Opinion of Advocate General Poiares Maduro delivered on 16 June 2005

Nurten Güney-Görres (C-232/04) and Gul Demir (C-233/04) v Securicor Aviation (Germany) Ltd and Kötter Aviation Security GmbH & Co. KG

Reference for a preliminary ruling: Arbeitsgericht Düsseldorf - Germany

Directive 2001/23/CE - Article 1 - Transfer of undertaking or business - Safeguarding of employees' rights – Scope

Joined cases C-232/04 and C-233/04

European Court reports 2005 Page I-11237

1. In this case, the Court of Justice is once again asked to define the concept of 'transfer' within the meaning of Article 1 of 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 undertakings or businesses (2) (OJ 2001 L 82, p. 16) (hereinafter 'Directive 2001/23' or 'the directive'). The Arbeitsgericht (Labour Court) Düsseldorf (Germany) has in fact submitted to the Court of Justice, in two separate orders for reference dated 5 May 2004, questions concerning the application of the directive where a contract for services relating to passenger security checks in Düsseldorf airport passes from one service provider to another. More particularly, the national court wishes to ascertain the consequences that follow where the contracting authority (3) makes certain assets available to the contractors.

I – Facts, legislative framework and questions referred

2. Under the terms of a contract of 24 March/5 April 2000, concluded between the Federal Republic of Germany and Aviation Defence International Germany Ltd, the latter was tasked with carrying out checks on passengers and baggage at Düsseldorf airport. Securicor Aviation (Germany) Ltd (hereinafter 'Securicor') took over responsibility for implementing the contract. By a letter of 5 June 2003, Securicor was informed that its contract would not be renewed after 31 December 2003, since the contract for the provision of airport security services had been awarded to Kötter Aviation Security GmbH & Co. KG (hereinafter 'Kötter'). Kötter commenced its activities on 1 January 2004.

3. Under the terms of the contract – which remain unaltered despite the change of contractor – the Federal Republic of Germany makes available to the contractor the aviation security equipment necessary to carry out the security checks and meets the costs of maintaining that equipment. The equipment consists of walk-through metal detectors, a baggage conveyor belt with automatic X-ray screening (baggage checking system and screening devices), hand-held metal detectors and explosives detectors.

4. The contract also stipulates that the contractor is to observe Paragraph 29c(1) of the Luftverkehrsgesetz (German Law on Aviation; hereinafter 'LuftVG'), according to which '[p]rotection against attacks on aviation security, in particular against aircraft hijacking and acts of sabotage, shall fall within the responsibility of the aviation authorities. Their territorial responsibility in that respect shall extend to the area airside. Inasmuch as persons have to be screened and objects have to be searched, X-rayed or screened in some other way for such responsibilities to be discharged, the aviation authorities may call upon the services of qualified persons to work as ancillary staff; such staff shall be required to work under their authority'. (4)

5. Consequently, employees of the contractor, who are required to carry out security checks, have to undergo four weeks' specialist training and pass an examination to qualify as airport security attendants in order to obtain the accreditation that will authorise them to carry out such security checks.

6. Mrs Nurten Güney-Görres and Mrs Gül Demir were employed from 20 April 2000 and 7 May 2001 respectively as security attendants and, as such, they were subject to the requirements of Paragraph 29c of the LuftVG. Securicor sent each of them a letter dated 26 November 2003 terminating the employment relationships with effect from 31 December 2003. The employees responded by bringing actions before the Arbeitsgericht Düsseldorf, registered at that court on 18 December 2003, seeking a declaration that the employment relationships should be continued with the new contractor on the ground that there had been a transfer of an undertaking.

7. The term 'transfer' of an undertaking is defined in Article 1(1) of Directive 2001/23, which provides as follows:

'(a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.

(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.' (5)

8. In German domestic law, that provision was transposed by Paragraph 613a of the Bürgerliches Gesetzbuch (German Civil Code); Paragraph 613a(1) provides in particular that '[w]here a business or part of a business is transferred to another owner by a legal transaction, the rights and obligations arising from the employment relationships existing on the date of the transfer shall pass to that owner'.

