



ADVISORY OPINION OF THE COURT

14 March 1997*

(Council Directive 77/187/EEC – transfer of part of a business)

In Case E-3/96

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice from Gulating lagmannsrett (Gulating Court of Appeal) for an advisory opinion in the case pending before it between

Tor Angeir Ask and Others

and

ABB Offshore Technology AS and Aker Offshore Partner AS

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,

THE COURT,

composed of: Bjørn Haug, President, Thór Vilhjálmsson (Rapporteur) and Carl Baudenbacher, Judges,

Registrar: Per Christiansen,

* Language of the request for an advisory opinion: Norwegian.

after considering the written observations submitted on behalf of:

- the appellants Tor Angeir Ask and Others, represented by Counsel Bent Endresen;
- the respondent ABB Offshore Technology AS (“ABB”), represented by Counsel Einar Østerdahl Poulsson;
- the respondent Aker Offshore Partner AS (“Aker”), represented by Counsel Kristine Schei;
- the Government of the Federal Republic of Germany, represented by Dr Ernst Röder and Sabine Maass, Officials in the Federal Ministry of Economics, acting as Agents;
- the Government of the United Kingdom, represented by John E. Collins, Treasury Solicitor's Department, acting as Agent, and Clive Lewis, Barrister;
- the EFTA Surveillance Authority, represented by Håkan Berglin, Director of the Legal and Executive Affairs Department, acting as Agent, assisted by Trygve Olavson Laake, Officer of that Department;
- the European Commission, represented by Hans Gerald Crossland and Maria Patakia, Members of its Legal Service, acting as Agents.

having regard to the Report for the Hearing, revised in order to incorporate answers from the appellants and respondents, respectively, to questions put to them by the EFTA Court in a letter of 8 November 1996,

after hearing the oral observations of the appellants, Tor Angeir Ask and Others, the respondents, ABB Offshore Technology AS, represented by Counsel Merete Bårdsen, and Aker Offshore Partner AS, the Government of the Federal Republic of Germany, represented by Agent Bernd Kloke, the EFTA Surveillance Authority, represented by Agent Trygve Olavson Laake, and the EC Commission, represented by Agent Hans Gerald Crossland, at the hearing on 15 January 1997,

gives the following

Advisory Opinion

1 By an order dated 21 May 1996, registered at the Court on 28 May 1996, Gulating lagmannsrett (the Gulating Court of Appeal) in Norway made a request for an Advisory Opinion in a case brought before it by Mr Tor Angeir Ask, Mr Per Gerhard Hallem, Mr Rolf Hole, Mr Knut H. Kattetvedt, Mr Tore G. Knudsen, Mr Kjell Kristoffersen, Mr Jostein Laukeland, Mr Ove Rognø, Mr Ivar Utland and Mr Sverre Weibell (appellants) against the respondents, ABB and Aker.

2 The questions referred by the Norwegian court concern the interpretation of Council 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 (hereinafter "the Directive"). The Directive is referred to in point 23 of Annex XVIII to the Agreement on the European Economic Area ("EEA"). Thus, according to Article 2(a) of the Agreement, the Directive is to be considered as a part of that Agreement as the Directive has been adapted by way of Protocol 1 to it.

3 Article 1(1) of the Directive provides:

"1. This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger."

4 Articles 3(1) and 3(2) of the Directive provides:

"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 within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.

2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions, with the proviso that it shall not be less than one year.”

5 Article 4(1) of the Directive provides:

“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 organizational reasons entailing changes in the workforce.

Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal.”

Facts

- 6 In the autumn of 1994, the Norwegian company Statens Oljeselskap AS (Statoil) put out to tender certain maintenance and modification work on the Statfjord oil field in the North Sea. The respondent ABB had held a maintenance contract with Statoil for the Statfjord installations since 1988. After a pre-qualifying round, ABB was not considered qualified to take part in the tender competition. The respondent Aker was awarded the contract for the maintenance and modification work on the Statfjord field. Under the new contract the respondent Aker has an overall responsibility implying, *inter alia*, the responsibility to plan where, when and how inspections and tests are to be performed, to define the necessary works and inspections, to plan and carry out measures and reparations or alterations and to control and document the tasks. The company shall also perform tasks such as engineering, non-destructive testing and modification works. Payments are based on agreed annual goal-budgets, based on defined annual programmes, fixed net hourly rates, lease of machines, costs of materials, etc. Under the contract between ABB and Statoil, ABB performed only specific tasks as defined by Statoil, albeit with its own supervisors, and in principle received payment at fixed rates on an hourly basis.
- 7 Aker commenced its work on Statfjord in February 1995, when the contract between Statoil and ABB expired. However, ABB continued to work on the platforms for a few months, completing some of the maintenance work under its contract and, according to counsel for ABB, took on one specific work contract awarded by Statoil. It is agreed that Aker did not take over any tools or equipment from ABB, nor was there any agreement between the parties regarding a transfer of employees.

