OPINION OF ADVOCATE GENERAL COSMAS

delivered on 24 September 1998 *

Summary

* Original language: Greek.

I — Introduction

1. In the present cases, the Court has been asked to interpret certain provisions 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] (hereinafter 'the Directive').

2. The questions raised in these cases have for the most part already been settled, mainly in the recent judgment delivered by the Court in *Süzen*. [2]

3. With regard to the first three joined cases, however, it must be pointed out that the Court had never had occasion to rule on a case in which one undertaking, having entrusted the cleaning of its premises to another, decides to terminate the contract and take over the cleaning operation itself (resumption in-house).

4. The other two joined cases are also concerned with the problem of undertakings succeeding one another in the performance of an activity. In Case C-247/96 *Horst Ziemann*, however, it will be necessary to consider the concept of a transferable economic entity.

II — The relevant Community provisions

5. It is clear from the second recital in the preamble to the Directive [3] that the purpose of the Directive is 'to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'.

6. In Section 1, which defines the scope of the Directive, Article 1 provides that it 'shall apply to the transfer of an undertaking, busi-

1 — OJ 1977 L 61, p. 26.

2 — Case C-13/95 *Ayse Süzen* v *Zehnacker Gebäudereinigung* [1997] ECR I-1259. By the two questions referred to the Court in that case, which were considered together, the national court sought to ascertain whether the directive also applies to a situation in which an employer who has entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of the same work, enters into a new contract with a second undertaking without any concomitant transfer of tangible or intangible business assets from one undertaking to the other.

3 — The Directive has recently been amended in the light of the case-law of the Court *inter alia*. The amendments are embodied in Council Directive 98/50/EC of 29 June 1998, OJ 1998 L 201, p. 88.

ness or part of a business to another employer as a result of a legal transfer or merger'. [4]

7. In Section 2 of the Directive, which is entitled 'Safeguarding of employees' rights', Article 3(1) provides that 'the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer ... shall, by reason of such transfer, be transferred to the transferee'.

8. Under Article 4(1), 'the transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce'.

4 — Article 1(1) as amended by Directive 98/50 reads as follows: '(a)This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger. (b)Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary. (c)This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive.'

9. Finally, under Article 7, Member States retain the right to apply or introduce measures which are more favourable to employees.

III — The relevant national provisions

A — *The provisions of German law*

10. The Directive was transposed into German law by § 613a of the Bürgerliches Gesetzbuch (German Civil Code, hereinafter 'BGB'), which provides as follows:

'Rights and obligations in the event of transfers of businesses

1. When a business or part of a business is transferred to another owner as a result of a legal transaction, that owner shall take over the rights and obligations arising from the

employment relationship existing on the date of the transfer ...' [5]

11. § 613a BGB also contains the following provisions:

'2. The former employer shall be jointly and severally liable with the new owner in respect of the obligations referred to in paragraph 1, in so far as such obligations arose before the date of the transfer and fall to be met within a year of that date. However, where such obligations fall to be met after the date of the transfer, the former employer shall be liable only in respect of the period before the date of the transfer.

3. ...

4. Termination of an employee's employment relationship by the former employer or the new owner because of the transfer of a business or part of a business shall be null and void. The right to terminate the employment relationship on other grounds shall remain unaffected.'

B — *The provisions of Spanish law*

12. The Directive was transposed into Spanish law by Article 44 of the Estatuto de los Trabajadores (Labour Relations Regulations), [6] which provides that:

'1. The transfer of an undertaking, business or independent production unit of a business shall not in itself terminate the employment relationship, as the new employer takes over the former employer's rights and obligations with respect to employment. ...

2. ...'.

5 — The same provision continues: 'Where those rights and obligations are governed by the provisions of a collective agreement or company agreement, they shall be incorporated in the employment relationship between the new owner and the employee, and may not be altered in a manner unfavourable to the employee within a year of the date of the transfer. The second sentence shall not apply if the rights and obligations under the new owner are governed by the provisions of a different collective agreement or company agreement. The rights and obligations may be altered before the expiry of the period specified in the second sentence if the collective agreement or company agreement ceases to apply or if the terms of another collective agreement, which the new owner and the employee agree is applicable, are not binding on both parties.'

6 — Approved by Real Decreto Legislativo (Royal Legislative Decree) No 1/1995 of 24 March, Boletín Oficial del Estado (Official Gazette, hereinafter 'BOE') of 29 March 1995.

IV — The facts and the questions referred by the national court

A — *Joined Cases C-127/96, C-229/96 and C-74/97*

(1) Case C-127/96, *Hernández Vidal*

13. Prudencia Gómez Pérez and María Gómez Pérez were employed for many years by Contratas y Limpiezas, SL (hereinafter 'Contratas y Limpiezas'), a company engaged in the business of cleaning buildings and premises. Both are cleaners.

14. They were assigned to cleaning duties at the premises of Francisco Hernández Vidal, SA (hereinafter 'Hernández Vidal'), a company engaged in the manufacture of sweets and chewing gum, pursuant to a cleaning contract concluded between Contratas y Limpiezas and Hernández Vidal.

15. That contract, concluded on 1 January 1992 [7] and renewable annually, was terminated on 2 January 1995 by Hernández Vidal, which wished to take over the cleaning of its premises itself and engaged new staff for the purpose. [8] Neither that company nor Contratas y Limpiezas wished to continue the employment relationship with Prudencia and María Gómez Pérez after that date. [9]

16. The two women brought an action for unlawful dismissal against the two companies before the Juzgado de lo Social No 5 (Social Court No 5), Murcia. By judgment of 23 March 1995, that court upheld the claim against Hernández Vidal only and ordered it to re-employ the two women or to pay them damages and to pay their wages for the period from the date of dismissal to the date of service of the judgment.

7 — During the oral procedure, Prudencia and María Gómez Pérez stated that they had worked for Hernández Vidal since 1983 and 1987 respectively and that a new contract had been concluded with that company in 1992.

8 — During the oral procedure Prudencia and María Gómez Pérez stated that, after taking over the cleaning of its premises itself, Hernández Vidal had engaged new staff, who had been shown their duties by the plaintiffs.

9 — As Hernández points out (point II.3 of its written observations), under Spanish law, the transfer of the business of cleaning buildings and premises is subject to special provisions that are highly favourable to employees. The provisions in question are set out in Article 13 of the Ordenanza Laboral para Limpieza de Edificios y Locales (Order relating to workers employed in the cleaning of buildings and premises), approved by administrative order of 15 February 1975 extended by administrative order of 28 December 1994, and Article 37 of the Convenio Colectivo para Limpieza de Edificios y Locales de la Región de Murcia (collective agreement covering workers employed in the cleaning of buildings and premises in the Region of Murcia).
Article 13 of the Ordenanza provides that, when an undertaking in which cleaning services have been provided by a contractor takes over those services itself, it is not obliged to keep on the staff who provided the services on behalf of the contractor if it employs its own staff to do the cleaning. It must, however, do so if it wishes to employ new staff to do the cleaning. Article 13 also provides that employees of a contractor providing cleaning services, whose employment relationship with that contractor is broken when the contract expires, are to be taken on by the new contractor.
Article 37 of the Convenio Colectivo provides that, on the expiry of a contract for cleaning services, staff employed by the outgoing contractor must be taken on by the new contractor, who takes over all the rights and obligations of his predecessor.

17. Taking the view that no transfer of a business or part of a business had taken place and that it could not therefore be held to be a transferee, Hernández Vidal appealed against that judgment to the Tribunal Superior de Justicia (High Court of Justice), Murcia.

18. Considering that the outcome of the case depended on the interpretation of the Directive, the Sala de lo Social (Chamber for Social Matters) of the Tribunal Superior de Justicia, Murcia, referred the following questions to the Court for a preliminary ruling:

'1. Is the work of cleaning the premises of an undertaking whose main business is not cleaning, being in this case the production of chewing gum and sweets, but which has a permanent need for that secondary activity "part of a business"?

2. May the term "legal transfer" cover the termination of a mercantile contract for the provision of cleaning services, after three years, with annual renewals, at the end of the third year, by decision of the undertaking hiring the services; if that is the case, may it depend on whether the undertaking hiring the services carries out the cleaning using its own workers or using workers under a new contractual arrangement?'

(2) Case C-229/96, *Friedrich Santner*

19. From 1980 Friedrich Santner was employed as a cleaner, first by Dörhöffer+Schmitt GmbH (hereinafter 'Dörhöffer+Schmitt') and then by B+S GmbH (hereinafter 'B+S'), which was created after the business of Dörhöffer+Schmitt was split up.

20. Mr Santner was engaged solely in cleaning the bathhouses of Hoechst AG (hereinafter 'Hoechst') under cleaning contracts which Hoechst had concluded with each of the two aforementioned companies in turn.

21. However, Hoechst terminated its contract with B+S and reorganised the cleaning of its bathhouses. It now does the cleaning itself, partly using its own workers and partly in cooperation with other outside firms.

22. On 27 April 1995, B+S terminated its employment relationship with Mr Santner.

Mr Santner took the view that a transfer of an undertaking had occurred and that his employment relationship should be continued with Hoechst. He therefore brought an action against the company before the Arbeitsgericht (Labour Court) Frankfurt am Main.

23. Considering that the outcome of the case depended on the interpretation of the Directive, that court referred the following questions to the Court for a preliminary ruling:

'1. Where, following termination of the legal transfer to an outside firm of the cleaning operations of individual parts of a business, those operations are again carried out by the undertaking itself, can they be treated as part of a business within the meaning of Directive 77/187/EEC?

2. Is the position the same where, following their retransfer to the undertaking, those cleaning operations of individual parts of the business are re-merged into the cleaning operations of the business as a whole?'

