2. Article 3 (1) of Directive No 77/187 must be interpreted as covering obligations of the transferor resulting from a contract of employment or an employment relationship and arising before the date of the transfer, subject only to the exceptions provided for in Article 3 (3).

# OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 8 November 1984

*Mr President,*
*Members of the Court,*

This reference by the Raad van Beroep (Social Security Court) at Zwolle in the Netherlands under Article 177 of the EEC Treaty raises questions of considerable importance and difficulty, on which widely differing views have been expressed both before the Court and in legal journals. Those questions concern the interpretation of Council Directive 77/187 (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) and arise in the following way.

Mr Abels, the plaintiff in the main proceedings, was employed by Machinefabriek Thole BV ('Thole') in the Netherlands from 1961. In 1981 it seems that the company was in financial difficulties. On 2 September 1981 the Arrondissementsrechtbank (District Court) at Almelo granted provisionally Thole's application for leave to suspend payment of its debts. That order was made final on 17 March 1982. On 9 June 1982, by which time a number of the employees had already been stood off, the same court declared Thole to be insolvent and appointed a liquidator. The liquidator made an agreement with Transport Toepassing en Produktie BV ('TTP') a private company with limited liability that the latter would take over Thole's business from 10 June 1982. Mr Abels and most of the other employees working for Thole at the time of the liquidation were engaged by TTP from 10 June 1982. Neither Thole nor TTP paid Mr Abels wages from 1 to 9 June 1982, or his arrears of holiday pay for the year beginning 1 July 1981, or a proportionate share of an end-of-year allowance which Mr Abels claimed was due to him. Accordingly, Mr Abels sought to recover these sums from the trade association which he alleged, under Dutch law, was liable to pay them if they were not otherwise paid. The trade association denied liability on the basis that under Articles 1639 (aa) and (bb) of the Dutch Civil Code, introduced by a law of 15 May 1981 in order to implement Directive 77/187, TTP is bound to pay them.

By Article 3 of the Directive, 'the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1 (1) shall, by reason of such transfer, be transferred to the transferee'.

The first question asks 'Does the scope of Article 1 (1) of Directive No 77/187/EEC also extend to a situation in which the transferor of an undertaking is declared bankrupt or is granted leave to suspend payment of debts?'

The same question is raised in two other cases pending before the Court, Case 179/83 *Industriebond FNV and Federatie Nederlandse Vakbeweging* v *The Netherlands* and Case 186/83 *Botzen* v *Rotterdamsche Droogdok Maatschappij*. It seems convenient to deal in this case with all the arguments raised on the point, and to incorporate the conclusions by reference in the Opinions in the other two cases, since they were all argued on the same day.

Since in English 'bankruptcy' and 'liquidation' have technical meanings, one referring to the insolvency of individuals or partnerships, the other to the winding up of companies, with different terminology, I use the words 'liquidator' and 'liquidation' as covering also 'a trustee in bankruptcy' and 'bankruptcy'.

The English version of Article 1 (1) reads: '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'. On the face of the language this clearly includes transfers other than those resulting from the contract. The French version, however, refers to transfers by a 'cession conventionnelle' (contractual transfer) though the preamble speaks merely of 'cessions' and, as I understand it, the Dutch, German and Italian versions are to the same effect ('overdracht krachtens overeenkomst', 'vertragliche Übertragung', 'cessione contrattuale'). The Danish version ('overdragelse') apparently falls between the two since it includes transfers by way of gift as well as by contract, but not by court order or inheritance, though it does include the purchase of an undertaking from the bankrupt estate (konkursbo) following an insolvency. The Danish version seems to me to be marginally nearer the French text than the English. In all the circumstances, since there does not seem to me any compelling reason derived from the terms and the objectives of the Directive taken as a whole, why the wider English version should prevail, it should be read as limited to contractual transfers in accordance with the majority of the texts (Cases 49/81 and 50/81 . *Kaders* v *Hauptzollamt Hamburg-Waltershof and Hauptzollant Hamburg-Ericus* (1982) ECR 1917 and 1941 in each case at paragraph 9).