- 8 Maintenance workers on some of the Statoil oil platforms are employed by Statoil, while on other Statoil platforms the workers are primarily employees of a third company.
- 9 Both respondents describe their employment arrangements as being such that their employees are employed by the company but are not hired for a specific project, contract or platform. In 1995 ABB assigned about 220 person-years to the Statfjord field: approximately 200 on the installations offshore and approximately 20 onshore. In 1996 about 330 person-years were required to fulfil Aker's obligations under the new contract regarding Statfjord: approximately 245 on board the platforms and approximately 85 onshore. The total number of employees involved is higher than the number of person-years indicated above because of the organisation of the work in shifts.
- 10 ABB dismissed 74 employees when its contract with Statoil expired. Out of 60 employees hired by Aker in relation to the new Statfjord contract, only 10 had previously been employed with ABB.
- 11 Sixteen of the employees dismissed by ABB brought cases before Stavanger byrett (Stavanger City Court), petitioning for their dismissals by ABB to be ruled invalid. Stavanger byrett came to the conclusion that there had not been a transfer of an undertaking, business or part of a business under the Norwegian legislation implementing the Directive. Ten of the original sixteen plaintiffs, all of whom were scaffolding constructors, appealed the case to Gulating lagmannsrett, which decided to stay the proceedings and refer the case to the EFTA Court.
- 12 The following questions were referred to the EFTA Court:

"1. Does Article 1(1) of the Council Directive 77/187/EEC cover a situation where a time-limited contract regarding maintenance and modification expires, and the principal concludes new time-limited contracts covering the same or other maintenance work with one or more other contractors?"

2. Is it of any significance to the answer to question 1 that the contract falls under Council Directive 90/531/EEC and 93/38/EEC?"

3. Is it of any significance if employees and/or equipment are taken over or transferred between companies holding maintenance contracts with Statoil?"

General remarks

- 13 The questions presented to the Court in the request for an advisory opinion concern the concept of transfer of an undertaking, business or part of business as a result of a legal transfer within the meaning of Article 1(1) of the Directive. The referring Court further asks whether it is of significance for the application of the Directive that the contract falls under directives regarding the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.
- 14 The EFTA Court has dealt with the concept of transfer in Article 1 of the Directive, as well as with certain other questions on the interpretation of the Directive, in three previous decisions, namely in the *Eidesund* case (Case E-2/95, not yet reported, hereinafter “*Eidesund*”) and the *Langeland* case (Case E-3/95, not yet reported), see Advisory Opinions delivered on 25 September 1996, and in the *Ulstein and Røiseng* case (Case E-2/96, not yet reported, hereinafter “*Ulstein*”) in which an Advisory Opinion was given on 19 December 1996.
- 15 As pointed out by the EFTA Court in these three cases, the European Court of Justice (the ECJ) has previously dealt with the concept of transfer in Article 1 of the Directive in numerous cases. Although none of these cases have dealt directly with the situation where an independent service provider is succeeded by another, the general principles of interpretation of the Directive seem to be well established in ECJ case law and the decisions of the ECJ can give considerable guidance with respect to such situations. Furthermore, on 11 March 1997, the ECJ delivered its judgment in case C-13/95 *Ayşe Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* (hereinafter “*Süzen*”), regarding the application of the Directive in a situation where a contract for cleaning services was terminated and subsequently a new service contract was entered into between the principal and a new service provider.

The first and the third question

- 16 By its first question, the referring court seeks to establish whether the Directive covers a situation where a time-limited contract regarding maintenance and modification work on an oil platform expires and the principal concludes a new time-limited contract covering the same as well as other maintenance work with another contractor. In its third question, the referring court asks whether it is of any significance in such a situation if employees or equipment, or both, are taken over by the new contractor. These questions should be examined together.

