

JUDGMENT OF THE COURT (Second Chamber)
12 November 1998 *

In Case C-399/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Cour du Travail de Bruxelles for a preliminary ruling in the proceedings pending before that court between

Europièces SA, in liquidation,

and

Wilfried Sanders,

Automotive Industries Holding Company SA, declared insolvent,

on the interpretation of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26),

* Language of the case: French.

THE COURT (Second Chamber),

composed of: G. Hirsch, President of the Chamber, G. F. Mancini (Rapporteur) and R. Schintgen, Judges,

Advocate General: G. Cosmas,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and by E. Sharpston, Barrister,
- the Commission of the European Communities, by Maria Patakia, of its Legal Service, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 7 May 1998,

gives the following

Judgment

- 1 By judgment of 11 December 1996, received at the Court on 17 December 1996, the Cour du Travail de Bruxelles (Higher Labour Court, Brussels) referred to the

Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26, hereinafter 'the Directive').

- 2 That question was raised in proceedings between Mr Sanders, a sales representative, and Europrièces SA (hereinafter 'Europrièces'), a company in liquidation, relating to the payment of compensation under various heads, including compensation in lieu of notice.

Community legislation

- 3 The Directive, according to Article 1(1) thereof, 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.
- 4 Under the first subparagraph of Article 3(1), the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer are, by reason of such transfer, to be transferred to the transferee.
- 5 Under Article 4(1) of the Directive, the transfer of an undertaking, business or part of a business does not in itself constitute grounds for dismissal by the transferor or the transferee. That provision does not, however, stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.

- 6 Furthermore, Article 4(2) provides that, if the contract of employment or the employment relationship is terminated because the transfer within the meaning of Article 1(1) involves a substantial change in working conditions to the detriment of the employee, the employer is to be regarded as having been responsible for termination of the contract of employment or of the employment relationship.
- 7 In the course of the proceedings before the Court, the Directive was replaced by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88).

National law

- 8 The Directive was transposed into Belgian law in the second chapter of Collective Agreement No 32 *bis* of 7 June 1985 concerning the safeguarding of employees' rights in the event of a change of employer as a result of the legal transfer of an undertaking and regulating the rights of employees re-engaged in the event of a takeover of assets following insolvency or judicial composition with transfer of assets, rendered mandatory by Royal Decree of 25 July 1985 (*Moniteur Belge*, 9 August 1985, p. 11527). That agreement was amended, *inter alia*, by Collective Agreement No 32 *quater* of 19 December 1989, rendered mandatory by Royal Decree of 6 March 1990 (*Moniteur Belge*, 21 March 1990, p. 5114).
- 9 The third chapter of Collective Agreement No 32 *bis* of 7 June 1985 determines the rights of workers in the event of a change of employer as a result of a takeover of assets following insolvency or judicial composition with transfer of assets. In particular, it provides that the Collective Agreement applies only if the takeover occurs within six months of the date of insolvency or judicial composition: if it does not, the staff are not covered by the agreement.

The main proceedings

- 10 Mr Sanders was employed by Europièces as a sales representative for the Erpent office from 15 February 1974. In July 1993 Europièces went into voluntary liquidation and a liquidator was appointed. On 27 July 1993, the liquidator dismissed Mr Sanders with 22 months' notice.
- 11 On 13 August 1993, the liquidator of Europièces informed Mr Sanders that Europièces had transferred part of its stock and equipment to Automotive Industries Holding Company SA (hereinafter 'Automotive Industries'); that not all of Europièces' business had been transferred to Automotive Industries; and that, as from 24 August, Mr Sanders would have to carry on his activities on behalf of the liquidation in the Brussels office under the direct orders of the liquidator's representative. The liquidator also indicated in that letter that he had been informed that draft contracts of employment had been submitted by Automotive Industries to some members of staff including Mr Sanders, who had refused the offer.
- 12 In reply to a letter from Mr Sanders of 18 August 1993 in which he asked why, as the representative for the Erpent office and for the region comprising the province of Namur, Luxembourg and Hainaut, he should have to carry on his activities on behalf of the liquidation in Brussels, the liquidator, in a letter of 25 August, simply set out Mr Sanders' role and duties. He was given the task of helping to realise the best price for the stock of parts belonging to the insolvent company and to cooperate in decreasing Europièces' liabilities. The liquidator stated that the list was not exhaustive and might be supplemented in due course. Further, he indicated that the activities of Europièces, which continued to exist only for 'sales' purposes, were limited to disposing of existing stock.
- 13 By letter of 8 September 1993, Mr Sanders asked the liquidator to specify whether he was still principally a sales representative or whether he had other tasks to perform, and stated that he did not consent to a change in his duties.

