OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 4 May 1988 *

Mr President,
Members of the Court,

1. Once again the Court is being asked to deal with a question concerning 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] The novelty of this case is limited, as we shall see, to the facts of the case themselves and does not extend to the problems submitted to the Court, which, in my view, have already been decided by the Court in its most recent rulings.

2. P. Bork International A/S ('PBI'), which had leased a beechwood veneer factory from Orehoved Trae- og Finérindustri A/S ('OTF'), terminated the lease in the autumn of 1981, with effect from 22 December 1981. On 9 December 1981 PBI ceased making payments and informed its staff that it would vacate the premises on 22 December 1981, that OTF had given no assurance that it would resume the operation of the factory after that date and that all the employees could expect to receive notice of dismissal. The employees were informed of their dismissal in mid-December and given the appropriate period of notice.

3. Although the undertaking had effectively ceased to operate on 22 December 1981, negotiations were conducted at the end of December 1981 between OTF and Junckers Industrier A/S ('JI') which resulted on 30 December 1981 in a written agreement for the purchase by JI of the beechwood veneer factory and the boiler unit belonging to it. Under the agreement, OTF transferred to JI the land, buildings, machinery and spare parts with effect from 4 January 1982. On that date, JI resumed the operation of the factory with staff composed exclusively of a number of PBI's employees who had been taken on again. Subsequently, on 8 January 1982, an agreement was concluded between PBI and JI for the purchase by the latter of the stock, spare parts, tools, auxiliary material and other equipment left on the premises. On 9 July 1982, PBI was wound up.

4. The Danish Højesteret (Supreme Court) has submitted a question to the Court for a preliminary ruling in the proceedings which have been instituted in order to determine who is liable to pay the wages and holiday pay of PBI's employees as a result of their dismissal by PBI. That court took the view that the determination of the debtor depended on whether or not the shutdown by PBI, followed by the takeover by JI, of the beechwood veneer factory had constituted a transfer of an undertaking within the meaning of the directive and the Danish implementing law of 21 March 1979. Since a transfer of that kind requires the transferee to safeguard the rights and obligations arising for the transferor from a contract of employment or employment relationship in existence at the date of the transfer, the question whether the debtor is the bankrupt's estate (PBI) or the purchaser

* Translated from the French.

1 — OJ L 61, 5.3.1977, p. 26.

of the factory (JI) would indeed appear to depend on whether or not there was a transfer of the undertaking in question for the purposes of the directive.

5. It is apparent from the grounds of the order for reference that the issues which led to the matter being referred to the Court related essentially to the fact that the operation which resulted in a resumption of business by JI after PBI had ceased to operate the factory was carried out in two stages. PBI terminated the lease with effect from 22 December 1981 and it was the owner of the factory, OTF, which sold the land, buildings, machinery and spare parts to JI on 30 December 1981. JI contended before the national court, and then before the Court of Justice, that there could not be a transfer within the meaning of the directive where the original employer had taken no part in the transactions which resulted in an undertaking being brought into operation by a subsequent employer. The application of the directive presupposed that the previous employer was a party to the agreement concerning the transfer of the undertaking.

6. There are no longer any grounds for the difference of opinion on that issue between the Lønmodtagernes Garantifond and the Commission, on the one hand, and JI, on the other. The Court made it quite clear in its judgment of 10 February 1988 in Case 324/86, that

'the fact that . . . the transfer is effected in two stages, in that the undertaking is first re-transferred from the original lessee to the owner and the latter then transfers it to the new lesseee, does not prevent the directive from applying, provided that the economic unit in question retains its identity . . .'. [2]

2 — Case 324/86 *Foreningen af Arbejdsledere i Danmark* v *Daddy's Dance Hall* [1988] ECR 739, paragraph 10 of the decision.

Accordingly, the fact that the lessee of the factory was not, after the termination of the lease, involved in the agreement between the owner and the purchaser enabling the factory to be brought back into operation does not in itself preclude the existence of a transfer within the meaning of the directive.

7. However, the examination of a legal situation such as that described by the national court cannot be limited to consideration of the possible consequences of the absence of a legal connection between the lessee of an undertaking and the person who, upon termination of the lease, purchases the undertaking from its owner. A proper answer calls for consideration of the question whether the directive is applicable after the lapse, between the cessation of business by one firm and its resumption by another firm, of a period of time in which the factory had ceased to operate. In its observations, JI contended that there could not be a transfer within the meaning of the directive when an undertaking has ceased to operate, and in this case it was considered to have done so definitively. That is the question on which the Commission has centred its argument in favour of the applicability of the directive.