Transfer of part of a business

- 17 Whereas the *appellants* propose an affirmative answer to the first question and the *respondents*, supported by the *German Government*, submit that the first question should be answered in the negative, the *Government of the United Kingdom*, the *EFTA Surveillance Authority* and the *EC Commission* all propose a qualified answer to the first question, to the effect that a situation like the one in the case at hand may be covered by the Directive provided that the relevant criteria for a transfer of an undertaking are met, i.e., that an economic entity is transferred and retains its identity after the transfer.
- 18 Referring to the stated purpose of the Directive and the wide and flexible interpretation given to the concept of transfer in the case law of the ECJ, the Court has on earlier occasions held that the Directive may be applicable in situations where fixed-term contracts for the provision of certain services are, upon their expiry, succeeded by new fixed-term contracts concluded with other service providers for the same or similar services. See the Court's Advisory Opinions in *Eidesund* and *Ulstein*.
- 19 However, the Court has held in *Ulstein*, at paragraph 27, that a mere succession of two contracts for the provision of the same or similar services will not, as a rule, be sufficient for there to be a transfer of an undertaking, business or part of a business. The decisive criterion for establishing whether there has been a transfer of an undertaking, business or part of a business for the purposes of the Directive is whether the business in question is transferred as a going concern with its own identity, and whether it retains this identity after the transfer. The object of the transfer must constitute a stable economic entity, so that an activity limited to performing one specific works contract falls outside the scope of the Directive, see case C-48/94 *Rygaard v Strø Mølle Akustik* [1995] ECR I-2745. This view has also been expressed by the EFTA Court in *Ulstein* and in *Eidesund*.
- 20 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 concerned, whether or not tangible assets, such as buildings and moveable property, or intangible assets, such as patents or know-how, are transferred, the value of the assets at the time of the transfer, whether or not most of the personnel is taken over by the new employer, whether or not customers are transferred, the degree of similarity between the activities carried on before and after the transfer and the period of suspension of those activities, if any. All of these circumstances are, however, only individual factors in the overall assessment to be made and cannot, therefore, be considered in isolation. The elements to be considered were set out in Case C-24/85 *Spijkers v Benedik* [1986]

ECR I-1119, at paragraph 13, and have consistently been invoked and referred to by the ECJ.

- 21 It is for the national court to assess the factual circumstances of the case and to take account of all the individual factors in the overall assessment. The core of the assessment is whether there is, in a particular case, a stable economic entity with its organisational structure and characteristics necessary for the operation of the entity that is transferred to another economic operator while retaining its characterising elements and continuing its activity. Further, as also pointed out in *Süzen*, in assessing the identity of the entity in question, it must be borne in mind that the activities carried on are not the only ones which characterise a business entity. Its organisation, workforce, managerial staff, organisation of the work, operating methods and, where appropriate, the operational resources available to it, are all factors contributing to the identity of a particular economic entity. It is important to note that individual factors carry different relevance in weight in relation to the business activity in question and its characteristics, see *Süzen*, at paragraphs 15 and 18.
- 22 In sum, for there to be a transfer of an undertaking, business or part of a business for the purposes of the Directive, a stable economic entity with its own identity must be transferred and it must retain its identity after the transfer. If there are no special circumstances which lead to the conclusion that an economic entity retaining its own identity has been transferred, the continuation of an activity by another undertaking is not by itself sufficient to constitute a transfer within the meaning of the Directive.
- 23 It seems to be uncontested that the entity in question in the case at hand would be the business unit working in ABB under the previous contract regarding the Statfjord field. As will be pointed out below, no assets were transferred from the first to the second service provider, nor were any tools or equipment taken over. Furthermore, only a very limited number of ABB's employees working under the Statfjord contract were re-engaged by Aker. No managerial staff was taken over, only scaffolding contractors, and even they were not taken over as an organisational group but engaged on an individual basis in competition with other applicants.

Assets and equipment

- 24 The *Government of the Federal Republic of Germany* submits that it is an indispensable condition for there to be a transfer of part of a business that a body of assets be transferred. The German Government further argues in this context that it is appropriate to apply the criterion of operating resources in the form of tangible or intangible assets. At the oral hearing, the agent of the *EC Commission*

stressed that there was nothing in the case law of the ECJ to support this contention; on the contrary, the case law shows that a number of factors must be taken into account, of which a transfer of a body of assets is one, but not a conclusive one.

- 25 As stated in *Eidesund*, at paragraph 39, the taking over of assets may constitute an important element in the overall assessment of the transaction. The taking over of tangible or intangible assets of a business or part of a business may be a strong indication that the business or the relevant part of the business has, in fact, been transferred. Depending on the circumstances, in particular the type of the business in question and its means of operation, this factor may be decisive in the overall assessment. However, as pointed out in *Ulstein*, at paragraph 33, the absence of this factor does not by itself render the Directive inapplicable. The importance of this factor in the overall assessment depends on the entity in question. Certain economic entities are thus less dependent on tangible and intangible assets for their operation than are other types of businesses, see judgment of the ECJ in *Süzen*, at paragraph 18.
- 26 Thus, where machinery or equipment needed for further production or operation has been taken over and used in the continued activity, it may underscore the notion that the business has been taken over as a going concern and that the identity and continuity of the business have been maintained. The Court notes, however, that in the present case no tools or equipment were taken over.

