

OPINION OF ADVOCATE GENERAL
POIARES MADURO
delivered on 27 January 2005¹

1. The House of Lords has referred to the Court a question about the application 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 businesses² to the privatisation of vocational training services in Wales, when some civil servants who had initially been seconded to become employees of the private undertaking which took over from the local employment offices responsible for those services. More specifically, the House of Lords is in doubt as to the date which should constitute the 'date of ... transfer' when the transfer is structured as a complex transaction taking place in a number of stages. The reference affords an opportunity to define that term more precisely: until now, it has not been central to questions about the interpretation of Directive 77/187, which

have none the less been frequently referred by the national courts.

I — Facts and questions referred for a preliminary ruling

2. In the course of administrative reform, undertaken in 1989, the United Kingdom Government established Training and Enterprise Councils ('TECs'), which were to take over from the government-funded local agencies run by civil servants which were responsible for programmes for the training of young people and the unemployed. In order to bring about that gradual privatisation, the TECs were allowed to use Department of Employment premises and were given free access to the information systems and databases. For an initial three-year period, staff from the local agencies were

1 — Original language: Portuguese.

2 — OJ 1977 L 61, p. 26. The directive has been amended by Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1998 L 201, p. 88). The legislation has been consolidated by Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 2001 L 82, p. 16). Only the original version of the directive was in force at the material time.

seconded to the TECs, while retaining their status as civil servants; thus the training programmes continued uninterrupted with qualified staff for whom the TECs were not financially responsible. The Department of Employment employees continued to perform the same tasks in the same buildings, under the supervision of the TECs. It was, however, anticipated, in a letter of 16 December 1991 from the Secretary of State to the Chairmen of the TECs' Staffing Group,³ that the TECs would ultimately become the employers of those staff. At the end of their secondment, employees were given the choice either of returning to the Department of Employment, and being redeployed, or of continuing to carry on the same activity as employees of the TECs. Against that background, the Department of Employment entered into an agreement with the TECs in 1992, which set out their respective obligations upon a civil servant changing his or her status in order to become an employee of a TEC.⁴ At that time, the question as to whether the Transfer of Undertakings (Protection of Employment) Regulations 1981, which transposed Directive 77/187 into United Kingdom law, applied was raised but was not decided.

3. The case before the Court concerns offices in North Wales, located in Wrexham and Bangor, which were taken over by Newtec, which became operational in September 1990. Celtec Ltd ('Celtec') became Newtec's successor in 1997, when a merger

took place. Forty-three civil servants were seconded to ensure that the privatisation of those offices in favour of Newtec proceeded smoothly. After around 3 years, 18 civil servants chose to resign from the civil service and took up employment with Newtec; the others decided to remain in the civil service and be redeployed, to retire, or to leave their employment for other reasons.

4. Mr Astley, Ms Hawkes and Ms Owens became civil servants on 31 August 1973, 4 November 1985 and 21 April 1986 respectively. They were seconded to Newtec when it was set up and then, after resigning from the civil service, became its employees. Throughout that period they continued to carry out the same tasks. Ms Owens and Ms Hawkes were employed by Newtec as of 1 July 1993 and Mr Astley as of 1 September 1993. In 1998, Ms Hawkes was dismissed by Celtec, which refused to recognise that her period of employment commenced when she became a civil servant. Mr Astley and Ms Owens also feared that they would be dismissed. The three employees brought an action before the Employment Tribunal, Abergele, seeking rulings as to the length of their period of service.

5. In fact, under section 1(3) of the Employment Rights Act 1996, the employer is required, when an employee begins employment, to give the employee a written statement containing particulars of, *inter alia*, the date when the employment began and 'the date on which the employee's period

3 — Annex 4 to the observations submitted to the Court by the respondents.

4 — Point 9 of the order for reference.

of continuous employment began taking into account any employment with a previous employer which counts towards that period'. If the employer fails to comply with that obligation to provide information, the employee may, under section 11(1) of the Employment Rights Act 1996, have the matter brought before the Employment Tribunal. Any decision as to the employee's length of service has consequences for the redundancy payment to which the employee may be entitled.⁵ Period of service or 'continuous employment' refers to employment with the same employer. However, in the case of a transfer, section 218(2) of the Employment Rights Act 1996 provides that the transfer does not break the continuity of the period of employment; that is to say, the period of employment with the transferor counts as a period of employment with the transferee. Mr Astley, Ms Owens and Ms Hawkes sought a ruling from the Employment Tribunal that they had been continuously employed since the commencement of their employment in the civil service, their contracts having been transferred to Newtec and then to Celtec. It is not in doubt that the merger from which Celtec resulted entailed a transfer of the employment contracts from one entity to the other. However, the transfer of the contracts from the Department of Employment to Newtec is central to the dispute.

6. The Employment Tribunal before which the matter was brought found, in its decision of 22 December 1999, that the privatisation

constituted the transfer of an undertaking within the meaning of Article 1(1) of Directive 77/187. In conclusion, it held that section 218 of the Employment Rights Act 1996 applied and that the applicants had been continuously employed since the start of their employment in the civil service.

7. It should be borne in mind that Directive 77/187, which was adopted on the basis of Article 100 of the EC Treaty (now Article 94 EC) seeks, in the words of the second recital in its preamble, 'to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'. By virtue of Article 1(1), the directive '[applies] to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger'. The preservation of the employees' rights on a transfer is provided for in Article 3(1): '[t]he transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee'.