8. It is necessary first of all to recall the conditions laid down by the Court for establishing whether there is a transfer of an undertaking within the meaning of Article 1 (1) of the directive. According to the Court's recent judgment of 17 December 1987 in Case 287/86, *Ny Mølle Kro*, that provision

'envisages the case in which the business retains its identity inasmuch as it is transferred as a going concern, which may be indicated in particular by the fact that its operation is actually continued or resumed

by the new employer, with the same or similar activities'.[3]

9. In its judgment of 18 March 1986 in Case 24/85, *Spijkers*, the Court describes the method which must be followed in order to determine whether the conditions for the transfer are satisfied. It is necessary

'to consider all the facts characterizing the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended'.

Furthermore,

'all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation'.[4]

10. One aspect of the Court's case-law, which in my view is fundamental for the purposes of the answer to be given, is the paragraph (worded identically in the *Spijkers* and *Ny Mølle Kro* judgments) in which, after laying down the conditions for the transfer and listing some of the criteria for assessing whether those conditions are satisfied, the Court adds that:

'it is for the national court to make the necessary factual appraisal, in the light of the criteria for interpretation set out above, in order to establish whether or not there has been a transfer in the sense indicated'.[5]

11. Observance of the distinction thus made by the Court between its own role in proceedings for a preliminary ruling relating to the directive, which consists in laying down in general terms the conditions for the transfer of an undertaking and listing some of the criteria for assessing whether those conditions are satisfied, and the role of the national court, which consists in implementing those interpretative criteria by means of the factual assessments needed in order to establish whether or not there is a transfer, must form the basis of the Court's answer in this case. Moreover, the Court cannot, without calling in question its previous decisions on this point, make any factual assessments concerning the application of one of the criteria listed in its judgments in *Spijkers* and *Ny Mølle Kro*.

12. In my view, the question whether an undertaking has ceased to operate illustrates that need to observe the division of functions between the Court of Justice and the national court. In its judgment in *Ny Mølle Kro*, the Court referred, among the circumstances to be assessed by the national court, to the fact that

'the undertaking in question was temporarily closed at the time of the transfer and therefore had no employees'

and pointed out that

3 — Case 287/86 *Ny Mølle Kro* [1987] ECR 5465, at p. 5484, paragraph 18 of the decision.

4 — Case 24/85 *Spijkers* v *Benedik* [1986] ECR 1119, paragraph 13 of the decision.

5 — Case 24/85, cited above, paragraph 14 of the decision, and Case 287/86, cited above, paragraph 21 of the decision.

'the temporary closure of an undertaking and the resulting absence of staff at the time of the transfer do not of themselves preclude the possibility that there has been a transfer of an undertaking . . . '.[6]

That conclusion is quite clear, inasmuch as the Court considers that a temporary cessation of business is not in itself incompatible with the existence of a transfer of an undertaking, within the meaning of Article 1 (1) of the directive, and that its impact on the existence of such a transfer depends on all the accompanying factual circumstances which are for the national court to assess.

13. In my view, therefore, it is not for the Court to examine in successive references for a preliminary ruling the different possible varieties of a temporary cessation of business in order to distinguish those which preclude the application of the directive from those which entail its application. That is a matter for the national court in each individual case. It is only where there are a number of sufficiently clear factors which make it possible to establish that an undertaking is no longer a going concern that the Court may draw the consequences of the cessation of business in a particular case.

14. In my view, it follows from an examination of the Court's previous decisions that the cases in which it has, in a particular instance, come to the conclusion that the directive is inapplicable correspond to certainly legally well-defined situations. Thus, in its judgments of 7 February 1985 in Case 135/83 *Abels,*[7] and in Case 186/83 *Botzen,*[8] the Court held that

'Article 1 (1) of [the directive] does not apply to the transfer of an undertaking . . . where the transferor has been adjudged insolvent . . . '.