(3) Case C-74/97, *Gómez Montaña*

24. The Red Nacional de los Ferrocarriles Españoles (Spanish National Railways, hereinafter 'Renfe') had awarded a contract to the cleaning company Claro Sol SA (hereinafter 'Claro Sol') for the cleaning and maintenance of Pontevedra railway station for the period 16 October 1994 to 15 October 1996.

25. After winning that contract, Claro Sol had engaged Mercedes Gómez Montaña and assigned her to the cleaning and maintenance of that station.

26. For a number of years previously, Mrs Gómez Montaña had been an employee of the cleaning companies that preceded Claro Sol.

27. At the end of the contractual period, Renfe decided not to renew the contract with Claro Sol and to take over the cleaning and maintenance of Pontevedra railway station itself.

28. On 1 October 1996, Claro Sol informed Mrs Gómez Montaña that the employment relationship between them would terminate on 15 October 1996, when the contract between Renfe and Claro Sol expired.

29. Mrs Gómez Montaña brought an action for unlawful dismissal against Claro Sol and Renfe [10] before the Juzgado de lo Social No 1 (Social Court No 1), Pontevedra.

30. The national court notes that, in cases of this kind, the case-law generally considers that Article 44 of the Estatuto de los Trabajadores is not applicable, since what is involved is the termination of a contract for works or services covered by Article 42 of the Estatuto. [11]

31. Considering that the outcome of the case depended on the interpretation of the Directive, that court referred the following question to the Court for a preliminary ruling:

'Does Directive 77/187/EEC of 14 February 1977 cover circumstances in which the termination of a contract with a cleaning company results in the dismissal of the worker employed by the contractor and the cleaning is taken over by the principal, a railway transport undertaking, using its own employees?'

B — *Joined Cases C-173/96 and C-247/96*

(1) Case C-173/96, *Sánchez Hidalgo*

32. The Municipality of Guadalajara had contracted out its home-help service for persons in need to the Sociedad Cooperativa Minerva (Minerva Cooperative Society, hereinafter 'Minerva') which, for this purpose, had been employing Francisca Sánchez Hidalgo and four other employees as home helps for several years.

33. On the expiry of the contract, the municipality entrusted the service in question to the Asociación de Servicios al Minusválido Aser (Association of Services for the Disabled, hereinafter 'Aser') as from 1 September 1994.

10 — Article 6(1) of the Texto Final del XIV Convenio Colectivo de 'Contratas Ferroviarias 1994' (Final Text of the Fourteenth Collective Agreement on Railway Contracts 1994 (BOE of 25 January 1995, No 21, point 217)) provides that a new undertaking which replaces the previous contractor must take on the staff employed at the workplace affected by the transfer and assume the rights and obligations arising from the existing employment relationship. Under Article 23(1) of the Convenio Colectivo de Limpieza de Edificios y Locales de Pontevedra (Collective Agreement on the Cleaning of buildings and premises in Pontevedra, *Informacion Laboral 1996*, No 4090, p. 8586), on expiry of the cleaning contract, the workers of the outgoing undertaking must be taken on by the new contractor, who must assume all the rights and obligations of the previous employer if any of the conditions specified in that provision is fulfilled. Article 23(3) provides that this does not apply in the case of a contractor who is carrying out the cleaning for the first time and has not concluded a maintenance contract.

11 — On the subject of the expiry of contracts for works or services, Article 42 of the Estatuto provides that 'the principal ... shall be jointly and severally liable, for a period of one year following completion of the work contracted out, for the performance of obligations relating to the payment of salaries and/or wages and social security contributions entered into by the contractors with their employees during the period for which the contract remains in force, such liability being limited, however, to that which would have existed if the situation had involved his own employees engaged in the same working categories or posts'.

34. Aser then concluded a new contract with Mrs Sánchez Hidalgo and the other four employees for the same services on a part-time basis but did not recognise their period of service with the previous undertaking.

35. Taking the view that the refusal to take into account their previous service constituted an infringement of Article 44 of the Estatuto de los Trabajadores, the five employees brought proceedings before the Juzgado de lo Social (Social Court), Guadalajara, for a declaration that their employment relationship with Minerva had been taken over by Aser.

36. That court decided that the conditions for the transfer of an undertaking within the meaning of the national legislation were not met and dismissed their action by judgment of 6 July 1995.

37. Mrs Sánchez Hidalgo and the other four employees appealed against that judgment to the Tribunal Superior de Justicia (High Court of Justice) Castilla-la Mancha.

38. In its order for reference, the national court states that, according to the case-law of the Tribunal Supremo (Supreme Court), [12] the protection conferred on employees by Article 44 of the Estatuto de los Trabajadores is applicable only where one of the following circumstances obtains: (a) there is a transfer of material assets from one contracting undertaking to another; [13] (b) that effect is provided for by the rules applicable to the sector (at present, only the collective agreement); (c) there is a specific provision to that effect in the conditions governing tenders for the new contract. However, the national court considers that none of those circumstances obtain in the present case.

39. The national court observes that, although there appears to be no essential difference between the literal tenor of the two provisions (Community and national) as regards the scope of the harmonising Community provision and the domestic provision which transposes it, nevertheless the interpretation of those provisions which is being developed by Spanish and Community case-law does appear to differ as regards the application of that legislation to certain cases such as the one now before the court, where successive contracts have been awarded to different undertakings for the provision of a service for a given principal, whether it be public — as it is in most cases — or private.

12 — Judgment of the Tribunal Supremo of 14 December 1994.

13 — The national court explains that the legal protection prescribed for cases where one undertaking succeeds another is not available where what occurs is that a different undertaking is made responsible for carrying out an activity, without any transfer of assets.

40. The national court's doubts stem from its impression that the Court considers that the Directive is applicable when there is merely a succession in the exercise of an activity, regardless of whether there has been a transfer of assets. [14]

41. Considering that the outcome of the case depended on the interpretation of the Directive, the Social Chamber of the Tribunal Superior de Justicia de Castilla-La Mancha referred the following question to the Court for a preliminary ruling:

'Where an undertaking ceases to provide, for a municipality which had awarded it a contract for this purpose, a home-help service for certain persons in need, and which then awards a new contract for that service to a different undertaking, without there being any transfer of material assets and without there being, either in the collective agreement or in the tendering conditions, any provision pursuant to which the new undertaking must be subrogated to the employment relationship between the workers and the previous undertaking to which the contract had been awarded, is this case to be regarded as falling within the scope of Article 1(1) of Directive 77/187/EEC of 14 February 1977?'

14 — The court refers, in particular, to Case 324/86 *Daddy's Dance Hall* [1988] ECR 739, Case C-29/91 *Redmond Stichting* [1992] ECR I-3189 and Case C-392/92 *Schmidt* [1994] ECR I-1311.

(2) Case C-247/96, *Horst Ziemann*

42. Horst Ziemann had been continuously employed from 1979 to 1995 as a security guard at a medical supplies depot of the Bundeswehr (Federal Armed Forces) at Efringen-Kirchen. During that period he was employed by each in turn of the five security companies successively responsible for maintaining site security at the depot. Most recently, from 1990 to 1995, responsibility for this activity had passed to Ziemann Sicherheit GmbH (hereinafter 'Ziemann Sicherheit').

43. On 30 September 1995, the Bundeswehr terminated the contract with Ziemann Sicherheit and, following an invitation to tender, awarded it to Horst Bohn Sicherheitsdienst (hereinafter 'Horst Bohn').

44. Horst Bohn took on the Ziemann Sicherheit personnel serving at the depot, with the exception of three employees, one of whom was Mr Ziemann.

45. Ziemann Sicherheit, which employs about 160 people to guard other establishments as well, many of which, however, are far away

from the Efringen-Kirchen depot, terminated Mr Ziemann's employment contract with effect from 30 September 1995.

46. On 9 October 1995, Mr Ziemann brought an action before the Arbeitsgericht (Labour Court) Lörrach to have his dismissal declared unlawful. Specifically, he claimed that the termination of the contract for protecting the Bundeswehr medical supplies depot at Efringen-Kirchen and the award of that contract to Horst Bohn amounted to a transfer of part of a business within the meaning of § 613a BGB, paragraph 1, and Directive 77/187/EEC and that Ziemann Sicherheit had dismissed him for reasons related to that transfer, in breach of § 613a BGB, paragraph 4.

47. The two undertakings, Ziemann Sicherheit and Horst Bohn, argued that no transfer of a business could have occurred in this case because there was no legal relationship between them.

48. According to the Arbeitsgericht, it appears from the case-law of the Court, in particular the judgment in *Schmidt*, [15] that the Directive is applicable whenever an undertaking continues or, as in this case, takes on an activity carried on until that time by another undertaking. In its view, the fact that, in the present case, a contract was awarded to a succession of undertakings, whereas in *Schmidt* a branch of a bank was subcontracting the cleaning of its premises to an outside firm for the first time, is not a decisive consideration.

49. In its order for reference, the national court points out that the activity carried on by the various succeeding companies in relation to protecting the medical supplies depot at Efringen-Kirchen was exactly the same.

50. To be precise, the national court states that the contract between the Bundeswehr, which runs the medical supplies depot, and the security outfit is a detailed contract drawn up by the competent military administration and put out to tender. Both the invitation to tender and the contract itself specify in great detail the nature and scope of the security duties entailed; the required number of security guards and accompanying dogs; requirements concerning security personnel [16] *vis-à-vis* qualifications, equipment, training, supervision and weapons instruction.

51. The national court adds that the contract is performed in accordance with the require-

15 — Cited in footnote 14 above.

