OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 23 February 1994 *

Mr President,
Members of the Court,

1. In the present case, the Landesarbeitsgericht Schleswig-Holstein has referred to the Court for a preliminary ruling the following questions on the interpretation of Council Directive 77/187/EEC on the safeguarding of employees' rights in the event of transfers of undertakings ('the directive'): [1]

'1. May an undertaking's cleaning operations, if they are transferred by contract to a different firm, be treated as part of a business within the meaning of Directive 77/187/EEC?

2. If the answer to Question 1 is in principle in the affirmative, does that also apply if prior to the transfer the cleaning operations were undertaken by a single employee?'

I would like first to set out the background to the action in the main proceedings.

2. Mrs Schmidt was employed as a cleaner by the Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen (Savings and Lending Bank of the former Bordesholm, Kiel and Cronshagen Districts) (hereinafter 'the Savings Bank') at a monthly wage last fixed at DM 413.40 net. She was the only cleaner at a savings bank in Wacken, which the defendant had taken over on 1 July 1990.

In February 1992 the Savings Bank terminated its employment relationship with Mrs Schmidt on the ground that the branch in Wacken had been renovated and extended and the cleaning of the new premises would take far more time than had previously been agreed with her. The Savings Bank subsequently contacted Spiegelblank, the firm which was already responsible for the cleaning of the Savings Bank's remaining premises, with a view to having it carry out the cleaning of the branch in Wacken as well.

Spiegelblank approached Mrs Schmidt on 21 February 1992 to work for it for a net monthly wage of DM 520 (which was thus higher than her previous wage). Mrs

* Original language: Dutch.

1 — 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).

Schmidt, however, was not prepared to work for Spiegelblank for that amount since she had calculated that her hourly wage would be lower in view of the considerable increase in the surface area to be cleaned.

3. Mrs Schmidt brought an action challenging her dismissal under Paragraph 1 of the German Kündigungsschutzgesetz (Law on protection against dismissal) on the ground that it was not socially justified within the meaning of that provision. In dismissing the action, the Arbeitsgericht (Labour Court) Elmshorn held that the Savings Bank was able to rely on business-related grounds in order to justify the dismissal: the renovation of the branch in Wacken and the resulting extension of the surface area to be cleaned had, it ruled, caused the Savings Bank to take a commercial decision to have the cleaning carried out in future by a cleaning firm rather than by its own staff. The Arbeitsgericht held that it could review such a decision only on the issue of whether it was manifestly unreasonable or arbitrary. The Savings Bank's decision was held to be neither.

Mrs Schmidt appealed against that decision to the national court which made the reference.

Examination of the questions submitted

4. In referring its questions, the Landesarbeitsgericht seeks to ascertain whether there has in the present case been a 'transfer of an undertaking, business or part of a business' within the meaning of Article 1(1) of the directive, with the result that the provisions of the directive are applicable to this case. Article 1(1) provides 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.'

In its order of reference, the Landesarbeitsgericht points out that the Court's judgment in the *Redmond Stichting* case [2] is of relevance to the questions in the present case. The question here, according to the Landesarbeitsgericht, is whether cleaning activities can also be 'activities of a special nature which constitute independent functions' as held by the Court in that judgment (see also point 10 below) and, if so, whether the fact that those activities are carried out by a single employee precludes assimilation to part of a business. If the answer to Question 1 is in the affirmative and that to Question 2 is in the negative, Paragraph 613(a)(4) of the German Bürgerliches Gesetzbuch (Civil Code) would, according to the Landesarbeitsgericht, have to be applied by analogy. That

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

provision, which is part of the German legislation which transposes the directive into national law, provides *inter alia* that the termination of an employment relationship of an employee by the previous employer by reason of the transfer of part of the undertaking has no effect. The application of that provision to the present case by analogy would therefore render the termination effected by the Savings Bank null and void.

5. According to the Savings Bank, the German Government and the United Kingdom, there is in this case no question of a transfer of the business of an undertaking for the purposes of Article 1(1) of the directive.

The *Savings Bank* argues that the cleaning operations in question did not form part either of its main or of its secondary activities. In its view, the transfer of a particularly small part of its operations cannot constitute a transfer of part of the business within the meaning of the directive or be assimilated thereto by way of analogy.

The *German Government* puts forward a more complex argument: it submits that the term 'business', as employed in the Court's case-law since the judgment in *Spijkers*, [3] implies that a clearly defined economic objective is being pursued within the context of an autonomous organization (which may itself be part of a larger organizational whole). This excludes, for instance, the possibility of describing an isolated element, such as a machine or a parcel of land, as a transferable part of an undertaking within the meaning of the directive; production and service units in the widest sense, on the other hand, should fall within the concept of business as so defined. The present case, however, is concerned not with a 'business' but merely and exclusively with a decision by an employer to entrust cleaning operations to an outside firm rather than have them carried out any longer by an employee of the undertaking itself.

