completely true. He referred in this connection to the judgment in Case C-382/92 *Commission* v *United Kingdom*, [17] in which the Court held that a further aim of the directive was to harmonize the costs which the protective rules entail for Community undertakings. The United Kingdom concludes from this that a municipal administration does not come under the directive if it carries out typical activities of an administration and therefore does not compete with other undertakings.

40. Such a distinction based on the character of the activity of the administration is not compatible with the main aim of the directive, employee protection, as has already been discussed at length in section 33.

41. Accordingly, the directive is applicable whenever employees within the meaning of the national protective provisions are employed in an undertaking or an organizational entity. It is irrelevant whether the undertaking is engaged in the sphere of public administration or in the private sector. This means that the directive may also be applied to a municipality where workers are employed there within the meaning of the national protective provisions. It is for the national court to verify this.

42. In the event that the Court should not follow this view and also regard an economic activity on the part of the undertaking as a precondition in order for the directive to apply, I would observe as follows with regard to that further precondition. Even if the view taken by the United Kingdom and the German Government is followed and an economic activity is regarded as being a basic precondition for the applicability of the directive, the outcome in this case remains the same, since the municipality is carrying out economic activities in accordance with this precondition. As I have already mentioned, at the hearing, counsel for the applicant in the main proceedings gave very many examples of economic activities carried out

16 — Fourth recital in the preamble to Directive 77/187.
17 — Cited in footnote 5.

by the municipality. Neither the German Government nor the United Kingdom contests that the municipality carries out those activities. Accordingly, the municipality takes part in economic activities. The concept of economic activities in the Community is mentioned in Article 2 of the EC Treaty, which defines the aims of the Community. That provision lays down that one of the tasks of the Community is to promote, by establishing a common market, a harmonious and balanced development of economic activities throughout the Community. As the Court has consistently held, the term 'economic activity' is to be broadly construed in this context. Thus, it was held as long ago as the judgment in *Donà* [18] that 'gainful employment or remunerated service' constitutes an economic activity within the meaning of Article 2 of the EEC Treaty. In order for an activity to be regarded as an economic activity, it is accordingly sufficient for it to be carried out for remuneration. It appears from the judgment in *Lawrie-Blum* that neither the sector in which the activity is carried out nor the relevant legal regime to which the activity is subject is determinative. Instead, the Court considers that, in order for Article 48 of the EC Treaty — the provision with which *Lawrie-Blum* was concerned — to apply, it is necessary only for the activity in question to be in the nature of *remunerated* work. This is true irrespective of the sphere in which the work is carried out. [19] In another judgment on Article 48, the Court held that the nature of the legal relationship between the employee and the employer, that is to say, whether it is a question of a particular status under public law or a private-law agreement, is also not determinative. [20]

43. Admittedly, those judgments do not refer to Directive 77/187, but Advocate General Van Gerven took as his basis in his Opinion in Case C-382/92 *Commission* v *United Kingdom* [21] whether an activity is carried out for remuneration. In order to determine the meaning of the term 'undertaking', he too proceeded from the assumption that, by virtue of the fundamental provision of Article 2, the EC Treaty covers economic activities throughout the Community and that that term has to be given a very broad meaning. In order for an activity to be classed as an economic activity, it is sufficient for it to be carried out for remuneration. The sphere in which the activity is carried out is not of decisive importance. Since the municipality carries out activities for remuneration, which is uncontested, there can be no doubt that it participates in economic life. It therefore carries out economic activities and participates in the common market.

44. This finding is probably not even altered in the light of the judgment in *Levin*. [22] In that case, the Court held as regards Article 48 that economic activities on an excessively small scale cannot be regarded as constituting part of economic life. Determining the scale of the economic activity falls to the national court. I would mention at this point, however, that, according to the uncontested submissions of counsel for the applicant at the hearing, it certainly cannot be assumed that the economic activity of the municipality of Schierke is on too small a scale.

18 — Case 13/76 *Donà* v *Mantero* [1976] ECR 1333, paragraphs 12 and 13.

19 — Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121, paragraph 20.

20 — Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, paragraph 6.