16 — Article 2 of the site security maintenance contract of 2 January 1990, which is mentioned in the order for reference.

ments specified by the Bundeswehr and on a special legal basis, namely the German Law concerning the Use of Direct Force and the Exercise of Special Powers by Soldiers in the Bundeswehr and Civil Surveillance Personnel [17] of 12 August 1965 (hereinafter the 'UZwGBw').

52. Lastly, the national court observes that contractual relations between employer and employee are to a large extent determined, not only by the above-mentioned German legislation and the contract for the provision of services, but also, irrespective of the employer's identity, by the basic collective agreement and the collective wage agreements for the security industry, which are recognised as being of general application.

53. The national court is consequently inclined to the view that it is in fact dealing with part of the Bundeswehr's business, namely 'site security maintenance'. It also considers that, since the Bundeswehr predetermines the form of the contract and since the site and equipment are the same and the same security personnel have been deployed for years, the 'economic entity' in question retains its identity, even if on each occasion a different employer actually runs it.

17 — Gesetz über die Anwendung unmittelbaren Zwanges und die Ausübung besonderer Befugnisse durch Soldaten der Bundeswehr und zivile Wachpersonen, Bundesgesetzblatt (Official Gazette), I, p. 796.

54. Considering that the outcome of the case depended on the interpretation of the Directive, the Arbeitsgericht Lörrach referred the following questions to the Court for a preliminary ruling:

'1. Do Article 1(1) and Article 4(1) of Council Directive 77/187/EEC also apply to the transfer of part of a business, such as the task of guarding a military installation, where there is no direct legal transfer between successor contractors (surveillance undertakings)?

2. Is that at any rate the case if, on termination of the contract, the part of the business reverts to the body awarding the contract, which then immediately enters into a contract for services with a successor which contains essentially the same standard conditions?

3. Is there at any rate a transfer of a business within the meaning of Article 1(1) of Directive 77/187/EEC if essentially the same employees continue to perform the same surveillance duties on essentially the same terms, which are determined to a large extent by the body awarding the contract?'

V — The questions referred by the national court

A — *The need to answer the questions*

55. I should point out, first, that most of the questions raised in these cases — with the exception of the question concerning the concept of a transferable economic entity raised in Case C-247/96 *Horst Ziemann* — could be answered on the basis of the case-law of the Court and in particular on the basis of its judgment in Case C-13/95 *Süzen*. [18] In my view, that judgment gives detailed indications for the national courts as to the criteria to be employed and the relative weight to be attached to them. The national courts nevertheless insist on the need for a preliminary ruling on the questions they have referred, in view of the special features of the circumstances in each case and, in particular, of the manner in which the transfers were carried out.

56. I consider that in the light of the Court's case-law, which answers most of the questions raised in the present cases, the national courts should be given general answers providing them with interpretative criteria that will enable them to classify the facts, a task which it is not for the Court itself to perform. Any other course would divert the Court from its true function, as defined in Article 177 of the Treaty, and would diminish the role of the national court in the administration of ordinary law within the Community legal order. In accordance with Article 177, 'it is clear therefore that the Court has never attempted wholly to displace national courts, and traditionally leaves certain matters to be decided by the referring court'. [19]

B — *The case-law of the Court*

57. It should be observed at the outset that — pursuant to Article 100 of the EC Treaty, which is the legal basis for the Directive — the sole criterion for determining whether an activity falls within the scope of the Directive is whether it constitutes an economic activity within the meaning of Article 2 of the

18 — This judgment has already been mentioned in footnote 2.

19 — This point was made by Advocate General Jacobs in point 45 of his Opinion in Case C-338/95 *Wiener* [1997] ECR I-6495, in which he also raised the broader issue of the appropriate division of tasks between the Court and national courts and suggested that the Court should exercise self-restraint and focus on important issues of Community law (points 8 et seq.), a suggestion which the Court did not follow in that case. However, Mr Jacobs added (point 45): 'It seems to me that, if it is open to the Court to reformulate questions and to give a reply which, in some cases, significantly diverges from the terms of the question referred in order to focus on the relevant Community law issues, it must also be open to the Court to exercise self-restraint and to limit itself to more general issues of interpretation.'

Treaty. [20] There can be no doubt that cleaning, the maintenance [21] and protection of various premises, and provision of home-help services for persons in need are examples of such economic activities.

58. It should also be borne in mind that, according to the established case-law of the Court, [22] the purpose of Directive 77/187 is 'to ensure that the rights of employees are safeguarded in the event of a change of employer by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor. The Directive is therefore applicable wherever, in the context of contractual relations, there is a change in the legal or natural person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the undertaking'.

59. The Court has also repeatedly ruled [23] that 'the decisive criterion for establishing the existence of a transfer within the meaning of the Directive is whether the entity in question retains its identity, as indicated *inter alia* by the fact that its operation is actually continued or resumed'.

60. According to the case-law cited above, there are two basic conditions for establishing the existence of a transfer of an undertaking, business or part of a business: (a) the undertaking, business or part of a business must constitute an economic entity at the outset, and (b) that entity must continue to exist after the change of ownership.

61. The Court has also ruled on a number of occasions [24] that 'the Directive is applicable wherever, 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. Thus, there is no need, in order for the Directive to be applicable, for there to be any direct contractual relationship between the transferor and the transferee: the transfer may also *take place in two stages, through the intermediary of a third party*, such as the owner or the person putting up the capital' (my emphasis).

20 — The concept of an 'economic activity' within the meaning of Article 2 of the Treaty covers the pursuit of an activity as an employed person or the provision of services for remuneration; see, for example, Case 196/87 *Steymann* [1988] ECR 6159, paragraph 10, and Case 13/76 *Donà* [1976] ECR 507, paragraph 12.

21 — Of an undertaking's photocopiers, lifts and electrical appliances, for example.

22 — See Case 101/87 *Bork* [1988] ECR 3057, paragraph 13. See also Joined Cases 144/87 and 145/87 *Berg* v *Besselsen* [1988] ECR 2559, paragraph 12, and Case C-305/94 *Rotsart de Hertaing* [1996] ECR I-5927, paragraph 16.

23 — See *Süzen*, cited in footnote 2, paragraph 10; Case 24/85 *Spijkers* [1986] ECR 1119, paragraphs 11 and 12; and, most recently, Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253, paragraph 16.

24 — See, for example, *Süzen*, paragraph 12, and *Merckx and Neuhuys*, paragraph 28.

62. It is therefore clear from the case-law of the Court that the mode of the transfer is immaterial and that the Directive applies wherever, in the context of contractual relations, there is a change in the natural or legal person who incurs the obligations of an employer towards employees of the undertaking. [25] In other words, wherever there is an economic entity to begin with and that entity retains its identity after the transfer, the mode of the transfer is of little significance. [26]

63. The Directive does not, however, define the terms 'undertaking', 'business' and 'part of a business'. The Court, in its case-law, provides a set of criteria for determining when there is an 'undertaking', 'business' or 'part of a business' and when there is a 'legal transfer' or when it is appropriate to speak of a 'transfer'.

64. It should be noted that, in his Opinion in *Schmidt*, [27] Advocate General Van Gerven pointed out that 'the Court recognises a common denominator underlying the three concepts of "undertaking", "business" and "part of a business", namely [the concept] of an "economic unit" ..., [a term] which, in my opinion, refer[s] to a unit with a minimum level of *organisational independence*, which can exist by itself or constitute part of a larger undertaking'.

65. However, the Court has held [28] that 'for the Directive to be applicable, ... the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract ... The term entity thus refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective'. [29]

66. In my view, the Court must make it clear that the term economic entity does not refer only to an organised grouping involving both persons and assets, since if it did, the protection offered by the Directive would be unavailable to entire sectors of activities in which the workforce is the main factor and the tangible or intangible assets are insignificant.

67. As regards the first criterion formulated by the Court, namely the extent to which there is a part of a business or a business, I believe it is important to take account of the specific nature of the economic activity in each particular case, such as, for example, the

25 — See, for example, *Merckx and Neuhuys* and *Süzen*, cited above in footnotes 23 and 2 respectively.

26 — For example, in Case 287/86 *Ny Mølle Kro* [1987] ECR 5465, paragraph 14 and, particularly, paragraph 15, the Court held that the Directive is applicable where the owner of a leased undertaking resumes its operation following a breach of the lease by the lessee.

27 — Point 13.

28 — See, for example, Case C-48/94 *Rygaard* [1995] ECR I-2745, paragraphs 20 and 21, and *Süzen*, cited in footnote 2 above, paragraph 13.

29 — It is interesting to note that Article 1(1)(b) of Directive 98/50 provides that there is a transfer within the meaning of that Directive 'where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'.

cleaning of certain premises. In principle, in the absence of evidence to the contrary, this is an activity, as the Commission rightly points out, in which the human factor is the main consideration and the material factors (tools, etc.) are quite clearly less important.

68. There are thus certain activities where, in the event of a transfer, the material component of the activity transferred is insignificant. What is important in such cases and what accounts for the turnover is the fact that '*unskilled labour*' is employed. Cleaning services, in particular, clearly fall into that category.

69. Consequently, neither the fact that an undertaking providing cleaning services has no actual assets — whether tangible (buildings, tools and equipment, etc.) or intangible (know-how, goodwill, etc.) — nor the fact that, if awarded a contract, it is provided with only minimal resources by the client undertaking, [30] means that the service provided cannot be an organised and independent economic entity. Otherwise, whole categories of undertakings with the above characteristics would probably receive no protection under the Directive and their employees — those most in need of that protection — would be effectively deprived of it, because no significant tangible or intangible factors of production are involved.