8. An appeal against the Employment Tribunal's decision was brought before the Employment Appeal Tribunal, which, in a decision of 5 October 2001, upheld the finding that there was a transfer within the meaning of Article 1(1) of Directive 77/187. It also found that the date of transfer for the purposes of Article 3(1) of Directive 77/187 was to be taken as the date on which the transferee was in exclusive possession and control of the business. In the present case, it

⁵ — Under section 155 of the Employment Rights Act 1996, an employee does not have any right to a redundancy payment unless he has been continuously employed for a period of not less than two years. The amount of compensation is calculated by reference to the period of continuous employment (section 162 of the Employment Rights Act 1996).

concluded that the transfer had taken place in September 1990, the time when Newtec became operational. Accordingly, the civil servants initially seconded to Newtec could not maintain that their rights had been transferred in 1993, three years after the date of the transfer.

9. By a judgment delivered on 19 July 2002, the Court of Appeal (England and Wales) adjudicated on the same dispute. A number of its findings are relevant for the purposes of the reasoning to follow. The Court of Appeal stated that the skills of the Department of Employment employees formed part of the undertaking being transferred to Newtec, since the skills were available to Newtec throughout the whole period of secondment. As regards the date of the transfer for the purposes of Article 3(1) of Directive 77/187, it embraces, in the Court of Appeal's view, the transfer of an undertaking taking place over a number of years. As a consequence, the Court of Appeal set aside the decision of the Employment Appeal Tribunal.

10. Celtec appealed to the House of Lords against the Court of Appeal's judgment. In the course of that appeal, the House of Lords referred the following questions to the Court of Justice:

'1. Are the words "the transferor's rights and obligations arising from a contract of employment or from an employment

relationship existing on the date of a transfer" in Article 3(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 to be interpreted as meaning that there is a particular point in time at which the transfer of the undertaking or part thereof is deemed to have been completed and the transfer of rights and obligations pursuant to Article 3(1) is effected?

2. If the answer to question 1 is "yes", how is that particular point in time to be identified?
3. If the answer to question 1 is "no", how are the words "on the date of a transfer" in Article 3(1) to be interpreted?"

11. All three questions concern the interpretation to be given to the notion of 'date of a transfer' within the meaning of Article 3(1) of Directive 77/187. To my mind it is therefore preferable to answer them together.

12. Written observations have been submitted during the written procedure before

the Court by Celtec, by the respondents, namely Mr Astley, Ms Owens and Ms Hawkes, and by the Commission. The hearing took place on 2 December 2004, at which those parties presented oral argument.

13. Following a preliminary description of what the transfer entailed and also of the circumstances in which Directive 77/187 might apply (II), I shall address how the expression 'date of a transfer' within the meaning of Article 3(1) of Directive 77/187 should be interpreted (III), and I shall then assess what the consequences are for this case.

II — Analysis of the transfer

14. Two issues should be addressed at the outset: first, the application of Directive 77/187 to the privatisation (A) and, second, determination of the undertaking transferred on that privatisation (B).

A — Application of Directive 77/187 to the privatisation of vocational training activities

15. Directive 77/187 governs a number of aspects of the transfer of an undertaking. Although the directive was initially intended to protect employees whose employer chan-

ged following an acquisition or a restructuring, the Court of Justice has recognised that it applies to contracting-out,⁶ subcontracting,⁷ privatisation⁸ and transfers of an undertaking to the State.⁹ The transfer of administrative functions from a municipality to a grouping constituted by a number of municipalities was, however, excluded from the material scope of Directive 77/187.¹⁰ For the directive to apply, the transferred undertaking must be engaged in an economic activity. That limitation upon the material scope of Directive 77/187 has been restated in Article 1 of Directive 98/50, which provides that: '[t]his 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'. In this instance, since there is no doubt as to the economic nature of the activity of vocational training, the privatisation of those activities can constitute a transfer within the meaning of Directive 77/187.

16. The personal scope of Directive 77/187 has been considered by the Court, which has

6 — Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755; Case C-392/92 *Schmidt* [1994] ECR I-1311; and Joined Cases C-173/96 and C-247/96 *Hidalgo and Others* [1998] ECR I-8237.

7 — Case C-234/98 *Allen and Others* [1999] ECR I-8643.

8 — Case C-164/00 *Beckmann* [2002] ECR I-4893; and Case C-4/01 *Martin and Others* [2003] ECR I-12859.

9 — Case C-175/99 *Mayeur* [2000] ECR I-7755; and Case C-425/02 *Delahaye* [2004], not published in ECR.

10 — Case C-298/94 *Henke* [1996] ECR I-4989.

repeatedly held that only those persons who are employees for the purposes of national law can rely on the safeguards afforded by the directive.¹¹ That reference back to national law was consolidated by Directive 98/50, which defines ‘employee’ as ‘any person who, in the Member State concerned, is protected as an employee under national employment law’.

17. However, it is unfortunate that there is no definition of ‘worker/employee’ in Community social law.¹² In fact, even though the Court has shown itself amenable to interpreting the notion of a ‘worker’ broadly for the purposes of Article 39 EC,¹³ it has always considered Directive 77/187 to effect only partial harmonisation and not to lay down a uniform definition of what constitutes an employee or of the rights which derive from a contract of employment.¹⁴ Even though that directive effects only partial harmonisation,¹⁵ the reference to national law for the meaning of ‘employee’ has particularly serious consequences as regards public-

service employees. If they are subject to a public-law instrument which denies them the status of employee under national law, they can be transferred to a private undertaking without enjoying protection comparable to that to which employees in a private undertaking are entitled in the same situation.¹⁶ The reference to national law for the meaning of ‘employee’ results in identical situations being treated differently solely on account of the legal classification of the employment relationship between public officials and their employer. Accordingly, whether privatisations concerning identical activities fall within the scope of Directive 77/187 depends upon the relevant national law. Such an outcome does not seem warranted in light of the objectives of the directive. It would instead be more consistent with the principle of the neutrality of Community law with regard to the distinction between public and private undertakings to consider any transfer of an economic activity to be subject to the mandatory rules of Directive 77/187.¹⁷

18. Even if the Court were not to be persuaded that any activity of an economic nature should be subject to Directive 77/187, it appears that the United Kingdom privati-

11 — Case 105/84 *Danmols Inventar* [1985] ECR 2639, paragraph 27; Case C-362/89 *D’Urso and Others* [1991] ECR I-4105, paragraph 12; and Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 38.