9. According to the Arbeitsgericht Düsseldorf, the existence of a transfer of an undertaking depends on whether operational assets, that is to say the aviation security equipment, were transferred from Securicor to Kötter. It is in fact established that Kötter uses the same assets as Securicor, provided by the contracting authority. The national court raises the question whether that fact is sufficient to determine that there has been a transfer of business within the meaning of Article 1 of Directive 2001/23, as interpreted by the Court in its judgment in *Abler and Others*. (6) In that judgment, the Court based its finding that there had been a transfer of an undertaking between service providers, one of which had taken over from the other, on the fact that a contracting authority had made assets available. The national court's doubts also derive from the interpretation of the concept of transfer in the decisions of the Bundesarbeitsgericht (Federal Labour Court) which takes the view that the assets made available to the contractor cannot be deemed to be that contractor's assets unless they are for 'independent commercial use'. (7) Consequently, in two separate decisions of 3 May 2004, joined by order of the President of the Court of 9 July 2004 because of the identical nature of the questions raised, the Arbeitsgericht Düsseldorf referred the following questions to the Court:

'(1) In examining whether there is – irrespective of the question of ownership – a transfer of a business within the meaning of Article 1 of Directive 2001/23/EC in the context of a fresh award of a contract, does the transfer of the assets from the original contractor to the new contractor – having regard to all the facts – presuppose their transfer for independent commercial use by the transferee? By extension, is conferment on the contractor of a right to determine the manner in which the assets are to be used in its own commercial interest the essential criterion for a transfer of assets? On that basis, is it necessary to determine the operational significance of the contracting authority's assets for the service provided by the contractor?

(2) If the Court answers Question 1 in the affirmative:

(a) Is it precluded to classify assets as being for independent commercial use if they are made available to the contractor by the contracting authority solely for their use and responsibility for maintaining those assets, including the associated costs, is borne by the contracting authority?

(b) Is there independent commercial use by the contractor when, for the purpose of conducting airport security checks, it uses the walk-through metal detectors, hand-held metal detectors and X-ray equipment supplied by the contracting authority?'

10. Both these questions seek to establish the circumstances in which a transfer of assets can be deemed to have taken place, where the contracting authority provides such assets to the successive contractors.

11. It should first be noted that there can be no doubt that Directive 2001/23 is applicable to service contracts. The Court in fact confirmed that possibility in its judgment in *Watson Rask and Christensen*. (8) That interpretation was later confirmed by the judgments in *Schmidt*(9) and *Süzen*. (10) Examples of the application of Directive 2001/23 to the passing-on of contracts include *Hidalgo and Others*, (11)*Hernandez Vidal and Others*, (12)*Allen and Others*, (13)*Liikenne*, (14)*Temco*(15) and, most recently, *Abler and Others*, cited above.

12. Although there is a great deal of case-law on this subject, the debate about the concept of transfer of an undertaking is ongoing because the Advocates General continue to put to the Court arguments designed to call into question its broad interpretation of that concept. (16) Case-law sometimes struggles to identify a clear dividing line between transfer of activity and transfer of an undertaking. (17) But it is that demarcation which guarantees a balance between the two objectives pursued by Directive 2001/23, namely, on the one hand and principally, the protection of workers (18) and, on the other, the completion of the internal market. (19)

13. An entity can retain its identity subsequent to being transferred only if it has previously existed as an independent entity. (20) Despite the arguments Kötter advanced at the hearing, I have no doubt about the existence of an economic entity whose function is to carry out security checks at Düsseldorf airport. However, in order to answer the questions referred by the national court, it will first be necessary to establish whether the assets provided by the contracting authority form part of the entity which has been transferred, that is to say it will be necessary to determine whether these assets made available to Securicor form part of it. That assessment will turn on the way in which the assets were made available. Thereafter, we shall consider the question of retention of the entity's identity.

II – Preliminary considerations regarding the transfer of assets from the contracting authority to the service providers

14. By its first question, the national court is seeking to establish whether the assets made available by the contracting authority form part of the transferable economic entity. Is it the case, as the national court believes, that the judgment in *Abler and Others* provides an answer to that question?