6. The *United Kingdom*, for its part, takes the view that the fact that an undertaking ceases to carry on cleaning activities on its own premises and instead engages a third party to provide those services does not of itself amount to a transfer of an undertaking, business or part of a business within the meaning of the directive. Referring to the criteria elicited by the Court in its relevant case-law, the United Kingdom takes the view that there has in the present case been neither a transfer of an undertaking nor a transfer of buildings or tangible assets. While there is, it argues, no reason to exclude cleaning operations from the types of activities which may be the subject of a transfer within the meaning of the directive, it does not follow that a simple contractual arrangement with a third party for the provision of such services amounts to a transfer of a business or part of a business.

7. The position taken by the *Commission* is more qualified. It takes the view that the

3 — Judgment in Case 24/85 *Spijkers* v *Benedik* [1986] ECR 1119, particularly at paragraph 11.

answer to the question depends on the actual circumstances under which the cleaning operations in question are carried out. If the cleaning is carried out by the staff of the undertaking within its own structure and using the means at its disposal, the cleaning operations ought in law to be treated on a par with the running of a works canteen in accordance with the description given by the Court in its judgment in *Watson Rask*. [4] It would in that case be a service which it provides itself, in which the unskilled nature of the activity and the absence of any necessary connection with the objects of the undertaking may not result in its being excluded from the scope of the directive.

If, on the other hand, an outside undertaking is entrusted with the cleaning, that activity cannot, in the opinion of the Commission, be treated as a part of a business within the meaning of the directive. The provision of a service would then be involved, to which the undertaking has recourse on a contractual basis on the ground that it cannot, or does not wish to, use its own staff or equipment to carry out the activity in question. It is a matter for the national court to determine whether or not the cleaning operations in the present case are covered by the first-mentioned possibility.

8. I would like first of all to make it clear that, along with the United Kingdom and the Commission, I see no reason to exclude *cleaning operations* from the type of activities which may form the subject-matter of a transfer within the meaning of the directive.

In order for a particular activity to come within the scope of the directive, the sole factor of crucial importance — in the light of the legal basis of the directive, namely Article 100 of the Treaty — is that it constitutes an economic activity within the meaning of Article 2 of the EC Treaty. [5] That is undoubtedly the case with regard to cleaning operations.

That, however, is not the point in the present case. The central question here is whether the cessation of a specific operation within an undertaking and the consequent transfer of that operation to an outside undertaking is to be regarded as a transfer of a part of the undertaking within the meaning of the directive.

9. As the Landesarbeitsgericht notes, such an outcome cannot be excluded *a priori* in view of the Court's recent case-law, particularly its judgments in *Redmond Stichting* and *Watson Rask*.

In its judgment in *Redmond Stichting*, the Court pointed out that whenever in the case of an undertaking — there, a foundation established under Netherlands law to assist victims of substance abuse — only part of its activities (in particular only the provision of help, but not social or recreational functions) are transferred to another undertaking, that does not necessarily mean that the directive

4 — Judgment in Case C-209/91 *Watson Rask and Christensen* v *ISS Kantineservice* [1992] ECR I-5755.

5 — The Court has already held in its judgment in Case 13/76 *Donà* v *Mantero* [1976] ECR 1333, at paragraph 12, and, more recently, in its judgment in Case 196/87 *Steymann* v *Staatssecretaris van Justitie* [1988] ECR 6159, at paragraph 10, that the term 'economic activities', within the meaning of Article 2 of the EC Treaty, covers the pursuit of an activity as an employed person and the provision of services for remuneration.

is inapplicable. The Court pointed out that the mere fact that those social and recreational activities

'*constituted an independent function* does not suffice to rule out the application of the aforementioned provisions of the directive, which were laid down not only for transfers of undertakings, but also for transfers of businesses or parts of businesses, with which *activities of a special nature* may be equated.' [6]

10. The judgment of 12 November 1992 in *Watson Rask*, which was delivered after the order of reference in the present case of 27 October 1992, concerned an undertaking, Philips, which had by contract transferred the running of its four works canteens to a catering firm, ISS. ISS undertook in that connection to accept on the same terms Philips' employees (numbering approximately 10) who worked in the canteens in return for a set monthly income and advantages in kind. Those advantages consisted in Philips' making available, without charge, the use of premises, tools, electricity, heating, telephone, changing rooms and refuse-removal facilities, as well as the provision by Philips of certain consumer goods at wholesale prices. The Court replied in the affirmative to the question whether the directive could apply to such a situation, adding in particular that:

'When the owner of an undertaking entrusts, by way of contract, the responsibility for the operation of a service in his undertaking, such as a canteen, to the owner of another undertaking who thereby assumes the obligations of an employer towards the employees affected, the resultant operation may come within the scope of the directive, as defined in Article 1(1). The fact that in such a case the activity transferred is for the transferring undertaking merely an *ancillary activity not necessarily connected with its objects* cannot have the effect of excluding that operation from the scope of the directive.' [7]

11. The Court has consistently held that the determination of whether the directive is *in fact* applicable must be left to the national court, which can thereby take account of the factors mentioned by the Court in paragraph 13 of its judgment in *Spijkers*:

'In order to determine whether those conditions are met, 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

6 — Judgment in *Redmond Stichting*, at paragraph 30 (emphasis added).