12 — Supiot, A., *Aut-delà de l’emploi*, Flammarion, Paris, 1999, advocates adopting a Community definition of ‘worker/employee’, p. 296. As to the flexibility of that concept, see Davies, P. and Freedland, M., ‘Employees, Workers, and the Autonomy of Labour Law’, *Mélanges en l’honneur de S. Simittis*, 2000, p. 31.

13 — See most recently the judgment of 7 September 2004 in Case C-456/02 *Trojani* [2004] ECR I-7573.

14 — Community social law can be described as a ‘transnational floor of rights’, as Barnard, C. and Deakin, S. suggest: ‘Social Policy in search of a role: integration, cohesion and citizenship’, 1996 *Onwards, lowering the barriers further*, Wiley, 1996, p. 177.

15 — *Danmols Inventar*, cited in footnote 11 above, paragraph 26.

16 — These arguments reflect those put forward by Advocate General Lenz in his Opinion in *Henke*, cited in footnote 10 above, and by Advocate General Alber in his Opinion in *Collino and Chiappero*, cited in footnote 11 above.

17 — The Court has already accepted, in relation to the concept of working time, that a reference to national law ‘does not mean that the Member States may unilaterally determine the scope of that concept’ (Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraph 59).

sation at issue in this case is in any event covered by the directive. In its judgment in *Beckmann*, which concerned a transfer from the public sector to the private sector in the United Kingdom (in that instance from the National Health Service to a private company, Dyamco Whicheloe Macfarlane), the Court had taken note of the interpretation of the parties and of the United Kingdom Government that, 'although the National Health Service belongs to the public sector ..., [the employees concerned] are covered by national employment law and are, therefore, eligible to benefit from the provisions of the directive'.¹⁸ In this case, the parties are also in agreement that the Department of Employment civil servants can be regarded as 'employees' and, as such, subject to Directive 77/187. There is therefore nothing to preclude application of the directive to the facts of this case.

20. By virtue of settled case-law, in order to determine whether there has been a transfer for the purposes of Directive 77/187, it is necessary to consider 'all the facts characterising the transaction in question'.¹⁹ Among the various factors to be taken into account, the Court mentions 'the type of undertaking or business, whether or not its tangible assets, such as buildings and movable property, have been transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of employees have been taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities are suspended'.²⁰ The weight to be given by the national court to each of the relevant factors will depend upon the nature of the activity concerned.²¹

B — *The undertaking transferred*

19. The questions referred for a preliminary ruling by the House of Lords on the meaning of the date of transfer should make it possible to determine whether the respondents are protected by Directive 77/187. Before reaching a decision on that point, it is necessary to determine what was involved in the transfer from the Department of Employment to Newtec.

21. The Court thus held that 'in certain labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity'.²² However, in a sector in which the activity requires substantial plant and equipment,

18 — *Beckmann*, cited in footnote 8 above, at paragraph 27.

19 — Case C-13/95 *Süzen* [1997] ECR I-1259, paragraph 14. See also Case 24/85 *Spijkers* [1986] ECR 1119, paragraph 13; Case C-172/99 *Liikenne* [2001] ECR I-745, paragraph 33; Case C-51/00 *Temco* [2002] ECR I-969, paragraph 24; and Case C-340/01 *Abler and Others* [2003] ECR I-14023, paragraph 33.

20 — *Süzen*, cited in footnote 19 above, at paragraph 14: see also the judgments cited in that footnote.

21 — *Süzen*, cited in footnote 19 above, at paragraph 18: see also the judgments cited in that footnote.

22 — *Temco*, cited in footnote 19 above, paragraph 26.

such as scheduled public transport by bus, the absence of a transfer to a significant extent of such assets precludes a finding that the entity has retained its identity.²³

III — Interpretation of the term ‘date of ... transfer’ for the purposes of Article 3(1) of Directive 77/187

22. At paragraph 11 of its decision of 22 December 1999, the Employment Tribunal identified the undertaking transferred as ‘the management of the government funded post-16 vocational training and enterprise activities in England and Wales together with the information systems and databases, some staff and some premises’.²⁴ The broad nature of that definition can be explained by the fact that the cases of the three applicants before the Employment Tribunal are to serve as a precedent for all the other civil servants whose situation changed as a result of the privatisation. The Employment Tribunal also found, at paragraph 12 of its decision, that the vocational training business was labour intensive. The Court of Appeal confirmed that the skills of the staff, who were first seconded and then employed, formed part of the undertaking transferred to Newtec. It is thus established that the transfer which took place encompassed assets as well as the employees’ skills. It is now necessary to determine the date on which that transfer took place.

23. The House of Lords asks the Court about the interpretation of the term ‘date of a transfer’ within the meaning of Article 3(1) of Directive 77/187. There are two aspects to the question referred: first, whether the date of the transfer refers to a specific date or an ongoing period; and, second, whether or not the date of transfer is a single date. Once the issues raised by this question have been identified (A), consideration will be given to the method of determining that date, particularly as regards a complex transfer (B).