15. It is certainly clear from that decision that there does not have to be a transfer of ownership for a transfer of tangible assets or buildings to have taken place. In *Redmond Stichting*, (21) for example, the associations in receipt of a municipal subsidy, first Redmond Stichting and then Sigma, rented a building from the local authority. The Court included among the elements making it possible to establish the existence of a transfer the fact that 'the premises rented by the Redmond Foundation were leased to the Sigma Foundation'. (22) Consequently, the fact that there has been no transfer of ownership from one service provider to another does not prevent there being a transfer of assets, if it is established that the assets at issue form part of the transferable entity. (23)

16. It is more difficult to establish the circumstances in which the provision of assets by a contracting authority amounts to incorporating those assets into the service provider's transferable entity. Case-law does not provide clear guidance on this point. It is in fact divided.

17. In circumstances in which one undertaking took over from another to provide cleaning services, the judgment in *Süzen* did not give a direct ruling, but merely pointed out that the identity of an economic entity comprises elements such as, where appropriate, 'the operational resources' the contracting authority makes available to that entity. (24)

18. Subsequent to that judgment, the Court seems again to have hesitated to express a view in *Watson Rask and Christensen*. (25) For the first time, Philips awarded a contract for the provision of catering services within

the company to an external service provider. It made available to ISS Kantineservice, without charge, the approved sales and production premises, the electricity, heating and telephones, and carried out general maintenance of the premises and equipment and refuse removal. (26) At point 6 of his Opinion, Advocate General Van Gerven took the view that in the circumstances it had to be considered that 'movable property was not transferred by Philips'. The Court simply notes that Directive 77/187 is applicable to the contracting-out of services, although it considered that the fact that the contracting authority made assets available formed part of the 'various advantages, details of which are laid down by the agreement' (27) between the two undertakings.

19. But the abovementioned judgment in *Temco* seems to provide an answer to the question of the consequences to be attached to the provision of assets by the contracting authority. In that case, Volkswagen made available to the cleaning companies with which it had a contract the resources needed for the industrial cleaning of its production plants. The Court accepted the assessment of the national court which concluded from that circumstance that no assets of any kind whatsoever passed from one service provider to another. (28) In point of fact, there is nothing to prevent the assets made available from being used by one contractor and then its successor, without necessarily forming part of a transferable entity.

20. Contrary to what appeared to have been established in *Temco*, the Court none the less adopted a different approach in its abovementioned judgment in *Abler and Others*, in which it acknowledged that, in some instances, the provision of assets by the contracting authority may result in a transfer of assets between service providers. Indeed, in that case, where one service provider took over from another to supply catering services in a hospital, the contracting authority made available to them the actual premises as well as the water, power and the essential small and large equipment. The Court noted that 'the tangible assets needed for the activity in question … were taken over by Sodexho'. (29) That conclusion necessarily implies, as the German Government noted at the hearing, that the tangible assets at issue formed part of the transferable entity, even though the hospital retained ownership of them. (30)

21. Consequently, whereas, in the *Temco* case, the fact that the contracting authority made available operational assets did not result in the inclusion of those assets in the transferable entity, the opposite conclusion is reached in *Abler and Others*. (31) It is disturbing that this difference is not the result of the application of a criterion that would enable a distinction to be made between the two cases. On the contrary, as the German Government argued in its oral observations, it seems to me that this inconsistency in case-law may be construed as the consequence of the absence of an effective criterion.

22. In the light of these uncertainties in case-law, and contrary to the position Securicor maintains, we have to avoid the kind of generalisation which entails that any provision of assets by a contracting authority implies that those assets must be included in the transferable entity. As the German Government pointed out at the hearing, taking that approach, any instance in which one service provider took over the performance of a contract from another would be classified as the transfer of an undertaking, subject only to the proviso that the contracting authority had made assets available. Simply losing a contract to a competitor could therefore be equated with the transfer of an undertaking, contrary to the Court's settled case-law. (32) The distinction between a transfer of an undertaking and a transfer of activity would, in consequence, be blurred afresh. (33)