However, apart from situations of that kind, the definitions used have been highly subtle, the most characteristic being those laid down by the Court, as we have seen, in its judgments in *Spijkers, Tellerup* and *Ny Mølle Kro.* In his Opinion of 9 February 1988 in Joined Cases 144 and 145/87 *Berg and Busschers* v *Besselsen,*[9] Mr Advocate General Mancini correctly summarized the case-law of the Court as it now stands by pointing out that:

'Ultimately, the only cases to which Article 1 [of the directive] is always and indisputedly inapplicable are those involving an undertaking which is bankrupt or a company which is in liquidation'.

15. Can the situation which gave rise to these proceedings before the Court be identified as one of the cases which permit the Court to conclude decisively that the directive is inapplicable? PBI was in fact wound up, but more than seven months after the transfer in question. Therefore that circumstance is not relevant. Moreover, PBI's unilateral intention expressed in December 1981 to cease business cannot be equated with the liquidation of an undertaking in the procedural sense, that is to say, a winding-up by the court.

16. Is it possible, however, leaving aside the strict cases of insolvency or liquidation, to identify in the situation which led the

6 — Case 287/86, cited above, paragraph 19 of the decision.

7 — Case 135/83 *Abels* [1985] ECR 469.

8 — Case 186/83 *Botzen* [1985] ECR 519.

9 — Joined Cases 144 and 145/87 *Berg and Busschers* v *Besselsen* [1988] ECR 2559.

Højesteret to refer the matter to the Court any criteria which would in the Court's view also be incompatible with the existence of a transfer within the meaning of Article 1 (1) of the directive? JI has argued before the Court that in December 1981 PBI regarded the beechwood veneer factory's cessation of operations as definitive, no resumption of operations being envisaged at the time, and considered that the dismissal of the factory's staff amounted to instant dismissal which terminated the employment relationship at once.

17. Those factors do not by any means strike me as being sufficient to justify at this stage an unequivocal answer to the effect that the directive is not applicable. They cannot be considered separately from other circumstances, such as the non-expiry of the period of notice, the shortness of the period for which the factory ceased to operate, the fact that the latter period coincided with the Christmas and New Year holidays which involved, by definition, as the national court has expressly pointed out, a very appreciable slackening in production, and the similarity between PBI's operations and those subsequently carried out by JI exclusively with staff previously employed by PBI.

18. Furthermore, the brevity of the cessation of operations and the swiftness with which they were resumed after the Christmas and New Year holidays, by a beechwood veneer factory such as that which purportedly closed down on the eve of those holidays, is a reason for ascertaining whether Article 4 (1) of the directive, which prohibits dismissal from being based on the transfer itself, has been complied with. Since OTF's aim, upon termination of the lease to PBI, was to sell all the movable and immovable property as soon as possible, thereby enabling a third party to resume the operation of the factory, can the owner's refusal to continue to operate the factory on his own account after the termination of the lease be regarded as sufficient to consider the dismissal by PBI of its employees as an instant dismissal terminating the employment relationship once and for all? Since the continuation of operations, as a result of the sale of the factory, was envisaged in principle upon termination of the lease, even though a sale had not yet been agreed, it is possible to take the view that Article 4 (1) of the directive prohibited the dismissals from being regarded as instant dismissals which brought the employment relationship to an end.

19. In my view, therefore, there are a number of issues which must be discussed and resolved. This means that the situation which has given rise to these proceedings has not disclosed any factor of such a kind as to enable the Court to state decisively that the directive is inapplicable and thus to relieve the national court of the need to make an assessment of the facts as a whole, as required by the Court in its recent judgments in *Spijkers* and *Ny Mølle Kro*.

20. Accordingly, I consider that the Court should rule as follows:

Article 1 (1) of Directive 77/187/EEC must be interpreted as being capable of applying where a leased undertaking is, upon termination of the lease, sold by the

owner to a purchaser, provided that the undertaking was transferred as a going concern. In order to determine whether that is the case, it is necessary to take account of all the facts connected with the transaction in question including, where appropriate, closure of the undertaking between termination of the lease and sale to a purchaser, and the resulting absence of employees who were dismissed before such closure; however, those factors are not, particularly in the event of a short-term closure not preventing the immediate resumption of a similar activity, in themselves of such a kind as to preclude the applicability of the directive, Article 4 (1) of which has the effect of restricting the possibility of dismissals if the resumption of operations by the undertaking was contemplated in principle.