A — The role of the date of transfer in Directive 77/187

24. The term ‘date of ... transfer’ is mentioned only in Article 3 of Directive 77/187. Following consideration of its place in the scheme of the directive, I shall set out the elements of interpretation provided by the Court in relation to that term.

²³ — *Liikenne*, cited in footnote 19 above, paragraph 42.

²⁴ — Decision reproduced in Annex 1 to the respondents’ observations.

1. The role of the date of transfer in the general scheme of the directive

25. The objective of Directive 77/187 is to safeguard employees' rights in the event of a transfer. To that end, a number of mechanisms are put in place. They are triggered when the conditions for a transfer to be legally classified as the transfer of an undertaking within the meaning of Article 1(1) of the directive are fulfilled. The analysis carried out under that article allows the extent of the transfer to be determined. Consequently, the employees attached to the transferred undertaking are identified.²⁵

26. The first consequence to follow from the finding of a transfer is laid down in Article 3 (1) of Directive 77/187 and entails the safeguarding of the rights which the employees derive from their contracts of employment or from an employment relationship.

27. Directive 77/187 is not confined to establishing the automatic preservation of an undertaking's contracts of employment on a transfer of undertakings. It also provides for an obligation to inform the employees' representatives that the transfer has taken place. Article 6(1) of Directive 77/187 requires the transferor to give information about the transfer to the employees' repre-

sentatives 'in good time before the transfer is carried out'. Following the amendments made by Directive 98/50, 'the date or proposed date of the transfer' is also specifically included in the information which must be provided.

28. The objective of that provision is to enable the employees' representatives to react to the structural change entailed by the transfer. Where it is agreed that the transfer will be implemented in stages, information about the transfer, if it is to serve a purpose, will be provided to the staff representatives before the first stage of the transfer. If those representatives are to be in a position to react to the projected transfer, the information provided will include an outline of the various stages envisaged.²⁶

29. Finally, Article 4 of Directive 77/187 represents the third limb of the protection granted by the directive. Where there is a dismissal as a result of the transfer, the employer is deemed to be responsible for it. Thus, any failure to adhere to the safeguarding of the rights arising from a contract of employment, for which Article 3(1) of the directive provides, is penalised. It makes no

25 — Case 186/83 *Botzen and Others* [1985] ECR 519, paragraph 15.

26 — See, by analogy with the obligation to consult laid down by Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (OJ 1994 L 254, p. 64), Case C-440/00 *Kühne & Nagel* [2004] ECR I-787 and Case C-62/99 *Bofrost** [2001] ECR I-2579.

difference to the application of that article whether the transfer takes place in one or a number of stages, the decisive factor being the connection established between the dismissal and the transfer.

for the transferor. Nevertheless, that does not rule out the possibility of a transfer taking place in several stages. It is none the less established that, once the transfer is completed, the transferee will have taken over the transferred undertaking's contracts of employment.

2. How the date of transfer has been interpreted by the case-law

30. The Court has stated in a number of judgments how Article 3(1) of Directive 77/187 is to be interpreted.

31. According to the Court, the date of transfer regulates how one employer takes over from another in the transferred undertaking. Thus, the date of the transfer determines the date on which the transferee assumes the obligations for which the transferor was responsible by virtue of the contracts of employment. Accordingly, 'Article 3(1) of Directive 77/187 of 14 February 1977 must be interpreted as meaning that after the date of transfer and by virtue of the transfer alone, the transferor is discharged from all obligations arising under the contract of employment or the employment relationship'.²⁷ Whilst before the transfer the transferor is responsible for the employer's obligations under the employment contracts, after the transfer the transferee is substituted

32. The date of transfer thus plays a role in determining the temporal scope of the obligations imposed on employers by Directive 77/187. The judgment in *Ny Mølle Kro*²⁸ provides an example. Ms Hansen, a waitress engaged in May 1983 by the Ny Mølle tavern, claimed the benefit of a collective agreement with which the transferor, the establishment's previous lessee, had undertaken to comply. Since Ms Hansen was engaged after the transfer, she could not rely on the conditions of employment in force before the transfer. As the Court explained: 'Article 3(2) of the directive is intended to ensure the continued observance by the transferee of the terms and conditions of employment agreed in a collective agreement only in respect of workers who were already employed by the undertaking at the date of the transfer, and not as regards persons who were engaged after that date'.²⁹

33. The judgment in *Wendelboe and Others*,³⁰ which ruled to the same effect, was delivered in the light of different factual considerations. Mr Wendelboe, Mr Jensen

27 — Joined Cases 144/87 and 145/87 *Berg and Busschers* [1988] ECR 2559, paragraph 14.

28 — Case 287/86 [1987] ECR 5465.

29 — *Ny Mølle Kro*, cited in footnote 28 above, paragraph 26.

30 — Case 19/83 [1985] ECR 457.

and Mr Jeppesen had been dismissed on 18 January 1980 by LJ Music ApS, when the company was on the verge of insolvency. Following the declaration of insolvency on 4 March 1980, the undertaking was taken over by the company ApS SPKR, which, under an agreement signed at the end of March 1980, was entitled to use its equipment as from the declaration of insolvency. ApS SPKR re-engaged Mr Wendelboe, Mr Jensen and Mr Jeppesen on 6 March 1980 but failed to take account of their length of service. The question of interpretation referred to the Court concerned whether the safeguarding of terms and conditions of employment on the occasion of a transfer had to be guaranteed for employees who were not employed by the undertaking at the time of the transfer. The Court replied to that question in the negative. It followed, in accordance with Article 4 of Directive 77/187, that employees dismissed before the transfer could not be reinstated on the ground that a transfer had taken place, provided that their dismissal was not connected with the transfer. It should be noted that, between the date of their dismissal on 18 January 1980 and their re-engagement on 6 March 1980, the three employees had suspended their activities.

nor those who were dismissed before the transfer, and for a reason unconnected with the transfer, may rely on Directive 77/187.