70. I therefore believe it ought to be clearly stated that in certain labour-intensive sectors, the idea of a group of employees engaged in a joint activity on a permanent basis [31] is of decisive importance. [32] Consequently, an organised group of employees engaged in a joint activity and pursuing a specific objective over a number of years in the same workplace may, even where there are no other significant factors of production, tangible or intangible, constitute an economic entity and accordingly fall within the scope of the Directive.

71. Indeed, this follows indirectly from the judgment in *Süzen*, [33] according to which: '... Where in particular an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets'.

30 — For example, use of the client's electricity, heating and refrigerators on the premises where the cleaning or maintenance, etc. is carried out.

31 — *Süzen*, paragraph 21.

32 — In this connection, see Vivien Shrubsall, 'Competitive tendering, Out-sourcing and the Acquired Rights Directive', Modern Law Review, 1998, pp. 85 to 92, p. 88.

33 — Paragraph 18.

72. Moreover, the Court has consistently held that it is for the national courts to determine whether the Directive is *indeed* applicable, taking into account the factual considerations listed 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 characterising 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. 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.' [34] (my emphasis).

73. The case-law cited above shows clearly that, in the case of contracts between undertakings, the mere fact that the service provided by the old and the new awardees of a contract is similar does not of itself justify the conclusion that an economic entity has been transferred. In this connection, the Court ruled in *Süzen* [35] that: 'An entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it'. [36]

74. For example, when the whole cleaning business is transferred, that means that all its

34 — See also *Redmond Stichting*, cited in footnote 14 above, paragraph 24, in Case C-209/91 *Watson Rask* [1992] ECR I-5755, paragraph 20, and *Süzen*, cited in footnote 2 above, paragraph 14.

35 — Paragraph 15.

36 — In paragraph 17 of its judgment in *Schmidt*, the Court refers to its judgments in *Spijkers*, paragraph 11, and *Redmond Stichting*, paragraph 23, according to which '... the retention of that identity [that of an economic entity] is indicated *inter alia* by the actual continuation or resumption by the new employer of the same or similar activities' (my emphasis). It concluded that, in the case at issue, where all the relevant information was contained in the order for reference, 'the similarity in the cleaning work performed before and after the transfer, which is reflected, moreover, in the offer to re-engage the employee in question, is typical of an operation which comes within the scope of the Directive and which gives the employee whose activity has been transferred the protection afforded to him by that Directive'. However, in my view, the Court's use of the term '*inter alia*' means that the pursuit of an economic activity is not the only criterion for determining whether a transfer of an undertaking, business or part of a business has occurred and that other facts must also be taken into account. In that particular case, the Court also took into account the offer to re-engage the sole employee of the part of the business in question. In its judgment in *Süzen*, paragraph 21, it confirmed that this is a relevant factor, albeit in combination with a number of others. The judgment in *Schmidt* was not well received: see, for example, Jean Déprez, 'Transfert d'entreprise. La notion de transfert d'entreprise au sens de la directive européenne du 14 février 1977 et de l'article L 122-12, alinéa 2 du code du travail: jurisprudence française et communautaire', in RJS, 5/95, pp. 315-321. See also Dr. Manfred Zuleeg, 'Ist der Standard des deutschen Arbeitsrechts durch europäische Rechtsprechung bedroht? Bemerkungen zum Urteil Christel Schmidt des Europäischen Gerichtshofs', in 'Das Arbeitsrecht der Gegenwart', pp. 41-54, and Dr. Bernd Waas, 'Betriebsübergang durch 'Funktionsnachfolge'?', in EuZW 17/94, pp. 528/532.
It is interesting to note that, shortly after the judgment in *Schmidt* and as a result of the critical response it provoked, the Commission incorporated in its Proposal for a Directive (94/C 274/08) COM(94)300 final — 94/0203(CNS) (OJ 1994 C 274, p. 10) amending Directive 77/187 a provision (Article 1(1), second subparagraph) which read: 'The transfer of an activity which is accompanied by the transfer of an economic entity which retains its identity shall be deemed to be a transfer within the meaning of this Directive. The transfer of only an activity of an undertaking, business or part of a business, whether or not it was previously carried out directly, does not in itself constitute a transfer within the meaning of the Directive'. That proposal was strongly criticised, both by the Parliament (OJ 1997 C 33, p. 81), which adopted Amendment 4 deleting that subparagraph, and before that by the Committee of the Regions (OJ 1996 C 100, p. 25, point 1.1) and the Economic and Social Committee (OJ 1995 C 133, p. 13, points 1.2.3 and 1.3); it was not in the end incorporated in Directive 98/50.

employees are transferred. In addition, its main assets are the order book, the list of customers, the way in which the work is organised, etc. In this case, there is no doubt as to the interpretation and application of the provisions of the Directive. On the other hand, the question does arise in the case of the transfer — or, to be more specific, the loss — to a competitor of a service contract for cleaning one or more establishments, entailing the loss of a single customer (for example, a contract for cleaning a single office).

75. The Court held in *Süzen* [37] that: 'The mere loss of a service contract to a competitor cannot ... by itself indicate the existence of a transfer within the meaning of the Directive. In those circumstances, the service undertaking previously entrusted with the contract does not, on losing a customer, thereby cease fully to exist, and a business or part of a business belonging to it cannot be considered to have been transferred to the new awardee of the contract'.

76. The Court also noted, in its judgment in *Süzen*, [38] that 'although the transfer of assets is one of the criteria to be taken into account by the national court in deciding whether an undertaking has in fact been transferred, the absence of such assets does not necessarily preclude the existence of such a transfer ...'.

77. The Court went on to say, in the same judgment, [39] that 'the national court, in assessing the facts characterising the transaction in question, must take into account among other things the type of undertaking or business concerned. It follows that the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of the Directive will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business. Where in particular an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets'.

78. At this point, I feel I must draw attention to the theoretical and practical confusion that arises when the new awardee's readiness to take over the majority of the staff assigned by his predecessor to performance of the contract is employed as a criterion to determine whether the entity constituted by the previous awardee can be regarded as the subject of a transfer within the meaning of the Directive.

37 — Paragraph 16.

38 — Paragraph 17. See also *Schmidt* and *Merckx and Neuhuys*, cited in footnotes 14 and 23 above, paragraphs 16 and 21 respectively.

39 — Paragraph 18.

79. It is true that the Court pointed out in this connection, in its judgment in *Süzen*, [40] that 'the factual circumstances to be taken into account in determining whether the conditions for a transfer are met include in particular, in addition to the degree of similarity of the activity carried on before and after the transfer and the type of undertaking or business concerned, the question whether or not the majority of the employees were taken over by the new employer'. It added: [41] 'Since in certain labour-intensive sectors a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, it must be recognised that such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task. In those circumstances, as stated in paragraph 21 of *Rygaard*, cited above, the new employer takes over a body of assets enabling him to carry on the activities or certain activities of the transferor undertaking on a regular basis'.

80. In my view, however, the use of this criterion would cause confusion because, if — in order to determine whether or not there has been a transfer — particular importance is to be attached to whether or not the transferee or contractor intended to take over the staff of the transferor or body awarding the contract, it would mean that the protection afforded by the Directive depends essentially on the intentions of the parties. It could be argued that this cannot be a decisive criterion in determining the protection to be afforded by the Directive because, as some Member States have rightly pointed out in their written observations, it begs the question: the result achieved by applying the Directive becomes a condition determining whether it is to apply. [42] This absurd conclusion, or vicious circle, is clearly contrary to the intention of the Community legislature, which was to protect employees in the event of a change in the ownership of the undertaking, business or part of a business as a result of a legal transfer or merger. The negative repercussions for employees of admitting readiness to take over staff as a decisive criterion for the application of the Directive cannot be neglected. [43]

81. In other words, there is to my mind a certain contradiction between the idea of using re-engagement of the major part of the staff by the new employer as a criterion for determining the application of the protective provisions of the Directive, on the one hand, and the purpose of those provisions, namely to protect employees in the event of a transfer, on the other.

40 — Paragraph 20. See also *Spijkers*, cited in footnote 23 above, paragraph 13.

41 — Paragraph 21.

42 — On this theme, see, for example, Patricia Pochet, 'CJCE: l'apport de l'arrêt *Schmidt* à la définition du transfert d'une entité économique', in 'Droit social', November 1994, pp. 931-935, in particular p. 934, where she rightly speaks of *petitio principii*. See also Vivien Shrubsall's analysis of the problem, op. cit., p. 87.

43 — In any case, the question still remains of who is to pay damages in the event of dismissal.

82. In *Rotsart de Hertaing*, [44] which — admittedly — concerned the interpretation of Article 3(1) of the Directive, the Court was able to avoid the issue, ruling in the light of earlier case-law [45] that 'in the event of the transfer of an undertaking, the contract of employment or employment relationship between the staff concerned and the undertaking transferred may not be maintained with the transferor and is automatically continued with the transferee'. [46] It concluded that 'contracts of employment or employment relationships existing on the date of the transfer of an undertaking between the transferor and the workers employed in the undertaking transferred are automatically transferred to the transferee by the mere fact of the transfer'. [47] In the same judgment, the Court added [48] that '... by reason of the mandatory nature of the protection afforded by the Directive, and in order not to deprive workers of that protection in practice, the transfer of the contracts of employment may not be made subject to the intention of the transferor or the transferee, and more particularly ... the transferee may not obstruct the transfer by refusing to fulfil his obligations'.

83. It is a feature of all these cases that they concern undertakings, businesses or parts of businesses in which the human factor, the workforce, is the main consideration and the tangible or intangible assets are of little or no importance.

