

JUDGMENT OF THE COURT  
15 October 1996 <sup>\*</sup>

In Case C-298/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Arbeitsgericht Halberstadt (Germany) for a preliminary ruling in the proceedings pending before that court between

**Annette Henke**

and

**Gemeinde Schierke,**

**Verwaltungsgemeinschaft 'Brocken',**

on the interpretation of 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 (OJ 1977 L 61, p. 26),

<sup>\*</sup> Language of the case: German.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini, J. C. Moitinho de Almeida and J. L. Murray (Presidents of Chambers), P. J. G. Kapteyn, D. A. O. Edward, J.-P. Puissechet (Rapporteur), G. Hirsch and H. Ragnemalm, Judges,

Advocate General: C. O. Lenz,  
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mrs Henke, by Matthias Zieger, Rechtsanwalt, Berlin,
- the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat in that ministry, acting as Agents,
- the Commission of the European Communities, by Christopher Docksey, of its Legal Service, and Horstpeter Kreppel, a national civil servant seconded to its Legal Service, acting as Agents,

having regard to the report for the Hearing,

after hearing the oral observations of Mrs Henke, represented by Matthias Zieger; the German Government, represented by Bernd Kloke and Sabine Maass, Regierungsrätin z.A. in the Federal Ministry of Economic Affairs, acting as

Agents; the United Kingdom Government, represented by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and Derrick Wyatt QC, and the Commission, represented by Klaus-Dieter Borchardt, of its Legal Service, acting as Agents, at the hearing on 23 April 1996,

after hearing the Opinion of the Advocate General at the sitting on 11 June 1996,

gives the following

### Judgment

1 By order of 19 October 1994, received at the Court on 4 November 1994, the Arbeitsgericht (Labour Court) Halberstadt referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of 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 (OJ 1977 L 61, p. 26; 'the Directive').

2 The questions were raised in proceedings brought by Mrs Henke against the municipality of Schierke and the 'Brocken' Verwaltungsgemeinschaft (administrative collectivity) concerning her dismissal.

3 Under Paragraph 75 of the Gemeindeordnung für das Land Sachsen-Anhalt of 5 October 1993 (Local Government Law for the *Land* of Saxony-Anhalt, GVBl.

LSA No 43/1993, p. 568), in the version resulting from the Law amending the Law on municipal cooperation and on other rules of the law on local authorities (GVBl. LSA No 7/1994, p. 164):

‘(1) Neighbouring municipalities in a rural district may form an administrative collectivity by means of a public-law agreement in order to strengthen their administration.

...’

Paragraph 77 of the Gemeindeordnung provides as follows:

‘(1) The administrative collectivity shall perform the functions falling within the sphere of activity conferred on member municipalities by the State in so far as this is not contrary to federal law. It shall also carry out those functions falling within that sphere of activity which is dependent upon there being a particular number of inhabitants in so far as the administrative collectivity has that number of inhabitants ...

(2) With the agreement of the municipal committee, the administrative collectivity shall perform such functions falling within the specific sphere of activity of the member municipalities as are entrusted to it by all the member municipalities ...’

4 Mrs Henke was taken on as secretary to the mayor’s office of the municipality of Schierke on 1 May 1992. On 1 July 1994, the municipality of Schierke and other

municipalities formed, pursuant to Paragraph 75 et seq. of the Local Government Law for the *Land* of Saxony-Anhalt, the 'Brocken' Verwaltungsgemeinschaft, to which it transferred administrative functions. By letter dated 5 July 1994, the municipality of Schierke terminated its contract of employment with Mrs Henke.

5 It was in those circumstances that Mrs Henke brought proceedings in the Arbeitsgericht Halberstadt for a declaration that the termination of her contract was null and void and, in the alternative, that she had been dismissed contrary to the applicable legislation. Before the national court, Mrs Henke essentially argued that, by virtue of Paragraph 613a of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB'), her contract of employment had been transferred to the 'Brocken' administrative collectivity and therefore could not be terminated.

6 Since Paragraph 613a of the BGB implements the provisions of the Directive in German law, the national court raised the question of the scope of the Directive, Article 1(1) of which 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.'

7 In those circumstances, the national court suspended the proceedings and 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 falling within the sphere of activity conferred on the member municipalities by the State 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?’

### The first question

8 By its first question, the national court essentially asks whether Article 1(1) of the Directive has to be interpreted as meaning that the concept of a ‘transfer of an undertaking, business or part of a business’ applies to the transfer of administrative functions from a municipality to an administrative collectivity such as the one in question in the main proceedings.