35. Finally, the Court has described the date of transfer referred to in Article 3(1) of Directive 77/187 as mandatory. In *Rotsart de Hertaing*³¹ the national court asked whether the transfer of the employees took place on the date of the transfer or if it was possible for the transferor or the transferee to choose to fix a later date. In that case Ms Rotsart de Hertaing had been dismissed by her former employer after the undertaking had been transferred from Benoidt to IGC Housing Service. The question arose as to whether the transferor, Benoidt, could remain her employer, once the transfer of the undertaking had taken place. Relying on the mandatory nature of the protection afforded to employees by Directive 77/187, the Court held that 'the transfer of the contracts of employment and employment relationships pursuant to Article 3(1) of the directive necessarily takes place on the date of the transfer of the undertaking and cannot be postponed to another date at the will of the transferor or transferee'.³² Two observations are necessary to make clear the scope of that judgment. First, the transfer took effect by a contract between the transferor and the transferee. It was therefore the result of a simple, specific transaction which took place on a particular date. If the transfer of the undertaking and the transfer of the employment relationships do not coincide, the date of transfer will not be so easily determined. Second, the Court characterised the rules in Directive 77/187 as mandatory with the aim

34. It follows from those cases that only contracts of employment existing as at the date of the transfer are subject to Directive 77/187, to the exclusion of all others. The date of transfer thus serves to limit employers' obligations. They are required to safeguard only the rights of those employees employed at the time of the transfer. Neither those who were employed after the transfer

31 — Case C-305/94 [1996] ECR I-5927.

32 — *Rostart de Hertaing*, cited in footnote 31 above, paragraph 26.

of preventing parties from derogating from them with a view to reducing the protection afforded to the employees of the transferred entity.³³ In the absence of such a risk, the Court is prepared to respect contractual freedom, acknowledging, for example, that an employee may refuse to allow his contract of employment to be transferred.³⁴

when it analyses this type of transfer. In the light of that case-law, I shall set out the interpretations of Article 3(1) of Directive 77/187 proposed by the parties before suggesting the different interpretation which in my view is the right one.

36. Thus, the role allotted to the ‘date of ... transfer’ in Article 3(1) of Directive 77/187, as interpreted by the case-law, does not mean that there must be one single, specific date if the transfer takes place in several stages.

1. Case-law dealing with complex transfers

B — Determination of the date of transfer in a complex transaction

37. A transfer effected by a series of transactions entailing a lapse of time between the decision to carry out a transfer and the various stages of its execution may be described as a complex transfer. In order to establish the consequences deriving from the fact that a transfer is complex, I shall first explain the reasoning followed by the Court

38. The inclusion of complex transfers within the scope of Directive 77/187 was a gradual process. It follows from the Court’s broad interpretation of Article 1(1) of Directive 77/187, which refers to transfers which are the ‘result of a legal transfer or merger’. The cases have construed that condition as not requiring a direct contractual link between the transferor and the transferee. Instead they find that ‘Directive 77/187 is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person responsible for carrying on the business and entering into the obligations of an employer towards employees of the undertaking’.³⁵ Thus the Court has specifically acknowledged that the assignment giving rise to the transfer of undertakings may take place in two stages, through the intermediary of a third party such as the owner or the person putting up the capital.³⁶ Nor does the fact that it is an

33 — Point 16 of the Opinion of Advocate General Van Gerven in Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others* [1992] ECR I-6577.

34 — The judgment in *Katsikas and Others*, cited in footnote 33 above, at paragraph 33.

35 — Judgments cited in footnote 19 above: *Süzen*, paragraph 12; *Liikenne*, paragraph 29; and *Abler and Others*, paragraph 41.

36 — *Temco*, cited in footnote 19 above, paragraphs 31 and 32.

administrative act which triggers the transfer preclude a finding that the condition in Article 1(1) of Directive 77/187 is met.³⁷

39. In the absence of any direct link between transferor and transferee, the transfer will, as a general rule, take place in several stages, including a period during which the activity of the undertaking transferred is suspended. It is also possible that the transfer of assets will not coincide with the transfer of the contracts of employment. In such cases, however, the Court has not considered a lapse in time to have any impact on the finding that there is a transfer of undertakings.

40. In his Opinion in *Hernández Vidal and Hidalgo and Others*, Advocate General Cosmas suggested that there might be a requirement for 'a close temporal connection between the termination of a contract and its award to another operator',³⁸ if the latter is to constitute a transfer within the meaning of Article 1(1) of Directive 77/187. The Court has not formally adopted that requirement, although it does include 'the period, if any, for which ... activities are suspended' among the factors which are relevant for determining whether a transfer has taken place.³⁹

41. In the case of a transfer implemented during the seasonal closure of a business, which entailed a delay between the transfer of assets and the commencement of the contracts of employment, the Court held that the contracts of employment had been transferred. The judgment in *Ny Mølle Kro* in fact states that the seasonal closure of a business 'as a general rule ... does not mean that the undertaking has ceased to be a going concern'.⁴⁰

42. Nor does a delay between the start of the work and the re-engagement of the employees preclude a finding that there has been a transfer. In the case of *Allen and Others*, a company had subcontracted to a subsidiary within the same group as itself driveage works in respect of which it had a contract. The Court found that there had been a transfer from one subsidiary of the group to another. Little importance was attached to 'the fact that the re-engagement of ACC's employees by AMS did not coincide with the beginning or end of the contracts, ... [since] a transfer of an undertaking is a complex legal and practical operation which may take some time to complete'.⁴¹ In the same judgment, the Court considered the possibility that the employees might, during the initial period of the transfer, have worked for both the transferor and the transferee. Nor was that fact such as to preclude a transfer being found to be a transfer of undertakings.⁴²

37 — Case C-29/91 *Redmond Stichting* [1992] ECR I-3189.