That, unhappily, makes the question more rather than less difficult, since on the words used in the English version, the literal solution, at any rate, would be simple. On the basis that only a contractual transfer is to be included, the Commission contends that transfers as a result of liquidation proceedings are to be ignored since there is no truly consensual transfer. Transfer of a business which is insolvent in the course of liquidation proceedings is a forced sale rather than an agreed sale by willing seller to willing buyer.

The counter-argument is that, since liquidation is not expressly excluded from the definition, it should be taken as included. If, therefore, there is at some stage a sale by the bankrupt estate (konkursbo) (as e.g. in Denmark) or by the liquidator (as e.g. in England) the transfer pursuant to that sale is subject to the terms of the Directive.

It does not seem to me that either of these textual arguments is conclusive, though each is maintainable.

On the one hand the classification of the sale by the creditors or a liquidator as a 'forced' sale ignores the fact that they may be not only willing but anxious to sell. A sale may be the principal object of the liquidation proceedings, not least if, as in England, the sale results from a shareholders' voluntary winding up. There also seems, on the arguments advanced, to be doubt as to the extent to which under various national laws, a sale in the course of liquidation proceedings is to be regarded as truly contractual.

The alternative argument seems to leave out of account the intervention of the court and any special vesting orders which may be made by the court, or which may result as a matter of law from the fact that liquidation proceedings are on foot, even if at some subsequent stage there is a transfer by way of contract. It also ignores the fact that liquidation proceedings are commonly dealt with by special rules of law both nationally and in Community Directives and, for example, are excluded from the Judgments Convention of 1968. It is, therefore, not a normal use of language to regard the ultimate transfer of an undertaking or business from one owner to another owner, via liquidation proceedings, as being 'a contractual cession'.

I do not consider that the Commission's argument that Articles 3 (1) paragraph 2, 4 (1) and 6 (1) show that liquidation proceedings are excluded, supports conclusively or sufficiently the position it adopts on the purely textual approach.

By the second paragraph of Article 3 (1) Member States may provide that after a transfer, the transferor, as well as the transferee, shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship. It is said that this can have no relevance to liquidation proceedings, since normally the transferor will cease to exist after the transfer. This Article is not, however, necessarily of universal application, and, in any event, even a solvent company may be wound up after its business or part of its business has been sold.

By Article 4 (1), transfer of an undertaking is not to constitute in itself grounds for dismissal of employees by the transferor or the transferee, though such dismissals may take place 'for economic, technical or organizational reasons entailing changes in the work-force'. It is said that this exception will always be open on economic grounds in a liquidation, so that Article 4 (1) first sentence is otiose. That does not seem to me to follow, since if a viable part of a business in liquidation is sold off, there may be no valid economic grounds for dismissing any of the staff employed in that part of the business.

Nor can I see that the provisions of Article 6 (1), that the representatives of employees must be told of the reasons for the transfer, are necessarily otiose, even if the employees might be able to appreciate in the circumstances why a transfer is taking place.

If regard is had to the drafting history, it is to be noted that in considering the wording

of the original draft (Articles 1 (1) and 3 (1) of which were very different from the final Directive) the Economic and Social Committee commented:

'1.7. The Committee understands that the Commission has preferred to consider these matters [including the continued liability of the transferor for old debts] as arising essentially in connection with insolvencies and bankruptcies and prefers that they should be settled as part of the extensive work that is being carried out by the Commission in this important field.'

This seems to indicate that the Commission did not intend to cover liquidation in its proposal for the Directive. On the other hand, the second paragraph of Article 3 (1) is new and it can be argued has a liquidation in mind—covering liability of both transferor and transferee, though whether in the liquidation of the latter or the former, may be debatable. However, it seems to me more likely that if the Commission changed its mind, or the Council decided to include liquidation, an express reference to it would have been included in the Directive.