84. For these reasons, I consider that in the case of undertakings, businesses or parts of businesses in which the human factor, the workforce, is the main consideration, the presence of a group of workers engaged in a joint activity on a permanent basis — a group that is taken over by the transferee or contractor — is of decisive importance. In other words, the question whether there has been a transfer of an undertaking, business or part of a business should be considered in the light of that factor; and that should be the criterion for determining the application of the Directive, rather than the — to my mind — unimportant issue of whether or not a certain number, or even the majority, of the staff have been re-engaged by the new employer.

85. By using that criterion, it will be possible to avoid situations where, for example, a transferee is free to take over workers with special skills or know-how and dismiss unskilled or low-skilled workers, that is to say, those most in need of the protection afforded by the Directive. [49]

44 — Paragraph 18. That case concerned the applicability of the Directive in the event of the termination of the employment contract of an employee of a company in liquidation, whose activities were taken over by another newly formed company operating from the same premises.

45 — See Case C-362/89 *D'Urso* [1991] ECR I-4105, paragraph 12.

46 — See also Vivien Shrubsall's analysis of the problem, op. cit., p. 87.

47 — See *D'Urso* and *Rotsart de Hertaing*, cited in footnotes 45 and 22 above, paragraphs 20 and 18 respectively.

48 — Paragraph 20.

49 — On this point, see Vivien Shrubsall, op. cit., p. 92.

86. I do not dispute that the factor of intention, in the sense of the wishes or actions of the parties (the transferor or the body awarding the contract and the transferee or the new contractor), also constitutes a criterion for determining whether or not a transfer has occurred. That factor cannot be disregarded. The readiness to take over all or most of the employees, in terms of their numbers and skills, is undoubtedly an important factor and one that should prompt the court adjudicating on the merits to consider carefully whether there are any other factors indicative of a transfer of an economic entity. In other words, I have been pursuing this line because of the particular nature of the undertaking or business at issue in the present case. I repeat that the Court has taken this factor into account, notably in its judgment in *Spijkers*.

87. This approach also has the advantage of reconciling the principle of economic freedom, the freedom to enter into contracts with all the attendant risks that freedom entails, on the one hand, with the principle of subrogation in the event of transfers and protection of employees, on the other.

C — *Joined Cases C-127/96, C-229/96 and C-74/97*

88. It must be borne in mind that the Court has never had occasion to consider a case in which one undertaking, having entrusted the cleaning of its premises to another, decides to terminate the contract and take over the cleaning work again itself (resumption in-house). [50]

(1) Case C-127/96, *Hernández Vidal*

(a) Question 1

89. As regards the point raised in the first question — to what extent application of the Directive is affected by whether the activity at issue is the main business of the undertaking or a secondary activity — [51] the case-law is quite clear.

90. In *Redmond Stichting*, the Court held that the transfer by one undertaking to another

50 — In fact, the circumstances in *Schmidt* were the precise reverse: in that case, one undertaking contracted out to another cleaning work that it had previously done itself, even though the activity in question had been performed, prior to the transfer, by a single employee. In *Süzen*, an undertaking had terminated the contract for cleaning its premises and concluded a new contract for the same work with a different undertaking.

51 — I should point out that Article 1(1)(b) of Directive 98/50 provides that there is a transfer within the meaning of the Directive where there is 'a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity *whether or not that activity is central or ancillary*' (my emphasis).

of only part of its activities [52] (namely, the provision of assistance to drug addicts but not the organisation of social and recreational activities) did not necessarily preclude the application of the Directive. The Court observed [53] that the mere fact that the organisation of social and recreational activities is '*said to have constituted an independent function* is not sufficient 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'. [54]

91. In *Watson Rask*, [55] the Court made the following observation: [56] 'Thus, where one businessman entrusts, by means of an agreement, responsibility for running a facility of his undertaking, such as a canteen, to another businessman who thereby assumes the obligations of employer vis-à-vis the employees assigned to that facility, the resulting transaction may fall within the scope of the Directive, as defined in Article 1(1). The fact that in such a case the activity transferred is *merely an ancillary activity for the transferor without a necessary connection with its company objects* cannot have the effect of excluding that transaction from the scope of the Directive'. [57]

92. Consequently, bearing in mind the points made in section (B) above, I take the view that the work of cleaning the premises of undertakings — an activity for which they have a permanent need even where their main business is not cleaning — may fall within the scope of the Directive if it is carried out by a stable group of employees pursuing a specific objective; this holds true even where there has been no transfer of significant tangible or intangible assets, provided that there is an economic entity and that that entity retains its identity after the transfer.

(b) Question 2

93. The second question referred by the national court has two branches. It first seeks to ascertain whether the term 'legal transfer' may cover the termination of a mercantile contract for the provision of cleaning services; secondly, it asks whether, if that is the case, it may depend on whether the undertaking

52 — The undertaking at issue in that case was a Dutch foundation engaged in assisting drug addicts.

53 — Paragraph 30.

54 — My emphasis.

55 — The undertaking at issue in this case, to which I have already referred in footnote 34, was Philips, which had entrusted the management of its four staff canteens to a catering company, ISS. Under that arrangement, ISS agreed to take over Philips' canteen staff (about ten people) on the same terms and conditions, while Philips agreed to pay a fixed monthly fee and offer certain remuneration in kind. Thus, Philips provided ISS with premises and equipment, electricity, heating and telephones, wardrobe facilities and refuse removal, and supplied it with various products at wholesale prices. The Court held that the Directive was applicable.

56 — Paragraph 17.

57 — My emphasis.

hiring the services carries out the cleaning using its own workers or using workers under a new contractual arrangement.

94. As I explained earlier, provided that there is an economic entity and that entity retains its identity after the transfer, the mode of transfer is immaterial. The fact that the transfer takes the form of a contract under which certain activities are entrusted by one undertaking to another and that those activities are subsequently resumed by the first undertaking after the termination of the contract is not, in my view, decisive for the application of the Directive, provided the other conditions described above are met.

95. It is true that, when the whole cleaning business is transferred, the transfer includes an organised group of employees and the main assets, comprising the order book, the list of customers, the way in which the work is organised, etc. In such cases, there is clearly no particular problem concerning the application of the protective provisions of the Directive.

96. The problem does arise, however, when the transfer does not include the whole cleaning business but only part of it, relating to a single customer.

97. In *Watson Rask*, the Court held [58] that: 'First, the decisive criterion for establishing whether there is a transfer for the purposes of the Directive is whether the entity in question retains its identity, as indicated *inter alia* by the fact that its operation is actually continued or resumed'. [59] It added [60] that it is necessary to consider all the facts characterising the transaction in question, including whether or not the majority of employees are taken over by the new employer.

98. In the present case, it is apparent from the contract concluded between Hernández Vidal and Contratas y Limpiezas that, although the employees worked in the premises of the former undertaking, their employment relationship was with the latter. Moreover, no offer was made to re-engage Prudencia and María Gómez Pérez after the contract between Hernández Vidal and Contratas y Limpiezas expired.

58 — Judgment cited in footnote 34 above, paragraph 19.

59 — See also *Schmidt*, *Spijkers* and *Redmond Stichting*, cited in footnotes 14, 23 and 14 above, paragraphs 17, 11 and 23 respectively.

60 — Paragraph 20.

99. I consider that the similarity in the cleaning work done before and after the termination of the contract cannot be regarded as a decisive factor for determining whether or not there is a transfer. Nor is an offer on the part of the new contractor to re-engage the employee sufficient in itself to resolve that question.

100. In my view, it is for the national court to assess in such cases, on the basis of the criteria defined by the Court — in particular by determining whether there is a group of workers engaged in a joint activity on a permanent basis and whether it is taken over by the transferee or contractor — whether the entity at issue is a business or part of a business, and whether that business or part of a business has been the subject of a transfer which brings the employees concerned within the scope of the Directive.

101. As regards the second branch of Question 2, it is, I think, sufficient to point out that the Court has consistently ruled that the Directive is applicable wherever there is a change in the person responsible for carrying on the business and there is no need for there to be any direct contractual relationship between the transferor and the transferee. [61]

102. Thus, in order to ascertain whether the conditions for the transfer of an economic entity are met, it is necessary to consider all the facts characterising the transaction in question. Accordingly, it is necessary to determine 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. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation. [62]

103. In view of the specific nature of cleaning activities, the answer to the question whether or not there has been a transfer depends not so much on the transfer of certain material assets (electrical and other equipment used for the work), as on whether or not a majority of the employees are taken over by the new employer, whether or not the customers are transferred and the degree of similarity between the activities carried on before and after the transfer. In any event, it is for the national court to establish in each case, in the light of the criteria for interpretation set out above, whether or not there has been a transfer.

61 — See, for example, *Merckx and Neuhuys*, *Daddy's Dance Hall*, *Bork* and *Redmond Stichting*, cited in footnotes 23, 14, 22 and 14 above, paragraphs 30, 10, 14 and 13 respectively.

62 — See, in particular, *Spijkers* and *Redmond Stichting*, cited in footnotes 23 and 14 above, paragraphs 13 and 24 respectively.

104. Finally, I should point out that the Directive seeks to provide a minimum level of protection for employees to ensure that their rights are safeguarded in the event of transfers of undertakings, businesses or parts of businesses. There is, moreover, a consistent body of case-law [63] to the effect that 'the rules of the Directive, in particular those concerning the protection of workers against dismissal by reason of the transfer, must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees'. This does not affect the right of Member States, under Article 7 of the Directive, to apply or introduce provisions which are more favourable to employees.

(2) Case C-229/96, *Friedrich Santner*

(a) Question 1

105. The first question referred by the national court seeks to ascertain whether, in a case where, following termination of the legal transfer to an outside firm of the cleaning operations of individual parts of a business, those operations are again carried out by the undertaking itself, they can be treated as part of a business within the meaning of the Directive.