38 — Point 162 of the Opinion in Joined Cases C-127/96, C-229/96 and C-74/97 *Hernández Vidal and Others* [1998] ECR I-8179; and Joined Cases C-173/96 and C-247/96 *Hidalgo and Others* [1998] ECR I-8237.

39 — See the judgments cited in footnote 19 above.

40 — *Ny Mølle Kro*, cited in footnote 28 above, at paragraph 20.

41 — *Allen and Others*, cited in footnote 7 above, at paragraph 32.

42 — *Ibidem*, paragraph 35.

43. Other examples could be cited of cases in which the Court has concluded that there was a transfer despite the fact that a period of time elapsed between the various stages of the transfer.⁴³ In all those cases the Court's analysis is both objective and pragmatic. It lays no particular importance on either the intention of the parties or on there being absolute contemporaneity between the various stages of a transfer. The Court disregards the fact that the transaction takes place in stages when defining the undertaking transferred. Whatever arrangements may be selected for implementing the transfer, the Court remains guided by the objective of Directive 77/187, which is the protection of employees.⁴⁴ Thus, the Court defines the undertaking transferred without requiring that the transfer occur on a single specific date. The fact none the less remains that the complex nature of a transfer will necessarily have consequences for the interpretation of the 'date of ... transfer' for the purposes of Article 3(1) of Directive 77/187.

2. Rejection of the parties' interpretations of the 'date of ... transfer'

(a) Fixing a single specific date of transfer by reference to an objective criterion

44. It is first of all suggested that the Court should find that the date of transfer is a

particular point in time, which corresponds to the point in time when the transferee gains effective occupation and control of the transferred undertaking. That position was adopted by the Employment Appeal Tribunal in its decision of 5 October 2001 and by Celtec. In Celtec's submission, there are a number of reasons why that is the right interpretation. First, it is consistent with a literal interpretation of Article 3(1) of Directive 77/187. The need to ensure that the persons concerned in a transfer have legal certainty also lends support to that interpretation.

45. In this case, Celtec's interpretation results in the date of transfer being set at September 1990. It follows that the applicant employees could have claimed protection of the rights arising from their contracts of employment at that time. However, according to Celtec, the Department of Employment employees implicitly refused to allow their contracts of employment to be transferred. Their decision to agree to be seconded to the TECs whilst remaining Department of Employment employees must be taken as a refusal to transfer their contracts of employment to the TECs.

46. Such an analysis cannot be accepted, since Celtec acknowledged at the hearing that the Department of Employment employees had not been offered a contract

43 — Case 324/86 *Tellerup (Daddy's Dance Hall)* [1988] ECR 739; *Berg and Busschers*, cited above in footnote 27, and Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253.

44 — Laulom, S., 'The European Court of Justice in the dialogue on transfers of undertakings: a fallible interlocutor?', *Labour Law in the Courts*, edited by Sclarra, S., Hart, 2001, p. 152: 'The mode of transfer becomes immaterial'.

of employment with the TECs in September 1990. In any event, to accept that employees can tacitly refuse to transfer their contracts of employment would run counter to the spirit of Directive 77/187, which instead provides for the automatic transfer of contracts of employment as the consequence of the transfer of an undertaking.

47. Accordingly, were Celtec's interpretation of the date of transfer for the purposes of Article 3(1) of Directive 77/187 to be accepted, the necessary conclusion would be that the Department of Employment employees' contracts of employment were transferred to the TECs with effect from September 1990. More generally, that interpretation would require the automatic transfer of the contracts of employment on a single date, unless the employees had made clear their refusal.

48. Furthermore, that interpretation would make it impossible to bring about a progressive privatisation of the kind implemented by the United Kingdom, since it would preclude secondment of the employees, the TECs having become the employers of the transferred employees as of September 1990. The State would therefore be prevented from structuring a reorganisation so as to include

an initial period during which the undertaking taking over certain public activities is not yet autonomous but, as in this case, has the use of employees for whose remuneration it is not responsible. In practice, that would preclude complex transfers such as that at issue, even in cases in which the delay in the transfer of the contracts of employment did not entail any diminution in the employees' rights and was accepted by them. Such an outcome would be incompatible with the contractual freedom of all the parties concerned by the transfer, in that it would require the simultaneous transfer of the employees' skills and the employment contracts. Moreover, that requirement would be difficult to reconcile with the Court's case-law concerning complex transfers, cited above at points 38 to 42 of this Opinion.

49. In the absence of a clear and objective criterion for determining a single specific date of transfer, Celtec submits, in the second place, that successive employers would have no means of knowing when their obligations start, or cease, to run vis-à-vis the employees of the undertaking transferred.

50. To my mind, regard for legal certainty does not entail identifying a single specific date of transfer. As the respondents' counsel stated at the hearing, there is no doubt that a contract of employment is transferred on a particular date. However, that does not mean that the transfer of an undertaking must, for its part, take place on a specific date. Legal certainty is fully guaranteed as soon as there is found to be a transfer of undertakings, since, as a consequence, the employees may

be certain that the rights arising from their contracts of employment will be preserved, pursuant to Article 3(1) of Directive 77/187.