Employees

- 27 By its third question, the referring court seeks to establish whether it is of relevance in a case like the one at hand if employees are taken over by, or transferred from, the first to the second service provider.
- 28 As the Court has already stated, the re-engagement of the transferor's employees is one of various factors to be taken into account by the national court to enable it, when assessing the transaction as a whole, to decide whether an undertaking, business or part of a business has in fact been transferred. See *Ulstein*, at paragraph 35.
- 29 Further, as held by the Court in *Eidesund*, at paragraph 43, and *Ulstein*, at paragraph 36, in cases where a high percentage of the personnel taken over and

where the business of the first service provider is characterised by a high degree of expertise on the part of its personnel, the re-engagement of that same personnel by the second service provider may support a finding of identity and continuity of the business. This, however, depends on the entity in question and the importance of the personnel for that identity. Where a business activity is primarily characterised by a stable workforce carrying out the activity and where the new contractor chooses to re-engage the workforce for the continued operation of the business, this may suffice to constitute a transfer within the meaning of the Directive.

Conclusion

- 30 It follows from the foregoing that Article 1(1) of the Directive must be interpreted as meaning that it does not apply to a situation in which a principal enters into a new contract with a second contractor with a view to having similar maintenance and modification work carried out when there is no transfer of significant tangible or intangible assets, including essential equipment, nor the taking over or re-engagement of an essential part of the workforce, in terms of number and expertise, who were especially assigned by the predecessor to the performance of the contract.

The second question

- 31 In its second question, the referring court asks whether it is of significance to the answer to the first question that the contract falls under Council Directive 90/531/EEC on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors and Council Directive 93/38/EEC co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. These directives are referred to in point 4 of Annex XVI to the EEA Agreement, cf. an amendment by Decision of the EEA Joint Committee No 7/94 of 21 March 1994, see also Parliament and Council Directive 94/22/EC, referred to in point 12 of Annex IV to the EEA Agreement, as amended by Decision of the EEA Joint Committee No 19/95 of 5 April 1995. Directive 93/38/EEC, which is to replace Directive 90/531/EEC, prescribes procedures for contracting entities when awarding supply, works or service contracts within the field of, *inter alia*, exploitation of a geographical area for the purpose of exploring for or extracting oil and gas.
- 32 The *Government of the Federal Republic of Germany*, the *Government of the United Kingdom*, the *EFTA Surveillance Authority* and the *EC Commission* are all agreed that it is of no significance for the answer to the first question that the contract in question falls under the above-mentioned Council Directives. The

appellants and the respondents take the same view. However, both respondents submit that when these Directives apply, this supports or confirms the proposition that Council Directive 77/187/EEC is not applicable to such situations. The respondent Aker submits that Directive 93/38/EEC contains specific provisions aimed at fostering real competition, and thereby movement of goods and services. If the purpose of Directive 93/38/EEC is to be achieved, it is not possible to argue at the same time that a change of contractor is a transfer of a part of a business.

- 33 The Court notes that it addressed the same question in *Eidesund*. There the Court noted that the Directive, by its wording and purpose, is general in its application and held that the fact that a transaction is subject to public procurement directives does not by itself prevent the Directive from being applicable in a case such as the one then before the Court. The Court does not find any grounds to reach a different conclusion in the present case. The Court considers, however, that in most cases of public tenders, regardless of whether they are subject to EEA public procurement rules, the succession of service providers will not constitute a transfer within the meaning of the Directive.

Costs

- 34 The costs incurred by the Government of the Federal Republic of Germany, the Government of the United Kingdom, the EFTA Surveillance Authority and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, 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,

in answer to the questions referred to it by Gulating lagmannsrett by order of 21 May 1996, hereby gives the following Advisory Opinion, taking the first and the third questions together:

1. **Article 1(1) of the Act referred to in point 23 of Annex XVIII to the EEA Agreement (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 it may cover a situation where a time-limited contract regarding maintenance and modification work on an oil platform expires and the principal concludes a new time-limited contract with another contractor. However, the Article does not apply in a situation in which there is no transfer of significant tangible or intangible assets, including essential equipment, nor the taking over or re-engagement of an essential part of the workforce, in terms of number and expertise, who were especially assigned by the predecessor to the performance of its contract.**
2. **The fact that a transaction is subject to public procurement directives does not by itself prevent Council Directive 77/187/EEC from being applicable in a case such as the one at hand.**

Bjørn Haug

Thór Vilhjálmsson

Carl Baudenbacher

Delivered in open court in Luxembourg on 14 March 1997.

Per Christiansen
Registrar

Bjørn Haug
President