106. I should point out, first, that, as the Court has stated, [64] the number of persons employed by a business is not a decisive factor in determining whether or not there is a stable economic entity whose activity is not limited to performing one specific works contract. [65]

107. However, to determine whether there is a stable economic entity, the national court must consider first whether it is dealing with an organised grouping of persons and assets or simply of persons, that is to say, a grouping of employees who constitute a stable unit by virtue of the fact that they are engaged in a particular economic activitiy and pursue the same objective, in the sense defined above. It must then determine whether that grouping has retained its identity.

108. I should also point out that, in the present case, the existence of part of a business within the meaning of the Directive is not precluded by the fact that Hoechst has carried out part of the cleaning operations itself, using its own workers, following termination of the legal transfer of the opera-

63 — See, for example, *Daddy's Dance Hall*, cited in footnote 14 above, paragraph 14, and Case C-319/94 *Jules Dethier Equipement* [1998] ECR I-1061, paragraph 40.

64 — See, for example, *Rygaard* and *Süzen*, cited in footnotes 28 and 2 above, paragraphs 20 and 13 respectively.

65 — I note that, in *Schmidt*, cited in footnote 14 above, the fact that the cleaning activity was performed by a single employee did not prevent the Court from deciding (paragraph 15) that there was a stable economic entity. It added that the protection afforded by the Directive cannot depend on the number of employees assigned to the part of the business transferred.

tions in question to an outside firm. The part of the operations concerned is the cleaning of certain bathhouses, a service which each of Mr Santner's employers had in turn contracted to provide. In such cases, the protection afforded by the Directive is extended to the employees assigned to that part of the business, since, as the Court has ruled, [66] 'an employment relationship is essentially characterised by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties'.

109. For the rest, I consider that this question should receive the same answer as the first question in Case C-127/96 *Hernández Vidal.*

(b) Question 2

110. The second question seeks to ascertain whether the position is the same where, following their transfer back to the undertaking, those cleaning operations of certain parts of the business premises are re-merged with the cleaning operations of the premises as a whole.

111. According to the German Government, the Directive is not applicable, there being no economic entity that retained its identity after the transfer, since the cleaning operations were shared between Hoechst, which used its own employees for the purpose, and outside firms. The Commission also takes that view.

112. It is apparent from the documents in the case that Hoechst never offered to re-engage Mr Santner [67] and that it did in fact take over all the cleaning operations in connection with its bathhouses but entrusted them partly to its own employees [68] and partly to outside firms. It also appears that no other material or organisational assets were returned to Hoechst after the termination of the contract.

113. I should emphasise, in this connection, that it is for the national court to establish whether the business retained its identity after the transfer, in the light of the various criteria defined by the Court and taking account of the specific nature of the business and of activity of cleaning business premises, as set out above.

114. I would point out, however, that Article 4(1) of the Directive states that the transfer of

66 — See Case 186/83 *Botzen* [1985] ECR 519, paragraph 15, and *Schmidt*, cited in note 14 above, paragraph 13.

67 — Unlike the situation in *Schmidt.*

68 — According to the documents before the Court, the employees in question were disabled people specially trained for the purpose.

an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee but that this provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce. Moreover, the Court has held [69] that both the transferor and the transferee have the power to effect such dismissals.

(3) Case C-74/97, *Gómez Montaña*

115. The national court asks whether the Directive covers circumstances in which the termination of a contract with a cleaning company results in the dismissal of the worker employed by the contractor and the cleaning is taken over by the principal, a railway transport undertaking, using its own employees.

116. I should emphasise, first, that, in accordance with the arguments developed above, the fact that Renfe took over the cleaning of Pontevedra railway station itself instead of entrusting it to another outside firm is not decisive in determining the answer to be given to the national court.

117. Moreover, in the light of the facts given by the national court and the written observations submitted in the course of the procedure, I consider that Renfe's decision to take over the cleaning and maintenance of the station itself is clearly a case of continuing the same economic activity. However, the national court will have to determine, in the light of the criteria set out above which are derived from the case-law of the Court, whether Claro Sol transferred a stable economic entity to Renfe. It is apparent from the order for reference that all that Claro Sol transferred to Renfe was responsibility for the cleaning and maintenance of the station, so it simply lost a contract for services to the contracting body, a loss that cannot in itself establish the existence of a transfer within the meaning of the Directive.

118. In other words, although Claro Sol lost a customer, it has not thereby ceased fully to exist, and a business or part of a business belonging to it cannot be considered to have been transferred to the new awardee of the contract. [70]

69 — See *Jules Dethier Equipement*, cited in footnote 63 above, paragraph 37.

70 — See also *Süzen*, cited in footnote 2 above, paragraph 16.

119. The national court will, however, have to determine whether, in order to provide the services in question, that is to say in order to carry out the work, Claro Sol needed a certain number of employees (workers or managerial staff) and certain assets, minimal though they might be (tools, equipment).

120. Similarly, the national court will have to consider whether there was a transfer of an organised grouping of employees, or at least a major part of such a grouping, in terms of their numbers and skills, or whether there was a transfer of operating methods or the way in which the work is organised, before deciding in the light of all these indications whether or not there was a transfer.

121. It is thus for the national court to decide, on the basis of the abovementioned criteria, whether or not there was an economic entity after the transfer, bearing in mind the fact that Renfe itself took over the cleaning of the Pontevedra railway station, using its own employees, and that it did not engage Mrs Gómez Montaña after the termination of its contract with Claro Sol, which had employed her for the whole of the period covered by the contract. If those criteria are not satisfied, the answer to the question must be in the negative.

122. Moreover, as I have already pointed out, the fact that the cleaning work is ancillary to Renfe's main business, which is rail transport, does not — according to the case-law of the Court — preclude the possibility that there may be a transfer of a business or part of a business within the meaning of the Directive. Nor should particular importance be attached to the number of employees assigned to the part of the business in question, if other factors suggest that there has been a transfer.

123. Lastly, it should be borne in mind that Article 7 of the Directive states that Member States may apply or introduce laws, regulations or administrative provisions which are more favourable to employees.

D — *Joined Cases C-173/96 and C-247/96*

(1) Case C-173/96, *Sánchez Hidalgo*

124. In order to answer the question referred by the national court, it is necessary on the one hand to take account of the various criteria laid down by the Court for establishing whether there has been a transfer of a business or part of a business and, on the other, to determine whether the economic entity transferred has retained its identity after the transfer.

125. It is apparent from the documents that the activity at issue in this case is one in which the human factor is paramount and the material assets (buildings, equipment, organisation of the work, know-how, etc.) are of lesser importance.

126. Thus, in so far as this is a labour-intensive sector, the criterion of a group of workers, in the sense of a group of employees engaged in a joint activity on a permanent basis, [71] is of decisive importance. It is for the national court to determine whether there is such an organised grouping. The fact that such employees, as a group, are engaged by the new owner may indicate that there is a transfer within the meaning of the Directive, even if no significant tangible or intangible assets have been transferred.

127. The national court must also establish, for example, the degree of similarity between the activities carried on before and after the transfer [72] and the structure of the undertakings in question, that is to say, how they are staffed, how they operate, etc. [73]

128. In other words, it is for the national court to establish whether there is a transfer of part of a business, by determining whether the home-help service has been continued with the same team of home helps, possibly assisted by other employees, whether the same timetable has been kept, whether the service is provided for the same people, etc.

129. The fact that the Municipality of Guadalajara, after putting the contract out to tender again, awarded it to a different undertaking is not, in my view, a decisive factor that should affect the answer to be given by the Court and thus preclude the application of the Directive; it is undoubtedly sufficient that too much time should not have elapsed between the two transfers.

130. In other words, there must be a close temporal connection between the expiry of a contract and its award to another operator. The length of the interval must be considered by the national court in the light of the facts and the nature of the business in question but it is enough in any event if the useful effect

71 — See *Süzen*, cited in footnote 2 above, paragraph 21.

72 — To be more precise, it must consider the particular characteristics of the activity exercised first by Minerva and then by Aser, under the contract concluded by those companies with the Municipality of Guadalajara, that is to say, it must decide whether or not these home-help services were the same.

73 — The Commission notes (at point 8 of its written observations) that, in a report submitted to the municipality, Aser explains that its structure is based on a number of teams of home helps, with a coordinator and a technical team trained by specialists (social workers, psychologists, etc.).

of the protective provisions of the Directive is preserved. [74]

131. Similarly, too much importance — to the point of affecting the Court's answer — ought not to be attached to the fact that there is no provision, either in the collective agreement or in the tendering conditions, to the effect that the new undertaking to which the service was entrusted after the contract had been put out to tender must be subrogated to the previous contractor *vis-à-vis* its employment relationship with the workers. Indeed, 'by reason of the mandatory nature of the protection afforded by the Directive, and in order not to deprive workers of that protection in practice,' [75] the application of the Directive cannot be made to depend on whether or not a collective agreement or tendering conditions contain a provision to that effect, since its application depends on a number of circumstances, in fact and in law, [76] which will determine whether or not there has been a transfer.

(2) Case C-247/96, *Horst Ziemann*

132. The peculiarity of this case lies mainly in the fact that the conditions to be applied and their application are largely determined by the body awarding the contract (the Bundeswehr), on the one hand — in the invitation to tender — as regards organisation of the task of protecting the medical supplies depot at Efringen-Kirchen by the particular body to which the contract is awarded, and, on the other hand, as regards the performance of that task.

133. The national court essentially raises two problems in the questions it refers to the Court. First, it calls for a definition of the concept of an economic entity in the context of the transfer of a business following a change in the provider of the service; this point is raised essentially in the first part of the first question and in the third question. It then raises the problem of the importance to be attached to the fact that the change in the provider of the service came about as a result of a call for tenders and the fact that there was no direct contractual relationship between the undertakings successively responsible for security (protection and monitoring) at one of the Bundeswehr's medical supplies depots; this problem is raised in the second part of the first question and in the second question.