At the time this Directive was made Directive 75/129 (on the approximation of the laws of the Member States relating to collective redundancies Official Journal 1975 L 48, p. 29) was in force. Article 1 (2) (d) stipulates that the Directive shall not apply to workers affected by the termination of an establishment's activities where that is the result of a judicial decision. This seems to exclude from the Directive cases where a company's business is terminated by judicial order in liquidation proceedings. It does not seem to me that this Directive gives any help as to the intention in Directive 77/187.

A later Directive (which is not required to be implemented until after all the events in this case and in Cases 179/83 and 186/83 had happened) is No 80/987. The sub-title of the Directive is 'on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer' (Official Journal 1980 L 283, p. 23). This requires Member States to ensure, subject to exceptions, that guarantee institutions are established so that, in the event of insolvency, the payment of certain specified arrears due to employees can be ensured. This clearly covers institutions which are in liquidation for insolvency, though as Article 2 (1) shows, it covers a wider range of procedures on insolvency than technical liquidation. Apart from indicating that special measures are taken in relation to insolvency, it does not seem to me that it casts any direct light on the question in issue here. There is no express reference in this, or in any of the three Directives, to the other two. Nor is there any form of qualification in the third Directive in respect of business transferred to another undertaking, as one might expect there to be if Directive 77/187 had been regarded as applying to institutions in liquidation for reason of insolvency, even if Directive 80/987 is primarily aimed at situations where the undertaking has been liquidated or ceased trading without any transfer of the business to another undertaking. The fact that Directive 80/987 does provide a

means of redress for workers whose employers are insolvent may provide some indication that Directive 77/187 does not apply. I do not think that this point carries much weight since it can equally be seen as a supplementary means of recourse for the worker if the transferor or the transferee does not pay his wages or other monies due to him.

Reference has been made to the national provisions of Member States. Even if it is right to have regard to these for the purpose of construing the Directive, I do not think that they assist. There are too many differences and doubts. Thus, whereas the United Kingdom and Denmark include liquidation in their implementing legislation, France excludes transfers 'dans le cadre d'une procédure de règlement judiciaire ou de liquidation des biens'. Luxembourg includes transfers other than by contract, but excludes specifically the case of a 'déclaration en état de faillite'. The Netherlands began by regarding liquidations as included in the implementing legislation but by memorandum of 6 April 1983, the Minister for Justice gave his opinion that they should be treated as excluded. The Belgian legislation has given rise to much debate, though apparently the majority view is that liquidations are excluded. Pre-existing German and Italian legislation went further than the Directive, though paragraph 613 (a) of the German Civil Code has been interpreted as including insolvencies in principle but not as passing on liability to the transferee of the business for debts existing at the date of transfer.

Against this somewhat inconclusive background, regard must be had to the objects and purposes of the Directive. The preamble makes it clear that the aim is to protect employees and in particular to safeguard their rights in the event of a transfer. The background to this need is that 'economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of businesses to other employers as a result of ['legal· transfers or mergers'/ 'cessions ou fusions'].

The Danish Government contends that those employees who most need protection are those whose employers are insolvent, therefore, the Directive must be taken as applying to liquidations. The Commission and the Dutch Government draw precisely the opposite inference. They claim that a potential purchaser may be deterred from buying up businesses which are insolvent, but which might be capable of rescue, if they are obliged to take on all the employees. The only way of saving the business may be to reduce the number of staff. It is in the interests of the labour force as a whole that such rescue attempts should be made, even if some staff have to go. In fact, rather than in theory, more jobs may be lost if purchasers are deterred by a rule that they must take on the employees and satisfy all obligations to them. Moreover the total closure of a business may lead to greater demands on the guarantee funds. In the converse situation where employees have to be taken on, it is said that other creditors

may suffer since the price paid for the business will be to that extent reduced and the amount of money available for the creditors be reduced accordingly.