(b) A solution for the present case dictated by exceptional circumstances

51. In addition, even if it were accepted that the date of transfer is the point in time when the transferee acquires control of the undertaking transferred, it would be difficult, if not impossible, in many cases to identify such a date with any certainty, given that the concept of 'effective control' appears to be open to a wide range of interpretations.

54. The Commission put forward a slightly different approach in its written observations to the Court.⁴⁵ It submitted that, although the date of the transfer corresponds in principle to a particular point in time, the transfer should, given the exceptional circumstances of the present case, take effect with regard to each individual employee only at the point at which Newtec becomes his employer. Thus, the date of transfer remains in principle a particular point in time but ceases in this instance to be a single date as it is identified individually for each employee by reference to the date on which he or she took up employment with Newtec.

52. It seems equally risky, as the Commission points out in its observations, to adopt another objective factor by reference to which the date of transfer is fixed, such as a threshold in the number of contracts transferred. That would introduce an artificial distinction between, on the one hand, the contracts transferred before the threshold is reached, which would be preserved under Directive 77/187 and, on the other hand, the contracts transferred after the date fixed in that way, which would be regarded as unconnected with the transfer.

55. Celtec rightly objects to that approach on the ground that it amounts to creating an exception outside the framework of Directive 77/187, which only the legislature has power to do.

56. It seems to me that in addition such an exception would not be easily workable, inasmuch as the Commission does not explain what features of the transfer it regards as exceptional. Further, the idea of

53. In short, the interpretation put forward by Celtec cannot, in my view, be accepted.

⁴⁵ — At the hearing the Commission appeared to have adopted a different position and to have supported that taken by the respondents.

exceptional circumstances is necessarily vague and requires assessment on a case-by-case basis, to the detriment of legal certainty.

57. In the light of those considerations, I do not find the interpretation proposed by the Commission in its observations convincing.

(c) Interpreting the date of transfer broadly, as a period of transfer

58. The second interpretation suggested to the Court consists in defining the date of transfer as a period of transfer which extends over time and which comes to an end with the transfer of the last part of the undertaking transferred. Consequently, the transfer from the Department of Employment to Newtec will be deemed to be complete when the transferor has ceased to be the employer of all that undertaking's staff and when the transferee has become their employer.

59. Of the United Kingdom courts which have adjudicated on the dispute between Celtec and three of its employees, the Employment Tribunal thus identifies a

period of transfer commencing in September 1990 and drawing to a close in 1993. The Court of Appeal also took the view that the date of transfer referred to in Article 3(1) of Directive 77/187 could be interpreted as encompassing a period of greater or lesser length over which the transfer is carried out. The respondents adopt that interpretation. At the hearing, the Commission appeared to endorse it.

60. The main argument put forward by the proponents of that interpretation is that it is compatible with the objective of Directive 77/187, which is to safeguard employees. However, to my mind, although it is certainly preferable for the interpretation adopted to be consonant with that objective, that argument does not, on its own, suffice to carry the day. It seems unwise to reason exclusively by reference to the directive's objective and to treat it as an instrument whose sole purpose is to protect employees, while failing to bear in mind the consequences which the proposed interpretation may have in future.⁴⁶

61. Although it may be wholly warranted to interpret certain provisions of Directive 77/187 broadly,⁴⁷ to conceive of the date of transfer as a period of transfer which comes

46 — For an outline of those risks, see More, G., 'The Concept of Undertaking in the Acquired Rights Directive: The Court under Pressure (Again)', 15 YEL, 1995, p. 135.

47 — The Court has, for example, interpreted Article 1(1) of Directive 77/187 broadly.

to an end when the last contract of employment is transferred would none the less give rise to numerous difficulties.

62. The fate of those contracts of employment whose transfer is completed before the date adopted as the 'date of transfer' would be uncertain. The question would also arise as to whether an employee recruited during the transitional period whilst the transfer is under way can benefit from the transfer of his contract pursuant to Directive 77/187. The ensuing uncertainty inherent in the transitional period suggests that a broad interpretation of the date of transfer should be rejected.

63. Although it avoids that pitfall, an interpretation by virtue of which the transfer operates individually for each contract of employment when all the rights connected to that contract are transferred does not appear appropriate either, for the following reasons.

64. Both of these interpretations prove incompatible with the system set up by the directive. Article 3(1) of Directive 77/187 brings about an automatic transfer of the contracts of employment as a result of the transfer of the undertaking. It merely sets out the consequences of the transfer of an undertaking for the contracts of employment. To regard the transfer of an undertaking as occurring only when the contracts

of employment are transferred would turn a consequence of the transfer of an undertaking into a condition for its existence. The result would be that whether there is a transfer of an undertaking would no longer be objectively determined but would be conditional upon the transfer of the contracts of employment. Consequently, if that interpretation were accepted, the transferor and the transferee would merely need to refrain from transferring the contracts of employment from one to the other in order to circumvent the application of Directive 77/187.

65. For those reasons, the interpretation which construes the 'date of transfer' under Article 3(1) of Directive 77/187 as a period of transfer must be rejected.

3. Alternative interpretation of the date of transfer in the context of a complex transfer

66. Directive 77/187 remains applicable however sophisticated the transfer concerned may be. Its objective remains to ensure a minimum level of social protection to the employees of a transferred undertaking by safeguarding their rights. Although

those social considerations are pre-eminent in the case-law, the latter also evinces the need to reconcile those considerations with the directive's other objective, which is to allow competitive undertakings to emerge.⁴⁸ The Court's case-law on the transfer of undertakings has always striven to strike a balance between the objective of safeguarding workers and the recognition of economic reality.⁴⁹

arbitrary choice, which might prevent, for example, the implementation of a progressive privatisation with a period of temporary secondment.