23. Moreover, as Kötter and the German Government both pointed out at the hearing, the economic consequences of a generalisation of that nature, which is not underpinned by a coherent criterion, could be of particular significance, since the matters over which the service providers are in competition would be greatly reduced. If the transfer of an undertaking were automatically assumed to have taken place where a contract passes from one service provider to the next, staff costs would be transformed into fixed costs. The scope for potential competitors to establish their own profile in the context of an invitation to tender for a service contract would be reduced to the minimum, consisting only in the organisation of staff in accordance with their skills. (34)

24. Given that case-law contains no clear criterion enabling a distinction to be drawn, the national court, supported by the German Government, suggests that the concept of 'independent commercial use' should be applied in order to determine whether the assets made available by a contracting authority are, or are not, to be ascribed to the contractor that uses them.

III – The criterion of independent commercial use

25. Pursuant to the case-law of the Bundesarbeitsgericht, the criterion of independent commercial use implies that the assets made available by the contracting authority will become an integral part of the transferable economic entity, provided that the service provider is able freely to administer those assets in accordance with its own interest.

26. The national court and the German Government take the view that this criterion makes it possible to explain the position the Court adopted in *Abler and Others*. (35) In economic terms, Sodexho was in fact free to manage the kitchen made available to it. It acted in accordance with its own economic interest as regards both devising menus and supplying clients other than the hospital. Furthermore, the user of the operational assets had to meet the costs of wear and tear. But, the German Government points out, in this case the equipment for carrying out passenger security checks made available to Securicor could not be considered to be part of a transferable entity, since Securicor had no discretion in regard to its use.

27. Before evaluating the relevance of the criterion advanced by the national court, it is necessary to refer back to the wording of Article 1(1)(b) of Directive 2001/23 which defines an economic entity as 'an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'. There is nothing in the wording of that article that requires or prevents the establishment of a criterion which makes it possible to ascertain those cases in which the fact that assets are made available actually implies a 'transfer' of those assets to the contractor by the contracting authority.

28. However, for the reasons set out below, it seems to me that the criterion of independent commercial use, as proposed by the national court, is not workable.

29. First, the criterion proposed by the national court has no foundation in legislation. The distinction established between a situation in which there is independent commercial use and a situation in which such use

is absent is actually designed neither to guarantee the protection of workers nor to complete the internal market. No justification is furnished for that difference in treatment. The fact that it cannot be related back to one of the objectives pursued by Directive 2001/23 undermines the credibility of the proposed criterion.

30. Secondly, however, the criterion of independent commercial use cannot be set aside simply because, in some cases, it has the effect of restricting the scope of Directive 2001/23. Although the directive is unquestionably primarily designed to protect workers, its objective is also to complete the internal market, as evidenced by the fact that it was adopted on the basis of Article 94 EC. It cannot, therefore, be claimed, as the Commission and Securicor contend, that the spirit or effectiveness of Directive 2001/23 would be jeopardised merely because it is not applicable to all situations in which one service provider takes over a contract from another, but only those which involve the transfer of an undertaking. (36)

31. Thirdly, although it is undeniable that Securicor enjoys less flexibility in using the security check equipment than will a canteen operator in its use of a kitchen, that does not mean that there will have been a transfer of assets in the second instance only. As the Commission pointed out at the hearing, the difference between the two situations is only a matter of degree: the two undertakings retain some flexibility in terms of how they organise their activity, using the assets available to them. (37)

32. Moreover, the criterion of independent commercial use is likely to provoke casuistic debate, the outcome of which will be difficult for undertakings to anticipate, thereby prejudicing their legal certainty. In that context, it is sufficient to refer to the decision of the Bundesarbeitsgericht of 25 May 2000, annexed to the German Government's observations, to see that this criterion effectively requires a detailed analysis of the independence conferred under the service contract to the undertaking which is to provide the service. However, since any service provider will inevitably enjoy a degree of economic independence vis-à-vis the contracting authority, that criterion does not make it possible to define those cases in which there has been a transfer of assets.