- 14 On 20 September 1993, the liquidator replied that the intention was not to alter Mr Sanders' duties unilaterally, but that circumstances and legal requirements made it necessary to assign other tasks to him.
- 15 Following a further exchange of correspondence, Mr Sanders sent a final letter to the liquidator on 18 October 1993 stating his view that his contract of employment as a sales representative had been the subject of a unilateral breach, or had at the very least been terminated.
- 16 Mr Sanders then brought an action before the Tribunal du Travail de Bruxelles (Labour Court, Brussels) against both Europièces and Automotive Industries.
- 17 According to the Tribunal du Travail, the facts showed that there had been a transfer of the stock, the goodwill and the lease to, or ownership of, the Erpent premises and that the Erpent economic unit to which Mr Sanders was attached had in any event been transferred with its identity intact, since Automotive Industries was carrying on the same business.
- 18 By judgment of 5 September 1995, the Tribunal du Travail therefore ordered Europièces to pay to Mr Sanders compensation plus interest at the statutory rate. It also declared the action against Automotive Industries to be admissible and invited Mr Sanders to make submissions on the applicability of the Directive to transfers by a company in voluntary liquidation and, if appropriate, to arrange for the case to be relisted for a hearing.

The question referred

- 19 On 16 November 1995, Europièces appealed against the judgment of 5 September 1995 to the Brussels Cour du Travail. Mr Sanders argued before that court that, with regard to the establishment of liability on the part of Automotive Industries, which was subsequently declared insolvent, there had been a transfer of an undertaking within the meaning of the Directive since the Erpent unit had been transferred at the beginning of the liquidation procedure. Under the Belgian legislation, a transfer in the event of liquidation was not considered to be equivalent to a transfer in the event of insolvency.
- 20 In its judgment of 11 December 1996, the Cour du Travail observed that the agreement relating to the transfer of assets from Europièces to Automotive Industries had not been produced, and there was therefore no way of knowing exactly what its terms were. Whilst the economic unit at Erpent did appear to have been transferred, Mr Sanders had failed to persuade the court that the Directive applied to a company in voluntary liquidation.
- 21 In those circumstances, the Cour du Travail decided to uphold the judgment appealed against in so far as it related to Europièces and, with regard to the application in respect of Automotive Industries, to stay proceedings in order to refer the following question to the Court of Justice for a preliminary ruling:

‘Does Directive 77/187 apply where a company in liquidation transfers all or part of its assets to another company which then issues orders to a worker which the company in liquidation states must be carried out?’
- 22 First of all, it must be determined whether it is appropriate to reply to the question referred or whether the question should, as the United Kingdom Government

argues, be declared inadmissible on the ground that the national court has failed to provide the Court with details of the factual and legal context of the question.

- 23 The Court has indeed held that, owing to the need to provide an interpretation of Community law which will be of use to the national court, it is necessary for that court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based (Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6; orders in Case C-386/92 *Monin Automobiles* [1992] ECR I-2049, paragraph 6, and Case C-9/98 *Agostini* [1998] ECR I-4261, paragraph 4).
- 24 In this case, however, the case-file forwarded by the national court contains sufficient information to enable the Court to interpret the rules of Community law in respect of the situation arising in the main proceedings. In addition, the legal context of the case is already largely familiar from a previous reference for a preliminary ruling relating to Belgian procedure in the matter of liquidation (Case C-319/94 *Dethier Équipement* [1998] ECR I-1061).
- 25 It is therefore appropriate to reply to the question.
- 26 The question seeks to ascertain first of all whether Article 1(1) of the Directive is to be interpreted as meaning that the Directive applies where a company in voluntary liquidation transfers all or part of its assets to another company from which the worker then takes his orders which the company in liquidation states are to be carried out. Secondly, in view of the circumstances of the case and in order to provide an answer which is of use to the national court, it is necessary to establish whether Article 3(1) of the Directive precludes a worker employed by the transferor at the date of the transfer of the undertaking from objecting to the transfer of his contract of employment or employment relationship to the transferee.

Whether there is a transfer within the meaning of the Directive

- 27 The first point to note in this regard is that the Directive does not apply to the transfer of an undertaking, business or part of a business in the course of insolvency proceedings (Case 135/83 *Abels* [1985] ECR 469).
- 28 However, it follows from the case-law of the Court that, in deciding whether the Directive applies to the transfer of an undertaking subject to an administrative or judicial procedure, the determining factor to be taken into consideration is the purpose of the procedure in question (Case C-362/89 *D'Urso and Others* [1991] ECR I-4105, paragraph 26, and Case C-472/93 *Spano and Others* [1995] ECR I-4321, paragraph 24). Furthermore, account should also be taken of the form of the procedure in question, in particular in so far as it means that the undertaking continues or ceases trading, and also of the Directive's objectives (*Dethier Équipement*, cited above, paragraph 25).
- 29 In *Dethier Équipement*, paragraph 27, the Court found that, although the objectives of a winding up by the court may sometimes be similar to those of insolvency proceedings, this is not necessarily the case, since liquidation proceedings may be used whenever it is sought to bring a company's activities to an end and whatever the reasons for that course.
- 30 Since the criterion relating to the purpose of the procedure for winding up by the court did not appear to be conclusive, the Court considered the form of that procedure in detail.
- 31 In particular, in relation to the appointment and duties of the liquidator, the Court found, at paragraph 30 of the judgment in *Dethier Équipement*, that the situation of an undertaking being wound up by the court differs considerably from that of

an undertaking subject to insolvency proceedings and that the reasons which led the Court to rule out application of the Directive in the latter situation may be absent in the case of an undertaking being wound up by the court.