Even if it is not inevitable that sales be prevented, if businesses in liquidation must take all their employees with them on a transfer, it seems to me likely to be a real risk in a significant number of cases, at the least to be a possible risk. The application of the Directive to going concerns may itself cause difficulties, but they do not seem likely to be so great as in the case of insolvent undertakings in liquidation. The counter-productive result of applying the Directive, which seems to be a real possibility, is so contrary to its objectives that in the absence of other clear indications, it seems to me that the intention was not to apply the provisions to undertakings which are in liquidation. That transfers of the business of such undertakings should not be included seems to be consistent with the fact that liquidation is normally the subject of special legislation. Further, the fact that liquidation rules and procedures vary from Member State to Member State (as emerged during the case) also makes it more likely than not that a special directive would be issued in respect of transfers by undertakings subject to such procedures.

It is arguable that Article 4 could be used to justify dismissals of all or part of the staff for economic reasons. That, however, seems to me to be such an oblique way of dealing with the problem that I do not consider that it should be accepted. Again it seems to me more likely that this kind of matter would be dealt with in respect of liquidations by a separate Directive, as it was in Directive 80/987.

If the Directive had made a clear provision that pre-existing debts were not the liability of the transferee, it would go some, perhaps a substantial, way to suggest that the risk of a potential purchaser being deterred from buying would be reduced. The qualified effect of transfer adopted by the German courts in interpreting paragraph 613 (a) of the German Civil Code would thus be reflected in the Directive. For the reasons given in answer to the second question I do not think that such a result flows from Article 3 (1) of the Directive.

It is suggested that, if liquidations are excluded from the scope of the Directive, it will be possible for undertakings to 'engineer' insolvencies so that employees can be dismissed before businesses are transferred, no obligations thus passing to the transferee. There may be a risk of this. It will, however, be for national courts to ensure that undertakings cannot escape the provisions of the Directive unless they really are insolvent. To this end, a mere winding up order in the English sense, or its equivalent, will not be sufficient since winding up can take effect for other reasons than insolvency. If there is a dispute as to whether a company is insolvent, then the Directive should be treated as not applying only in situations where an appropriate court has formally found, in accordance with national law provisions, that an undertaking in liquidation is insolvent and that the transfer of a business is made as a consequence.

In this regard it is also important to recall that Article 7 of the Directive specifically preserves the rights of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees. Unless and until specific provisions are made to cover the position of employees where businesses are transferred following insolvency, it is thus open to Member States to make national rules which in their view are necessary to protect employees. This provision seems to me to take much of the sting out of the argument that it is unthinkable, since they must need protection, that employees of insolvent undertakings could not have been included in the Directive. It seems more likely than not, in view of the differences between the laws of the Member States on insolvency and because of the special rules applying to insolvency, as opposed to viable undertakings, that transfer in this situation would be dealt with by a special Directive, in the meantime Member States being free to take the necessary measures appropriate to their own conditions.

The first question also refers to the suspension of payments by judicial order ('surséance van betaling'), though the question does not strictly arise in the present case since liquidation followed the order which was made. As I understand it this order is made by the court provisionally on the application of a debtor who considers that he cannot pay his debts. An administrator is appointed and in the meantime debts (other than preferential or secured debts including those to employees) cannot be enforced. The administrator must approve all acts of administration including transfer of parts of the enterprise and dismissal of employees. This provisional order is made without a full investigation by the court, but after a further hearing, of which creditors must be given notice, the court may make a final or definitive order. It seems that in a large number of cases, if the financial difficulties are not resolved, the final suspension order is followed by bankruptcy.

In this case, the business was only transferred after a final order was made. The description given of the rights of the owner of the business, subject to cooperation with the administrator, shows that the position is different from that obtaining in a liquidation, and it is much easier to see a sale of the business by the owner as a consensual transfer. None the less it seems to me that, at the stage of a final order, the extent of judicial control and the nature of the proceedings, though different from liquidation is such that it should be treated in the same way, as the Dutch Government contends. The sale of the business, or part of it, may be subject to the same problems as a sale in liquidation proceedings, if all the employees must be taken on. Accordingly, for the reasons which seem to me to point to transfers in liquidation for insolvency being excluded, I consider that transfer after a final order of 'surséance van betaling' is excluded from the Directive. In this regard it is to be noted that the Commission's draft Convention on Bankruptcy and Winding Up includes this procedure as one of 'the arrangements, compositions and other proceedings' which are covered.