67. Where a transfer takes place because a contract has been entered into between the transferor and the transferee, it is easy to identify the date on which the transfer takes effect. However, in the absence of such an agreement, it becomes difficult to identify with any certainty a particular point in time at which the transfer takes place. The issue in the present case is precisely to afford protection to the transferred employees, whilst allowing some flexibility in the practical arrangements for the transfer, which reflects economic and political considerations. As has been shown in the analysis of Celtec's argument, adopting a single point in time as the date of transfer would entail an

68. Conversely, neither of the objectives of Directive 77/187 is jeopardised if the attempt to pinpoint a particular date on which the transfer is deemed to have taken place is abandoned. In fact, that is the way to ensure that the employees' rights are safeguarded whilst allowing the transfer to take place in stages.

69. If the protection afforded by Directive 77/187 to employees is not to be jeopardised, it is necessary to ensure that their rights are not affected by the date on which their contracts are transferred. If that were not the case, transferors and transferees could be tempted to postpone the transfer of the contracts of employment with a view to circumventing the application of Directive 77/187.

70. In order to satisfy the requirement that employees' rights be safeguarded, it seems to me that the following three conditions must be fulfilled. First, the transfer of the contracts of employment on a date other than the date of the transfer of assets will be neutral for the employees only if the terms and conditions of employment in force at the time when a

48 — The fourth recital in the preamble to Directive 77/187 refers to the 'direct effect on the functioning of the common market' which may be produced by the differences in the social laws of the Member States. Barnard, C., *Employment Law*, 2nd edition, 2000, p. 445. Deakin, S., and Browne, J., 'Social Rights and Market Order: Adapting the Capability Approach', *Economic and Social Rights in the EU Charter of Fundamental Rights, a legal perspective*, Oxford, 2003, p. 28: 'The historical function of social rights is to reconcile the traditional mechanisms of social policy with the mechanisms of a market order'.

49 — As to the way in which the Court has struck a balance between those two requirements, see Hunt, J., 'The Court of Justice as a policy actor: the case of the Acquired Rights Directive', 18 *Legal Studies*, 1998, p. 336.

decision about the transfer is made remain unchanged while the practical arrangements are being implemented, a process which may be staggered over a period of time.⁵⁰ If the transferor's economic position deteriorates and the maintenance of the terms and conditions of employment is jeopardised as a result, a postponement of the transfer of the contracts of employment will not comply with Directive 77/187.

contracts being transferred to the transferee only on a date subsequent to the transfer of the assets, the employees none the less retain the option to refuse to allow their contract to be transferred if they so wish. It is clear from the case-law that an employee's refusal to allow his contract of employment to be transferred is assessed under national law.⁵² Likewise, the assessment of the employees' consent to a deferred transfer of their contracts of employment will be a matter for national law.

71. Second, the date fixed for the transfer of the contracts of employment should not have any impact on the extent of the transfer. In other words, once the parameters of the undertaking transferred, and hence the employees attached to it, have been identified, pursuant to Article 1(1) of Directive 77/187, the only possible room for manoeuvre available to the transferor and the transferee will concern the date on which the contracts of employment are transferred.

73. Compliance with those three conditions, which it is for the national court to assess, allows the transfer of an undertaking to be executed in a number of stages without the minimum protection conferred on employees by Directive 77/187 being undermined.

72. Third, since it is established that the employees may refuse to allow their contract to be transferred from one employer to the other,⁵¹ *a fortiori* their ability to agree to the transfer of their contract of employment taking place at a later date than the date of the transfer of the undertaking must be recognised, as long as their rights remain the same. Furthermore, in agreeing to their

C — Analysis in relation to the transfer at issue

74. The privatisation which took place has been found to be a transfer within the

50 — It seems to me neither necessary nor desirable to impose a time-limit within which the arrangements for the transfer must be implemented, provided that the terms and conditions of employment are preserved from the day on which a decision to transfer has been taken.

51 — See *Katsikas and Others*, cited in footnote 33 above.

52 — *Katsikas and Others*, cited in footnote 33 above, *Merckx and Neuhuys*, cited in footnote 43 above, and Case C-399/96 *Europièces* [1998] ECR I-6965.

meaning of Article 1(1) of Directive 77/187. It follows that the contracts of employment of the Department of Employment employees were transferred to the TECs, pursuant to Article 3(1) of the directive. The national court will have to satisfy itself that the transfer of the contracts on a date subsequent to the transfer of the undertaking's assets has not resulted either in the exclusion of certain employees from the protection conferred by the directive or in a diminution

of their rights. It will also be for the national court to establish whether the Department of Employment employees consented to the transfer of their contracts taking place only at the end of their secondment. However, if those three conditions are not fulfilled, the transfer of the contracts of employment will be deemed to have taken place at the time when the other aspects of the transfer took effect in Newtec's favour, i.e. in September 1990.

IV — Conclusion

75. In the light of the foregoing considerations, I propose that the Court give the following answer to the questions raised by the House of Lords:

The 'date of ... transfer' mentioned in Article 3(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 does not require there to be a particular point in time at which all the aspects of the undertaking or business are simultaneously transferred. In the context of a privatisation, the transfer of the contracts of employment may take place after the transfer of the assets, as long as that does not result in a diminution in the protection conferred by Directive 77/187 on the employees and as long as those employees have signalled their agreement.