21 — Opinion in Case C-382/92 *Commission* v *United Kingdom* [1994] ECR I-2435, at 2438, sections 22 to 27.

22 — Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035, paragraph 17.

45. In addition, I would stress the point that I made earlier that the municipality participates in the common employment market and hence in the common market through its employment of workers.

46. Accordingly, for that reason too it cannot be held that the municipality is not carrying out an economic activity on the ground that it *also* acts in the exercise of public powers. It would conflict with the protective purpose of the directive were employees to be excluded from the protection afforded by the directive simply on the ground that the municipality carries out activities in the exercise of public powers in addition to economic activities.

47. The Commission's approach, according to which the individual areas of the municipal administration should be regarded separately, also fails on account of the protective purpose of the directive. In this connection, the Commission discusses the issues connected with functional succession, which the Court has already had to consider on several occasions and, according to the Commission, will have to deal with further in the future. [23] However, that theory is irrelevant for the purpose of determining this case, since it is absolutely clear that it was not individual functions which were intended to be transferred from the undertaking, but the complete entity. To apply the theory posited by the Commission in the present case, in which the whole entity is to be transferred, would raise many problems. Why should an employee of the municipal administration, who is treated under national law in the same way as his or her other colleagues, be excluded from the protection of the directive on the sole ground that he or she, unlike them, carries out an activity in the exercise of public authority? It is questionable what approach would have to be taken if the employee's activity altered and he or she then carried out an economic activity.

To effect a breakdown into individual areas of activity is also incapable of practical implementation on another ground: how should the employees of a small municipality who carry out several duties — and hence economic functions and functions in the exercise of official authority — at the same time be classed? Only if no account is taken of the protective purpose of the directive, the only reason for excluding an employee from the scope of application of the directive would be that he was engaged in economic activity only on a negligible scale (cf. the discussion of the judgment in *Levin* in section 44). This would again be a matter for the national court to determine.

Accordingly, even on the basis of this alternative approach, the directive would be applicable to the municipality.

23 — In fact, several proceedings concerned with this issue are pending.

48. Moreover, this also accords with the Commission's proposal for a replacement directive, [24] which expressly provides that it should apply to public undertakings. As the Commission states in the sixth recital in the preamble, it is necessary to clarify the existing rules. According thereto, considerations of legal certainty and transparency require that 'it be expressly provided, in the light of the case-law of the Court of Justice, that the Directive should apply to private and public undertakings carrying out economic activities, whether or not they operate for gain'. The provisions of the proposal for a directive continue to employ no more precise a definition of the term 'undertaking'. Consequently, it will be necessary to adhere to the characteristics laid down or to be laid down by the Court. The following remains to be said about the expression 'economic activities' which the Commission uses in its proposal: if that expression is considered in conjunction with the Commission's submissions, it appears that the term 'undertaking' should not be more narrowly construed than it has been to date and that, in the Commission's view, even activities carried out in the exercise of official authority may be covered by the expression 'economic activities'. In the Commission's view, the directive is also applicable where a secretary with the status of an official carries out an activity which a private undertaking could also perform. It can be inferred from this that, in such case, the secretary would then be carrying out economic activities within the meaning of the directive. Conversely, this signifies as regards the interpretation of the expression 'economic activities' that the Commission uses it to designate such activities — even where activities carried out in the exercise of public authority are involved — as could also be carried out by a private undertaking. The activities carried out for gain by the municipality which are in question in this case therefore unquestionably fall within the expression 'economic activities'. This means that the directive would be applicable to the instant case even after the adoption of the Commission's proposal, also and above all because the protective purpose of the directive will remain unchanged.

49. I would simply add that the view taken by the Bundesarbeitsgericht (Federal Labour Court) accords with the one formulated here. It has held that Paragraph 613a of the Bürgerliches Gesetzbuch (Civil Code) applies to public establishments, schools, military personnel and the like. Paragraph 613a is the provision which transposes the directive into German law. [25]

50. To sum up, I would stress once again that, in my view, an undertaking within the meaning of the directive will be involved whenever an organizational entity employs workers who are protected under the protective provisions of national employment law.