It is suggested that there is a danger of a debtor obtaining a provisional order, transferring the business, dismissing the employees and then applying to have the order lifted. In view of the fact that there is no enquiry at the preliminary stage, different considerations may well apply to the period between the provisional and the final order. Since, however, the point does not arise in any of these cases and has not been fully argued, I would leave open the question whether transfer made after a merely provisional order is within the Directive.

The second question asks, if the answer to question 1 is in the affirmative, must Article 3 (1) of the Directive be interpreted as meaning that the transferor's obligations which are assigned to the transferee by reason of the transfer of the undertaking also include the debts which arose from the contract of employment or the employment relationship before the date of the transfer within the meaning of Article 1 (1)?

It seems to me necessary to consider this question in any event in connection with the answer to the first question, even if strictly on the view I have formed no answer is sought.

It seems to me that whether 'existing on the date of transfer' governs 'rights and obligations' or 'a contract of employment or . . . an employment relationship' (and I think it means the latter), it covers debts owed by the transferor to the employee at the date of transfer. The intention is certainly to ensure for the future that the transferee is to have the same rights and liabilities *quoad* the employee as the transferor had, but it is also intended that existing rights and obligations shall be transferred over. If it had been intended merely to substitute the transferee for the transferor for the future (so that the employee could insist, for example, on the same pay and seniority) and to exclude existing ('old') debts, quite different language would have been required. As it is, not only the debts of the transferee who becomes the employer on the transfer (Article 2) but also those of the transferor become the liability of the transferee.

This view seems to me to be supported by the English version of the second sub-paragraph of Article 3 (1) which provides:

'Member States may provide that after the date of transfer within the meaning of Article 1 (1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship'.

The use of the word 'arose' clearly indicates that obligations existing at the date of transfer may be made the several liability of the transferor as well as of the transferee. The second sub-paragraph in any event confers a discretion on Member States to make only the transferor liable. That confirms that the transferee is already liable

(as I see it) under the first paragraph. It would in any event be strange to make the insolvent company liable for future debts of the transferee unless it was intended also to cater for the possible insolvency of the transferee company. Without specific indication in the preamble or in the text of the Directive, this seems to me unlikely.

The interpretation of this paragraph is of course of wider significance than in liquidation proceedings since it applies in any event to transfers between viable undertakings. If the transferor has failed to pay salary due at the date of transfer, or accrued holiday pay or the like, it seems to me that the intention is that the employee should be entitled to look to his new employer rather than that he should have to make claims against the old employer, who may, even if solvent, have gone out of business or dissipated his assets, subsequent to the transfer. The objective of protecting the employee, in my view, requires that he should be able to look to his new employer; the sale price of the transfer must reflect any potential or actual liabilities of the transferee following transfer.

I add that for the reasons given in my Opinion in Case 19/83 the obligations transferred relate only to employees who are employed in the undertaking at the time of transfer.

In all the circumstances, it is my view that the questions referred should be answered on the following lines:

(1) Council Directive 77/187 does not apply to the transfer of an undertaking, business or part of a business where the undertaking or the owner of the business or part of the business had been declared bankrupt or has been granted final leave to suspend payments ('surséance van betaling').

(2) Article 3 (1) of Directive 77/187 must be interpreted as meaning that the transferor's obligations to employees who are employed at the date of transfer, which are assigned to the transferee by reason of the transfer of the undertaking, include the debts which existed before the date of the transfer within the meaning of Article 1 (1) and which arose from the contract of employment or the employment relationship with the transferor.

It is for the national court to rule on the costs of the parties to the litigation before it; the Commission and the Member States which have intervened should bear their own costs.