33. Finally, I share the Commission's view that the criterion of independent commercial use would attribute excessive importance to the terms of the contract drawn up between the contracting authority and the service provider. Were the substance of the agreed contract to be the decisive factor in determining that there had been a transfer of an undertaking, the parties to the contract would, consequently, be placed in a position allowing them to circumvent the application of Directive 2001/23. Due consideration of the terms laid down in the contract between the contracting authority and the service provider for the performance of a contract must, in fact, form part of an objective assessment of the various circumstances of the case. (38)

34. All in all, it cannot *automatically* follow from a clause in a contract, whereby the contracting authority is to make available assets, that there has been a transfer of assets between the two service providers. Otherwise confusion would arise between operating the activity and operating an undertaking. (39) That would mean that the mere fact that the contracting authority made assets available would result in the transfer of an undertaking between service providers.

35. In the light of those considerations, it seems to me that the criterion of independent commercial use is not workable, both because it does not make it possible to identify those cases in which the assets, although made available by the contracting authority, actually form part of a separate economic entity, and because there is no legislative basis for it.

36. In the light of their interpretation of *Abler and Others*, the Commission and Securicor suggest that the crucial point is to determine whether the assets made available are essential in order to provide the relevant services. However, that alternative criterion fails to take account of the lack of choice available to the contractor, given that, once it has won the contract, it is bound by the terms of the contract entered into with the contracting authority. In addition, it seems logical to assume that the contracting authority will make available to the service provider only those assets it needs to perform the contract with which it has been entrusted.

37. Moreover, although the Court did indeed state in *Abler and Others* that the assets made available to the contractor, namely various items of kitchen equipment, were essential for the performance of the contract in question, that is to say the provision of meals, there is nothing in that judgment to indicate that this was the decisive criterion. Finally, that criterion would not be apt to resolve the inconsistency identified between the judgments in *Abler and Others* and *Temco*, since the assets made available by the contracting authority in *Temco* were also essential for the performance of the service contract.

38. Although neither the criterion suggested by the national court nor that advanced by the Commission and Securicor seems to me to carry conviction for the reasons set out above, it remains to be established whether the fact that a contracting authority makes assets available must play a part in determining whether there has been a transfer of an undertaking between service providers.

39. In a situation in which identical service contracts are concluded between a contracting authority and successive service providers, it is particularly difficult to define what actually constitutes the transferable economic entity, since many elements of that entity are fixed by contract. For example, it is inherent in the nature of a contract entered into in the context of an invitation to tender that the client base of the service provider will remain the same. Similarly, the assets made available represent a constant in the account the service providers must balance in submitting a tender, and similarly, for instance, the place where the service is to be provided, or, in the case of Securicor and Kötter, the physical layout of Düsseldorf airport. In point of fact, the same assets, made available by the contracting authority, will be used by all the service providers to which the contract passes, and they will have no discretion in that regard. In other words, the assets made available are outside the control of the successive service providers and, therefore, cannot be considered to form part of a transferable organisational entity.

40. That is why, in determining whether there has been a transfer of an undertaking in this case, it will be necessary, in accordance with the criteria laid down in *Spijkers*, (40) to focus on those elements of the economic entity which the service provider owns. Only in that way can it be established that the transfer relates to an independent economic entity, in accordance with the wording and objective of Article 1 of Directive 2001/23. Since the first question referred by the national court is based solely on the question of independent commercial use, it must elicit a negative response. Consequently, the answer to the second question will be in the negative also.

41. In the cases pending before the Arbeitsgericht Düsseldorf, given that the assets needed to carry out the security checks entrusted first to Securicor and then to Kötter are made available by the Federal Republic of Germany, the existence of a transfer of an undertaking between these two service providers will have to be determined by reference to elements other than those particular assets.

42. As the German Government points out in its written observations, the questions referred by the national court relate to only one of the elements material to an assessment of the transfer. However, it follows from the proposed answer that this factor – namely the transfer of the assets made available – must not be decisive. In the light of the information in the case-file, and in order to provide the national court with a helpful answer, it is therefore necessary to consider the implications of the suggested analysis in the circumstances of this case.

IV – The implications of the suggested analysis for this case

43. Before we examine the circumstances of this case, it is necessary to remind ourselves of the conditions in which a transfer of an undertaking may occur without a transfer of assets.