- 32 The Court therefore found in *Dethier Équipement* that the Directive applies in the event of the transfer of an undertaking which is being wound up by the court if the undertaking continues to trade. In particular, it observed at paragraph 31 that where the undertaking continues to trade while it is being wound up by the court, continuity of the business is assured when the undertaking is transferred. There is accordingly no justification for depriving the employees of the rights which the Directive guarantees them on the conditions it lays down.
- 33 So far as this case is concerned, it must be borne in mind that voluntary liquidation is essentially similar to winding up by the court, save for the fact that it falls to the shareholders in general meeting, and not to the court, to take the decision to wind up the company, appoint the liquidators and determine their powers. Only where a majority of the shareholders cannot be assembled must the company apply to the court for a declaration putting it into liquidation. The court then designates the liquidators in accordance with the company's articles of association or pursuant to the decision of the shareholders in general meeting, unless it is clear that disagreement between the shareholders will prevent them from taking a decision in general meeting, in which case the court itself appoints a liquidator.
- 34 Thus it would seem that, at least in some procedural respects, voluntary liquidation has even less in common with insolvency than winding up by the court.
- 35 In the light of the foregoing, it should be noted that the reasons which led the Court to hold in *Dethier Équipement* that the Directive can apply to transfers

that occur while an undertaking is being wound up by the court are all the more pertinent where the undertaking transferred is being wound up voluntarily.

- 36 The answer to the first part of the question, as recast above, is therefore that Article 1(1) of the Directive is to be interpreted as meaning that the Directive applies where a company in voluntary liquidation transfers all or part of its assets to another company from which the worker then takes his orders which the company in liquidation states are to be carried out.

The worker's right to object to the transfer of his contract of employment or employment relationship

- 37 In relation to the second part of the question, as recast above, the Court has consistently held that the Directive is intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the new employer on the same conditions as those agreed with the transferor (see *D'Urso and Others*, cited above, paragraph 9, and Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others* [1992] ECR I-6577, paragraph 21).
- 38 However, the protection which the Directive is intended to guarantee is redundant where the person concerned decides of his own accord not to continue the employment relationship with the new employer after the transfer. In that situation the Court has already held that Article 3(1) of the Directive does not apply (Case 105/84 *Danmols Inventar* [1985] ECR 2639, and *Katsikas*, cited above, paragraph 30).

- 39 In the event of the employee deciding of his own accord not to continue with the contract of employment or employment relationship with the transferee, it is for the Member States to determine what the fate of the contract of employment or employment relationship should be. The Member States may provide, in particular, that in such a case the contract of employment or employment relationship must be regarded as terminated either by the employee or by the employer. They may also provide that the contract or employment relationship should be maintained with the transferor (Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253, paragraph 35).
- 40 Further, it should be noted that Article 4(2) of the Directive provides that if the contract of employment or the employment relationship is terminated because the transfer within the meaning of Article 1(1) involves a substantial change in working conditions to the detriment of the employee, the employer is to be regarded as having been responsible for the termination.
- 41 It appears from the order for reference that draft contracts of employment were submitted to various members of staff, including Mr Sanders who declined to enter into them.
- 42 In addition, the liquidator would appear to have informed Mr Sanders that the intention was not to change his duties unilaterally, but that circumstances and legal requirements made it necessary to allocate other tasks to him.
- 43 That being so, it is for the national court to examine the reasons why the employee refused the contract of employment offered to him and to determine whether that contract involved a substantial change in working conditions to his detriment.
- 44 In the light of the foregoing, the answer to the second part of the question, as recast above, must be that Article 3(1) of the Directive does not preclude a worker employed by the transferor at the date of the transfer of an undertaking from

objecting to the transfer of his contract of employment or employment relationship to the transferee, provided he decides to do so of his own accord. It is for the national court to determine whether the contract of employment proposed by the transferee involves a substantial change in working conditions to the detriment of the worker. If it does, Article 4(2) of the Directive requires Member States to provide that the employer is to be considered responsible for the termination.

Costs

- 45 The costs incurred by the United Kingdom Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the question referred to it by the Cour du Travail de Bruxelles by judgment of 11 December 1996, hereby rules:

1. Article 1(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 directive applies

where a company in voluntary liquidation transfers all or part of its assets to another company from which the worker then takes his orders which the company in liquidation states are to be carried out.

2. Article 3(1) of Directive 77/187/EEC does not preclude a worker employed by the transferor at the date of the transfer of an undertaking from objecting to the transfer of his contract of employment or employment relationship to the transferee, provided he decides to do so of his own accord. It is for the national court to determine whether the contract of employment proposed by the transferee involves a substantial change in working conditions to the detriment of the worker. If it does, Article 4(2) of the directive requires Member States to provide that the employer is to be considered responsible for the termination.

Hirsch

Mancini

Schintgen

Delivered in open court in Luxembourg on 12 November 1998.

R. Grass

G. Hirsch

Registrar

President of the Second Chamber