24 — Commission proposal for a Council Directive 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 1994 C 274, p. 10).

25 — Judgment of the Bundesarbeitsgericht of 16 March 1994, AZ: 8 AZR 639/92, published in *Neue Zeitschrift für Arbeitsrecht* 1995, pp. 125, 126 and 127; judgment of the Bundesarbeitsgericht of 21 July 1994, AZ: 8 AZR 227/93, published in *Entscheidungen zum Wirtschaftsrecht* 1995, p. 119; judgment of the Bundesarbeitsgericht of 7 September 1995, AZ: 8 AZR 928/93, published in *Arbeit und Recht* 1996, p. 29.

Transfer of the undertaking

51. Now that it has been established that in the instant case the municipality of Schierke definitely has to be classed as an undertaking within the meaning of the directive, the question arises as to whether a 'transfer of an undertaking, business or a part of a business' within the meaning of the directive took place.

52. The applicant in the main proceedings submits that duties and the material pertaining thereto, such as records, diskettes and sundry administrative equipment, were transferred to the 'Brocken' administrative collectivity and that there was therefore a transfer of an undertaking within the meaning of the directive.

53. The Commission refers in its observations first to the judgment of the Court in the case of *Spijkers*.[26] It maintains that, according to that case, there is a transfer whenever an economic entity, within which the relevant employment relationships exist, retains its identity and only the proprietor of the economic entity has changed.

54. The existence of an economic entity with its own identity in the case of the municipality of Schierke is confirmed as regards the sphere of activity in which the applicant was engaged by the fact that industrial development and tourism and the related administrative work were amalgamated in organizational terms and operating funds to carry out these tasks were made available. As regards retention of identity when the transfer was carried out, the Commission considers that the question should not turn on whether the work carried out by the applicant in her sphere of responsibility is in the meantime dealt with and carried out by the administrative collectivity jointly for the other member municipalities as well, but on the fact that everything which was previously carried out by the municipality of Schierke itself is now done in a similar or the same form by the administrative collectivity in the interests and on behalf of the municipality of Schierke.

55. The United Kingdom also referred in this connection to the judgment in *Spijkers* v *Benedik* and enumerated the aforementioned requirements in order for there to have been a transfer of an undertaking. However, in considering the case at issue, it comes to a different conclusion than the Commission.

A 'government corporation' may come within the scope of the directive only in the case of the transfer of a stable economic entity. The transfer must enable at least certain activities of the transferor to continue. An economic entity comprises business

26 — Case 24/85 *Spijkers* v *Benedik* [1986] ECR 1119, paragraph 11 et seq.

premises and/or assets and/or employees, who continue to carry out economic activities. A local 'government authority' no longer falls within the scope of the directive if it is exclusively or chiefly engaged in activities typical of the public administration.

56. The Court has already considered the question of the interpretation of the expression '*transfer* of undertakings' on several occasions. In the judgments in *Spijkers* v *Benedik*, *Ny Mølle Kro* and *Redmond Stichting*, the Court held that the decisive criterion for ascertaining whether a transfer within the meaning of the directive had taken place was whether the undertaking transferred had retained its identity. [27]

According to those judgments it should be considered whether the economic entity was disposed of as a going concern, as is indicated, inter alia, by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities. [28]

57. In assessing this, the principal focus of attention should be on whether the business operations are continued. The 'going economic entity' referred to in this test designates the 'thing' which is transferred, which, according to the wording of the directive, is an undertaking, a business or a part of a business and has to be determined in the light of the protective purpose of the directive, as described above. [29]

58. In order to determine whether the entity retains its identity, it is necessary to consider all the facts characterizing the transaction in question. These include the type of undertaking and what is done with its tangible assets, such as buildings and movable property. In addition, regard should be had to the value of its intangible assets, whether or not the majority of its employees is taken over by the new employer, [30] whether or not its customers are transferred and the degree of similarity between the activities carried on before the transfer and after the transfer by the new employer. In any event, the Court has held that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation. [31]

59. If these criteria are applied to the facts of the instant case, there is much evidence, according to the uncontested statements of the parties, to suggest that those requirements are met. For instance, the records, diskettes and other documents of the

27 — *Spijkers* v *Benedik*, cited in footnote 26, Case 287/86 *Ny Mølle Kro* [1987] ECR 5465, paragraph 18 et seq, and *Redmond Stichting*, cited in footnote 4, paragraph 23.