7 — Judgment in *Watson Rask*, at paragraph 17 (emphasis added).

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. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation.' [8]

12. A case such as this, however, requires additional clarification. The question which arises is whether the mere allocation of an activity to a third party ('contracting out') — even where, as in the present case, neither tangible nor intangible assets of any significance are directly or indirectly transferred and only one member of staff is taken over — can be regarded as a transfer of an undertaking, business or part of a business within the meaning of Article 1(1) of the directive.

The starting point for a reply to that question is to be found in paragraphs 11 and 12 of the judgment in *Spijkers* (which directly precede the paragraph cited above):

'... It is clear from the scheme of Directive 77/187 and from the terms of Article 1(1) thereof that the directive is intended to ensure the continuity of employment relationships existing within a business, irrespective of any change of ownership. It follows that the decisive criterion for establishing whether there is a transfer for the purposes of the directive is whether the business in question retains its identity.

Consequently, a transfer of an undertaking, business or part of a business does not occur merely because its assets are disposed of. Instead it is necessary to consider, in a case such as the present, whether the business was disposed of as a going concern, as would be indicated, *inter alia*, by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities.'

13. It is apparent from the above passage that the Court recognizes a common denominator underlying the three concepts of 'undertaking', 'business' and 'part of a business', namely that of an 'economic unit' or a

8 — Judgment in *Spijkers*, at paragraph 13; see also paragraph 24 of the judgment in *Redmond Stichting* and paragraph 20 of the judgment in *Watson Rask*.

'business', [9] terms which, in my opinion, refer to a unit with a minimum level of *organizational independence*, which can exist by itself or constitute part of a larger undertaking. In its judgment in *Botzen*, which was delivered before that in *Spijkers*, the Court had already held that for the question whether there has been a transfer of employees' rights and obligations within the meaning of the directive 'the only decisive criterion ... is whether or not a transfer takes place of the department to which they were assigned and which formed the *organizational framework* within which their employment relationship took effect.' [10]

From all this I infer that the phrase 'undertaking, business or part of a business' within the meaning of the directive is underpinned by the concept of an economic unit which refers to an organized whole consisting of persons and (tangible and/or intangible) assets by means of which an economic activity is carried on having an objective of its own, albeit one that is ancillary to the objects of the undertaking; a whole which, moreover, can be part of an even larger corporate whole. [11]

14. In its judgment in *Spijkers*, the Court stated that a mere transfer of assets is not sufficient to constitute a transfer of an undertaking, business or part of a business. The German Government is for that reason correct in pointing out that the mere transfer of, for instance, a parcel of land or a machine does not come within the directive. Rather, it appears from the Court's list that account must be taken (by national courts) of factors such as the transfer of 'tangible assets, such as buildings and movable property', 'intangible assets' and 'whether or not the majority of its employees are taken over'.

15. It is for the national court to apply this definition to a particular case, while bearing in mind the 'facts characterizing the transaction in question' referred to above (point 11). With regard to the second question referred by the Landesarbeitsgericht, I would note that, although it does not seem desirable to me to have a strict quantitative criterion by which to delimit the scope of the directive, the fact that the economic activity in question is performed by a single employee only is one of the matters which should be taken into consideration in determining whether there is an organizational unit.

9 — 'Economic unit' is the expression used in most of the language versions of the judgment, particularly in the Danish ('økonomisk enhed'), German ('wirtschaftliche Einheit'), French ('entité économique'), Italian ('entità economica'), Portuguese ('entidade económica') and Spanish ('entidad económica'). 'Business' is the term used in the English version, 'bedrijf' that used in the Dutch.

10 — Judgment in Case 186/83 *Botzen and Others* v *Rotterdamsche Droogdok Maatschappij* [1985] ECR 519, at paragraph 14 (emphasis added).

11 — Compare this to the definition which the Court, admittedly in the context of different rules, has developed for the concept of 'part of a business' within the meaning of Article 7 of Directive 69/335/EEC concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412) as referring to 'any part of an undertaking if it constitutes an organized whole of assets and persons capable of acting together to perform a particular activity' (judgment in Case C-50/91 *Commerz-Credit-Bank AG-Europartner* v *Finanzamt Saarbrucken* [1992] ECR I-5225, at paragraph 12).

Conclusion

16. I accordingly propose that the Court reply to the questions referred by the Landesarbeitsgericht as follows:

Cleaning operations constitute an economic activity which may come within the scope of Directive 77/187/EEC. In determining whether that directive does in fact apply to a situation in which an undertaking ceases cleaning operations previously performed by its staff in order to contract them out to a separate undertaking, the national court must consider, in the light of the criteria for interpretation provided by the Court in its well-established case-law, whether a particular case involves the transfer of an economic unit, that is to say an organized whole consisting of persons and (tangible and/or intangible) assets by means of which an economic activity is carried on having a specific, even ancillary, objective of its own.