(a) The concept of a transferable economic entity

134. The first problem raised by the national court is whether the Directive also applies to the transfer of a business or part of a business, such as the task of guarding a Bundeswehr medical supplies depot (first part of Question 1), if the same employees continue to perform the same duties on essen-

74 — This point is considered in greater detail below in the context of Case 247/96 *Horst Ziemann*.

75 — See *Rotsart de Hertaing*, cited in footnote 22 above, paragraph 20.

76 — The Commission refers in its written observations (at point I.4) to a report submitted by Aser to the Municipality of Guadalajara, from which it appears that Aser intended to keep on the whole team of home helps responsible for providing the service when the transfer took place.

tially the same terms, these being specified by the body awarding the contract (Question 3).

135. In other words, given that the body awarding the contract (the Bundeswehr) defines in detail the rules for the organisation and exercise of certain activities which continue to be performed by essentially the same employees, the question before the Court is whether this indicates the existence of an economic entity, the transfer of which would fall within the scope of the Directive. If not, that is to say, if there is no economic entity, the question of whether the protective provisions of the Directive apply does not arise.

136. For the Directive to be applicable in a case where two undertakings are responsible in turn for the exercise of an activity, the first undertaking must have established a sufficiently organised (economic) entity for the purpose.

137. It must therefore be determined whether the influence exerted by the body awarding the contract on the organisation and exercise of that activity by the awardee may, in some cases, effectively deprive the latter of its freedom of action and consequently of the power to establish an organised economic entity to exercise the activity in question.

138. Ziemann Sicherheit doubts whether the Directive is applicable to institutions such as the Bundeswehr, which are governed by public law.

139. Both Ziemann Sicherheit and the German Government consider that protection of the medical supplies depot did not constitute an economic entity, since Ziemann Sicherheit was unable to operate independently because of the Bundeswehr's influence over the organisation and performance of the tasks in question. In their opinion, what was transferred was a contract, not a business or part of a business.

140. According to the Commission, there is an economic entity but it was not transferred; rather, it belonged, and still belongs, to the Bundeswehr, which permits it only a mininimal measure of organisational structure and independence.

141. As I have already mentioned, the Court has held [77] that 'for the Directive to be applicable, ... the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract'. It has also stated that: 'The term entity thus refers to an organised grouping of persons

77 — See, for example, *Rygaard* and *Süzen*, cited in footnotes 28 and 2 above, paragraphs 20 and 13 respectively.

and assets facilitating the exercise of an economic activity which pursues a specific objective'.

142. It is therefore not sufficient for employers to succeed one another in the exercise of a particular activity, there must also be a transfer of an economic entity, that is to say, of an organised grouping of persons and/or assets facilitating the exercise of an economic activity which pursues a specific objective. Also, as I explained earlier, in the case of activities where the workforce is the main factor, the existence of tangible or intangible assets cannot be decisive.

143. Consequently, as the Commission rightly observes (at point 22 of its written observations), the question of a transfer of a business or part of a business from the first contractor to the second (that is, from Ziemann Sicherheit to Horst Bohn) arises only if the 'site security maintenance' of the medical supplies depot at Efringen-Kirchen is an economic entity and therefore part of a business within the meaning of Article 1(1) of the Directive and if that part of a business belonged to Ziemann Sicherheit before it was transferred to Horst Bohn. If, on the other hand, the 'site security maintenance' part of the business always belonged to the Bundeswehr despite the fact that its management was entrusted to a succession of outside firms, the question of whether there has been a transfer of part of a business does not arise.

(i) The concept of an 'economic entity'

144. As I have already pointed out, where the guarding of certain premises is entrusted to an undertaking, it constitutes a service and, as such, an economic activity. When that activity, which pursues a specific objective, albeit one that is ancillary to the main object of the undertaking, is exercised by an organised entity, that is to say by an organised grouping of persons and/or assets, that entity may be regarded as an economic entity, which forms the basis of any undertaking, business or part of a business in accordance with the terminology used in the Directive.

145. It is true that an economic entity must be organised, that is to say, it must have an organisational structure, however minimal, in order to constitute an undertaking, business or part of a business.

146. In practice, that could refer mainly to the way in which staff are organised, the length and continuity of the period during which the activity is exercised, the existence of a work schedule with set hours of work, the selection of staff and their assignment to specific tasks. These factors, mentioned purely by way of example, must be checked in each case by the national court.

147. In the light of the facts given in the order for reference, I agree with the Commission that 'site security maintenance' *vis-à-vis* the medical supplies stored at the depot in question may constitute an economic entity. My reason for taking this view is that site security was entrusted for a very long time to a particular group of security guards, even if their obligations were governed by the UZwGBw and by the terms and conditions of the services contract. Moreover, it is apparent from the documents in the case that security personnel are selected, trained and employed on the basis of their ability to provide the required service. They keep to established security procedures, work for set hours and follow specific instructions.

(ii) Whether the 'maintenance of site security' remained in the hands of the Bundeswehr or was transferred to the successive contractors.

148. The Commission considers that, in this case, in view of the facts as described by the national court, there was no transfer of part of a business by the Bundeswehr to the first undertaking and, after termination of the contract, to the second. Effectively, in terms of its organisational structure and autonomy, the economic entity constituted by the 'maintenance of site security' at the medical supplies depot at Efringen-Kirchen inheres permanently in the Bundeswehr, as the body awarding the contract. There was consequently no transfer of a business or part of a business to Ziemann Sicherheit or Horst Bohn.

149. That view cannot, in my opinion, be sustained. I have accepted that there is an economic entity consisting of the protection of the medical supplies depot at Efringen-Kirchen, which belongs to the Bundeswehr. Whatever the influence exerted by the Bundeswehr on the organisation of that economic entity, in particular through the rules contained in the contract for services, I do not think that influence is sufficient to exclude the protection afforded by the Directive in the event of transfers of undertakings, businesses or parts of businesses.

150. In other words, I take the view that the part played by the body awarding the contract (the Bundeswehr), [78] however impor-

78 — I should point out that the contract between the Bundeswehr, which runs the medical supplies depot, and each of the security outfits is a highly detailed contract drawn up by the competent military administration and that it is put out to tender. Both the call for tenders and the contract list in detail the nature and scope of the security guards' duties; the number of security guards and accompanying dogs; the requirements to be satisfied by the security guards deployed; requirements *vis-à-vis* the qualifications required of security guards, their equipment, training, supervision and weapons instruction. The authority awarding the contract (the Bundeswehr) places at the disposal of security personnel, on the premises of the medical supplies depot, a duty room; lavatories and washing facilities; rest area and changing rooms. The contractor may deploy only security guards approved by the awarding authority in writing; it must give it prior notice of replacement staff; and it must relieve personnel of their duties and replace them, if the awarding authority so requires, at any time. The national court adds that the site security contract is performed in accordance with the conditions imposed by the Bundeswehr and on a special legal basis, namely the UZwGBw.

tant, does not affect the freedom of the awardee to the extent that it could no longer be held to have certain powers of organisation *vis-à-vis* the economic entity in question.

151. The national court observes that the contractor is required not to deploy those security guards on other sites; however, the same situation could arise, for example, in connection with the guarding of a bank. The contractor must provide certain equipment (uniform, armbands, a weapon, truncheon, whistle, torch, first-aid pack, security equipment etc.). Clearly, all these factors must be taken into account in determining whether there are grounds for speaking of an economic entity which the contractor is, at least to some extent, responsible for organising.

152. Moreover, even in cases where cleaning services or guard duties, for example, are entrusted by an undertaking [79] to an outside firm, the client very often specifies the hours to be worked, requires or prohibits the use of certain raw materials, lays down certain elementary security rules, and may even insist on inspecting the staff assigned to the services or duties in question or refuse to admit to the workplace anyone unconnected with the service or duties. Similar circumstances might arise in the case of an undertaking that takes on the job of maintaining the gardens of a business or private client, or running a canteen on the premises of a business.

153. In my view, it follows that the first body to which the contract is awarded has a certain, albeit small, degree of freedom in the way in which it organises the economic entity 'maintenance of site security' and performs the tasks assigned to it. Similarly, the contractor's duties are not limited solely to supplying, for consideration, security personnel with whom it has concluded a contract of employment and the Commission's arguments to the contrary must be rejected as being without foundation.

154. Consequently, in so far as the Bundeswehr decides to contract out the responsibility for providing a particular service to an undertaking (the first contractor), on the terms reported by the national court — which, incidentally, is responsible for verifying the facts — and since the economic entity retains its identity even after the transfer and the contractor has a certain, albeit limited, power to organise that economic entity, I can accept that that entity did not remain in the hands of the Bundeswehr after the first contract was awarded.

79 — For example, a museum, a bank, a block of flats or offices, etc.

(iii) The transfer of part of a business

155. In the light of the foregoing considerations, I take the view that in the circumstances described by the national court we are indeed dealing with an economic entity ('maintenance of site security' at the medical supplies depot at Efringen-Kirchen), which was owned by the first contractor.

156. However, to ascertain whether there was a transfer from the first contractor to the second after termination of the contract, it is necessary to refer to the various criteria derived from the case-law of the Court, which the national court must take into account, bearing in mind the specific nature of the activity at issue. According to the documents in the case, it is an activity in which the human factor is paramount and the tangible or intangible assets are clearly of lesser importance.