28 — *Spijkers* v *Benedik*, cited in footnote 26, paragraph 12, *Ny Mølle Kro*, cited in footnote 27, paragraph 18, and *Redmond Stichting*, cited in footnote 4, paragraph 23.

29 — See sections 32, 33 and 34.

30 — Joined Cases C-171/94 and C-172/94 *Merckx* [1996] ECR I 1253, paragraph 26.

31 — *Redmond Stichting*, cited in footnote 4, paragraph 24, which refers to *Spijkers* v *Benedik*, cited in footnote 26, paragraph 13.

municipality of Schierke were transferred to the administrative collectivity. In addition, at least some of its employees were taken over and the degree of similarity between the activities of the two corporations is very high, which is also evidenced by the fact that *all* the functions of the municipality of Schierke are being continued. The inhabitants of the municipality of Schierke, which in this context are to be regarded as its 'customers', are now looked after by the administrative collectivity.

It can also be gleaned from the submissions that to some extent the former premises are still being used, for example as local offices.

These are all facts which, taken as a whole, enable it to be concluded that the new 'proprietors', the 'Brocken' administrative collectivity, are actually continuing with at least similar activities, as a result of which there is much to suggest that the criteria laid down by the Court in *Spijkers* v *Benedik* might be fulfilled.

In particular, the fact that the newly formed administrative collectivity carries out its tasks for several municipalities and to some extent has moved functions out to local offices does not mean that a transfer cannot be held to have taken place.

It is typical of a transfer of an undertaking and generally also its purpose for restructuring and reorganization of the old undertaking to take place. The directive does not intend to prevent this; the only intention is to protect employees against disadvantages flowing from the transfer as such.

Dismissals for economic, technical or organizational reasons entailing changes in the workforce may still take place. [32]

60. At any event, it remains in principle for the national court to establish all the facts which might suggest that the entity maintained its identity after the transfer, which means that the new proprietor is continuing operations in at least a similar manner.

32 — Second sentence of Article 4(1) of Directive 77/187.

In this respect, it falls to the Court of Justice only to point to the aforementioned criteria required by Community law so that the national court can arrive at a decision which is in conformity with the directive in the particular case.

Legal transfer

62. In the view of the applicant in the main proceedings, the transfer is based on a legal transfer within the meaning of the directive. Although the law of the *Land* of Saxony-Anhalt authorized restructuring by means of the formation of an administrative collectivity, this was effectuated by means of a public-law agreement. What was involved, therefore, was not merely execution of a binding statutory instruction; in contrast, it was made possible for the municipalities to shape and determine the manner and extent of the reorganization in their own discretion. The participating municipalities were partners with equal rights in a contract governed by public law.

61. In view of the foregoing, I consider that the reply to be given to the national court's first question is that a transfer of an undertaking, a business or a part of a business within the meaning of Article 1(1) of Directive 77/187 is involved where — in the case of a voluntary amalgamation of two or more independent municipalities into an administrative collectivity — the municipalities employ persons who are protected as employees under domestic legislation and the operations of the existing municipalities are actually continued.

In this connection, all the facts characterizing the transaction in question (the formation of an administrative collectivity) must be taken into consideration, namely the type and extent of the powers transferred, the activities carried out, the area of territorial responsibility, the right to have disposal over records and other administrative materials and whether the workforce is taken over. It is for the national court to make these findings of fact.

63. The Commission refers in the first place to the Court's judgments in *Abels* and *Redmond Stichting*. [33] It further argues that, if a public administration may also be an undertaking within the meaning of the directive, it cannot be seen why the expression 'legal transfer' in Article 1(1) of the directive should only cover a transfer under private law. No such limitation may be inferred from the directive itself; moreover, it would not be compatible with the protective purpose of the directive.