9 Mrs Henke argues that the Directive applies in such a case because entities such as the municipality of Schierke carry out, at least to some extent, activities of an economic character. She adds that, according to the Court’s case-law, the protection afforded by the Directive is operative even if only part of the undertaking is transferred.

- 10 The Commission proposes that the answer should be that an operation resulting in a transfer of all of an undertaking's tasks and of the tangible assets appertaining thereto and in a change of employer constitutes a 'transfer' within the meaning of the Directive. It takes the view, however, that a public entity does not constitute an 'undertaking' within the meaning of the Directive, except in so far as it does not exercise powers of a public authority and it employs persons who are protected under national law by virtue of the fact that they are employees.
- 11 The United Kingdom Government considers for its part that it is possible for there to be a 'transfer' within the meaning of the Directive only if the operation relates to an entity which has retained its identity, that is to say, if the premises, assets or employees are transferred. In addition, in its view, a local public authority does not come within the scope of the Directive if it mainly or solely performs activities typical of those carried out by a public service.
- 12 The German Government proposes that the answer should be that an operation such as the one at issue in the main proceedings does not constitute a 'transfer of an undertaking' within the meaning of the Directive. In its view, municipalities are not 'undertakings' or 'businesses' within the meaning of the Directive because they do not carry out any economic activity and do not come within the field of application of the Treaty. It further argues that the creation of a grouping of municipalities does not amount to a 'transfer' within the meaning of the Directive, since the municipalities' activities were not taken over; instead, a new entity was created to replace the municipalities.
- 13 As appears from the preamble to the Directive, in particular the first recital, the Directive sets out to protect workers against the potentially unfavourable consequences for them of changes in the structure of undertakings resulting from economic trends at national and Community level, through, *inter alia*, transfers of undertakings, businesses or parts of businesses to other employers as a result of transfers or mergers.

- 14 Consequently, the reorganization of structures of the public administration or the transfer of administrative functions between public administrative authorities does not constitute a 'transfer of an undertaking' within the meaning of the Directive.
- 15 This interpretation, moreover, is borne out by the terms used in most of the language versions of the Directive in order to designate the subject of the transfer (virksomhed, Unternehmen, entreprise, impresa, επιχείρηση, onderneming, empresa, yritys, företag; and bedrift, Betrieb, business, établissement, stabilimento, εγκατάσταση, vestiging, establecimiento, centro de actividad) or the beneficiary of the transfer (indehaver, Inhaber, chef d'entreprise, imprenditore, επιχειρηματίας, ondernemer, empresário, empresario) and is not contradicted by any of the other language versions of the text.
- 16 It appears from the documents in the case-file that the purpose of a number of municipalities in the *Land* of Saxony-Anhalt, including the municipality of Schierke, grouping together was, in particular, to improve the performance of those municipalities' administrative tasks. It resulted, *inter alia*, in the reorganization of administrative structures and the transfer of administration functions of the municipality of Schierke to a public entity specially set up for that purpose: the 'Brocken' administrative collectivity (Verwaltungsgemeinschaft).
- 17 It appears that, in the circumstances to which the main proceedings relate, the transfer carried out between the municipality and the administrative collectivity related only to activities involving the exercise of public authority. Even if it is assumed that those activities had aspects of an economic nature, they could only be ancillary.



18 In those circumstances, the reply to be given to the national court's first question is that Article 1(1) of the Directive must be interpreted as meaning that the concept of a 'transfer of an undertaking, business or part of a business' does not apply to the transfer of administrative functions from a municipality to an administrative collectivity such as the one in question in the main proceedings.

### **The second question**

19 By its second question, the national court asks whether Article 1(1) of the Directive has to be interpreted as meaning that the concept of a 'legal transfer' applies to a transfer of an undertaking which, as in the case of the transfer referred to in the first question, is effectuated by a public-law agreement.

20 In view of the reply to the first question, the second question no longer has any purpose. There is therefore no need to answer it.

### **Costs**

21 The costs incurred by the German and United Kingdom Governments and the Commission of the European Communities, 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 court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Arbeitsgericht Halberstadt, by order of 19 October 1994, 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 must be interpreted as meaning that the concept of a 'transfer of an undertaking, business or part of a business' does not apply to the transfer of administrative functions from a municipality to an administrative collectivity such as the one in question in the main proceedings.

Rodríguez Iglesias

Mancini

Moitinho de Almeida

Murray

Kapteyn

Edward

Puissochet

Hirsch

Ragnemalm

Delivered in open court in Luxembourg on 15 October 1996.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President