157. In other words, it is an organised group of workers, specifically engaged in a joint activity. I see no reason, therefore, why that group, which constitutes an economic entity, cannot be transferred whenever, irrespective of any similarity in the duties performed, the new employer takes over all or a majority of the employees (in terms of their numbers and skills) who were assigned specifically to the performance of the contract by the previous contractor and is thus able to ensure that the guarding of the medical supplies depot continues smoothly, even if no other significant tangible or intangible assets are transferred.

158. This conclusion is supported by the fact that, in the words of the order for reference, essentially the same employees continue to perform the same security duties on terms which are virtually identical, even though they are determined to a large extent by the body awarding the contract. [80]

(b) The mode of the transfer

(i) The second limb of the first question

159. In the second limb of the first question, the national court seeks to ascertain whether the Directive is applicable where the transfer takes the form not of a direct transfer between two undertakings but of the termination of a contract with one undertaking and its award to another following an invitation to tender.

160. I would merely point out in this connection that the mode of transfer — that is to say, the question whether it was effected by means of termination of the contract, a call for tenders and the award of a new contract

80 — I should point out that the national court states (point II.4 *in fine*) that, according to Mr Ziemann, Horst Bohn took on nine of the twelve employees engaged in security duties at the medical supplies depot at Efringen-Kirchen and Mr Ziemann was the only employee (apart from one other of the older employees) to be dismissed, the reason given being that the body awarding the contract considered him to be too old for security duties. The Commission states (at point 7 of its written observations) that a third employee left the company of his own accord.

to a different undertaking — matters little, provided that the conditions, specified by the Court and set out in its judgment in *Süzen*, for determining whether or not there has been a transfer are satisfied. The rules applicable in the event of the termination of a (site security maintenance) contract followed by the award of a new contract without any prior invitation to tender will therefore apply in the present case *mutatis mutandis*. Moreover, the Court has consistently ruled that there is no need for any direct contractual relationship between the new contractor and its predecessor [81] for there to be a 'legal transfer' within the meaning of the Directive. [82]

(ii) Question 2: the importance of the interval between the two contracts

161. In its second question, the national court seeks to ascertain also whether, for the Directive to apply, it is significant that in the present case, on termination of the contract with the first undertaking, [83] the part of the business represented by the maintenance of site security at the medical supplies depot reverted to the body awarding the contract, [84] and was thereupon *immediately* contracted out to another undertaking [85] under a contract for the supply of services stipulating essentially the same standard conditions. The national court inquires, therefore, whether the fact that a new contract was concluded *immediately* with another contractor, on effectively the same terms, decisively supports a finding that the 'site security maintenance' part of the business was transferred and thus a transfer of part of a business was effected by means of a prior call for tenders.

162. I take the view that there must be a close temporal connection between the termination of a contract and its award to another operator. It is for the national court to determine the length of the interval in question in the light of the facts and the nature of the business in each particular case.

163. In any event, I consider that it is essential to maintain the useful effect of the protective provisions of the Directive in the event of a transfer of a business. That protection would not be assured if the provisions in

81 — Thus, the Court has held that the Directive applies to the termination of a lease of a restaurant followed by the conclusion of a new management contract with another operator (*Daddy's Dance Hall*, cited in footnote 14 above), the termination of a lease followed by a sale by the owner (*Bork*, cited in footnote 22 above), and also a situation in which a public authority ceases to grant subsidies to a legal person thereby bringing about the full and definitive termination of its activities in order to transfer them to another legal person with a similar aim (*Redmond Stichting*, cited in footnote 14 above). In paragraphs 30 and 32 of its judgment in *Merckx and Neuhuys*, cited in footnote 23 above, it held that the Directive applied to a situation where a motor vehicle dealership concluded with one undertaking is terminated and a new dealership is awarded to another undertaking pursuing the same activities, which takes on part of the staff and is recommended to customers, without any transfer of assets.

82 — I should mention that, because of the discrepancies between the versions of the term 'legal transfer' in the various languages, the Court has given it a broad interpretation, in keeping with the aim of the Directive, which is to protect employees. Thus, it has consistently ruled that the Directive is applicable 'wherever, in the context of contractual relations, there is a change in the legal or natural person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the undertaking'. See, for example, *Bork* and *Redmond Stichting*, cited in footnotes 22 and 14 above, paragraphs 13 and 11 respectively.

83 — In this case, Ziemann Sicherheit.

84 — The Bundeswehr.

85 — Horst Bohn.

question were not allowed to apply in a case where a long-standing 'site security maintenance' contract, performed within an undertaking by a security unit, is terminated without being immediately transferred to another security outfit. As the Commission rightly observes (in point 47 of its written observations), it is for the national court, [86] when considering whether the part of the business in question remained the same after the transfer as before, to determine whether there is indeed such a close temporal connection.

164. That said, it should be noted that, in the light of the information provided in the order for reference, this question does not appear to arise in the present case, because the close temporal connection between termination of the Bundeswehr's contract with the first undertaking (Ziemann Sicherheit) [87] and its award of the new contract to the second undertaking (Horst Bohn) may be regarded as established, [88] since the transition from one to the other [89] occurred directly, without any lapse of time.

VI — Conclusion

165. I therefore propose that the Court give the following answers to the questions referred by the national courts:

A — Joined Cases C-127/96, C-229/96 and C-74/97

(1) Question 1 in Case C-127/96, *Hernández Vidal*, and Question 1 in Case C-229/96, *Friedrich Santner*

'Article 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'

86 — The Commission rightly points out (at point 48 of its written observations) that the type of transfer and the calibre of the staff re-engaged may provide useful clues for determining the length of time during which a business may still effectively be transferred after the termination of the old contract and before the new one commences. Thus, where the new operator must first be selected by means of a lengthy tendering procedure, the interval may be longer than in cases where part of a business is transferred by a direct change of contractor. The interval allowed may also be more generous where the work to be entrusted to the new contractor is highly skilled, so that it will take longer to find a suitable undertaking or contractor than it would if the activities could be performed by any one of a number of undertakings or contractors.

87 — On 30 September 1995.

88 — Mr Ziemann's action against Ziemann Sicherheit and Horst Bohn was brought on 9 October 1995.

89 — According to the Commission, the contract was awarded to Horst Bohn on 1 October 1995.

rights in the event of transfers of undertakings, businesses or parts of businesses is to be interpreted as meaning that the work of cleaning the premises of an undertaking, an activity for which it has a permanent need although its main business is not cleaning, may fall within the scope of the Directive if it is carried out by a stable group of employees pursuing a specific objective, that is to say, if there is an economic entity and that entity retains its identity after the transfer.'

(2) Question 2 in Case C-127/96, *Hernández Vidal*; Question 2 in Case C-229/96, *Friedrich Santner*; and the question in Case C-74/97, *Gómez Montaña*

'Article 1(1) of Directive 77/187 is to be interpreted as meaning that the Directive is not applicable in a situation in which one undertaking, having entrusted the cleaning of its premises to another, terminates the contract and takes over the cleaning operation itself, using its own employees or staff engaged for that purpose, unless there is a concomitant transfer from one undertaking to the other of significant tangible or intangible assets, or unless — in sectors such as cleaning services, in which the workforce is the main production factor — the first-mentioned undertaking takes over a major part, in terms of their numbers and skills, of the employees assigned by its predecessor to the performance of the contract.'

B — Joined Cases C-173/96 and C-247/96

(1) The question in Case C-173/96, *Sánchez Hidalgo*

'Article 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 is to be interpreted as meaning that the service of home help for persons in need may fall within the scope of the Directive, even where no significant tangible or intangible assets are involved, if it is carried out by a stable group of employees pursuing a specific objective, that is to say by an economic entity, and that entity retains its identity after the transfer.

Article 1(1) of Directive 77/187 is to be interpreted as meaning that the Directive may apply where an undertaking which had entrusted the service of home help for

persons in need to another undertaking entrusts the same service to a third undertaking on expiry of the first contract, provided that the latter takes over a major part, in terms of their numbers and skills, of the employees assigned by its predecessor to the performance of the contract, even if there is no concomitant transfer from one undertaking to the other of significant tangible or intangible assets.

The protection afforded by the provisions of Directive 77/187 to employees in the event of a change of employer following a transfer of an undertaking, business or part of a business cannot depend on whether or not the new employer is formally required, under a collective agreement or tendering conditions, to be subrogated to the former *vis-à-vis* its employment relationship with the workers, since the existence of a transfer of an undertaking, business or part of a business within the meaning of the Directive depends on a range of circumstances, in fact and in law, characterising the transaction in question.'

(2) Case C-247/96, *Horst Ziemann*

(a) The first part of Question 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 is to be interpreted as meaning that a transfer of an undertaking, business or part of a business cannot be ruled out merely on the ground that, on the basis of the applicable legal or contractual provisions, the body awarding the contract exerts a direct influence over the awardee with respect to the manner in which the contract is performed. A case of this kind may fall within the scope of the Directive if there is a stable group of employees pursuing a specific objective, that is to say, an economic entity, and that entity retains its identity after the transfer.'

(b) Question 3

'Article 1(1) of Directive 77/187 is to be interpreted as meaning that the Directive is applicable where the body awarding the contract terminates its contract with the

awardee and awards a new contract to another, if, in sectors such as the protection of premises, where the workforce is the main factor, and in cases where essentially the same employees continue to perform the same tasks in the same place and on essentially the same terms, the new awardee takes over a major part, in terms of their numbers and skills, of the employees assigned by its predecessor to performance of the contract.'

(c) The second part of Question 1, and Question 2

'Article 1(1) of Directive 77/187 is to be interpreted as meaning that a transfer of an undertaking cannot be ruled out merely on the ground that the body awarding the contract has terminated a contract with one awardee for services such as the protection of premises and entrusted the same tasks within a reasonable length of time to another, following an invitation to tender, without any direct legal transfer between the first awardee and the second.'