33 — Cited in footnotes 11 and 4.

What is more, the public-law contract is a condition precedent for the subsequent statutory effect. In that prior stage, the municipalities had a certain leeway in coming to their arrangements; so, the applicability of the directive turned in the first place on the outcome of the negotiations between the municipalities.

64. The German Government argues instead that what was involved was a public-law agreement establishing an administrative collectivity, the object of which was to carry out tasks in the exercise of public authority in the sphere of operation of the municipalities. Consequently, there was no legal agreement within the meaning of the directive.

65. I am unable to follow that view. As the Court has consistently held, [34] most recently in the judgment in *Merckx*, the concept of *legal transfer* has to be given a broad interpretation on account of the differences between the language versions of the directive and the divergences between the laws of the Member States with regard to that concept. Its interpretation must be in keeping with the objective of the directive, which is to safeguard employees in the event of a transfer of their undertaking. As a result, the directive is applicable whenever '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'. [35]

If the starting point is taken of the aforementioned protective purpose of the directive, which seeks to safeguard every employee who is protected under national law against disadvantages resulting from the transfer of an undertaking, it is clear that both the employees of an undertaking governed by private law and those of an undertaking governed by public law should receive this protection. On this footing, it can make no difference whether the agreement between the old and the new 'proprietor' is to be assessed in the light of the private or the public law of the Member State concerned.

66. It makes no difference to this conclusion if, in fact, — as was raised at the hearing — under the law of Saxony-Anhalt some of the functions were transferred by operation of law as a result of the formation of the administrative collectivity. I would first stress that it cannot be the task of the Court of Justice to determine and review the relevant provisions of the statute of the *Land*. This comes within the jurisdiction of the national courts alone.

67. What can be said here, however, is that it also transpired at the hearing that the

34 — *Abels*, cited in footnote 11, paragraphs 11, 12 and 13; *Redmond Stichting*, cited in footnote 4, paragraph 10 et seq.

35 — *Merckx*, cited in footnote 30, paragraph 28.

municipalities were free to decide whether functions, activities and powers were to be transferred at all and, if they so decided, to what extent they should be transferred. As regards the functions which devolve upon the administrative collectivity by operation of law after it has been formed, it should be observed that, when the municipalities formed the collectivity they were aware of the legal consequences which their agreements would have. The formation of the administrative collectivity by contract simply created the preconditions for the transfer of functions by operation of law. Consequently, in that respect the municipalities acted knowingly and intentionally in enabling the statutory consequences to occur. In other words, in the instant case there could be assumed to be a legal transfer of functions even if the statute of the *Land* did provide for the transfer of functions by operation of law.

68. Consequently, where corporations governed by public law, in this case municipalities, transfer functions by public-law agreement and employees protected by national law are affected thereby, this will cause the directive to apply.

69. Accordingly, the reply to be given to the national court's second question is that, in so far as question 1 is answered in the affirmative, the transfer will be based on a legal agreement within the meaning of Article 1(1) of Directive 77/187/EEC where the administrative collectivity was formed by public-law agreement.

C — Conclusion

70. I therefore propose that the Court should answer the questions referred by the national court in the following terms:

(1) A transfer of an undertaking, a business or a part of a business within the meaning of Article 1(1) of Council Directive 77/187/EEC of 14 February 1977 is involved where — in the case of a voluntary amalgamation of two or more independent municipalities into an administrative collectivity — the municipalities employ persons who are protected as employees under domestic legislation and the operations of the existing municipalities are actually continued.

In this connection, all the facts characterizing the transaction in question (the formation of an administrative collectivity) must be taken into consideration, namely the type and extent of the powers transferred, the activities carried out, the area of territorial responsibility, the right to have disposal over records and other administrative materials and whether the workforce is taken over. It is for the national court to make these findings of fact.

(2) The transfer will be based on a legal agreement within the meaning of Article 1(1) of Directive 77/187/EEC where the administrative collectivity was formed by voluntary public-law agreements of the member municipalities, even if as a result some of the functions are transferred by operation of law.