44. In *Redmond Stichting*, one of the questions referred sought to establish the consequences to be drawn where there had been no transfer of movable property. The Court noted that the fact that movables were not transferred 'does not seem in itself to prevent the directive from applying', but left it to the national court to include that aspect in its overall assessment.

45. However, in *Liikenne*, while the Court noted that there had been no transfer of assets between the two bus companies, it ruled out the application of Directive 2001/23, even though some staff had been transferred from one undertaking to the other.

46. Those apparently contradictory decisions illustrate the importance of first determining the nature of the activity involved in the possible transfer. In fact, the elements material to establishing whether there has been a transfer of an undertaking depend on the kind of activity in which the economic entity is engaged. (41)

47. The Court introduced that criterion in relation to activities which are essentially based on the workforce and its skills, and this led the Court to conclude that 'a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity'. (42)It follows that, in relation to an activity of that kind, 'it must be recognised that such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task'. (43)

48. But if the activity in question is not essentially based on the workforce and its skills, whether a transfer of an undertaking has taken place turns on establishing whether there has been a transfer of assets between the undertakings. (44)

49. It follows from that case-law that, in order to determine whether there has been a transfer of an undertaking, it is first necessary to classify the nature of the activity in question. The surveillance of a medical supplies depot of the Bundeswehr (federal German army) was classified as an activity that was essentially based on manpower and its skills. (45) In this case, as Securicor points out in its written observations, in contrast to straightforward surveillance activities, the activity of carrying out security checks at an airport requires specialist and sophisticated equipment. However, contrary to what Securicor suggests, the obligation to achieve a specific result imposed on an undertaking responsible for security checks in an airport does not seem relevant for the purposes of distinguishing that activity from a surveillance activity, since it has no influence on the organisation of the economic entity in question.

50. Although it is ultimately for the national court to analyse the relative importance to be attached to the different criteria establishing the existence of a transfer within the meaning of Directive 2001/23, it would appear from the case-file that the specific assets made available by the contracting authority and suitably skilled staff make up the economic entity whose activity consists in carrying out security checks on baggage and passengers in an airport.

51. Since the specialist security check equipment is in any event made available by the contracting authority to successive service providers, it is necessary to ascertain whether the staff transferred from Securicor to Kötter represent an essential part, in terms of their number and their skills, of the staff assigned to the performance of the contract. (46)

52. At first sight, it seems paradoxical to make the conclusion that a transfer of an undertaking has taken place is dependent on whether staff and their skills have been transferred from one employer to the next, when that is in principle the consequence which follows when a transfer of an undertaking is found to have taken place. (47) But that criterion forms part of an overall assessment of the circumstances. It takes on significance only when there has been no transfer of assets and where it is necessary to identify other factors which could constitute a transferable entity. Furthermore, it does not strictly relate to the transfer of staff as such, but actually to the transfer of their specific skills, deemed to constitute an organised entity. The aim is to ensure that the parties to the transfer are not free to exclude the application of Directive 2001/23.

53. Moreover, while the effect of establishing that there has been a transfer of an undertaking within the meaning of Article 1 of Directive 2001/23 is indeed to require the employer of the transferred entity to maintain the employment relationships, (48) there is nothing to prevent that employer embarking on reorganisation, which may, if necessary, involve redundancies, provided that these are not directly linked to the transfer of the undertaking. (49)

54. Finally, the Federal Republic of Germany's argument that maintaining the contracts would have particular implications in Germany because of the rigid nature of the employment law in force is irrelevant. Indeed, it is clear from settled case-law that a Member State may not rely on its domestic law to set aside the application of a Community directive.

55. It is common ground that Kötter took over 167 of the 295 workers previously employed by Securicor and tasked with carrying out security checks on passengers and baggage at Düsseldorf airport on behalf of the Federal Republic of Germany. Those employees were given specific training to enable them to carry out the security checks for which they were responsible.

56. Consequently, it cannot be ruled out that Kötter took over the essential part of its predecessor's staff in terms of their skills. If that is the case, and subject to the national court's assessment of all of the material factors, several elements seem present to indicate that there was a transfer of an undertaking from Securicor to Kötter within the meaning of Directive 2001/23.

V – Conclusion

57. I therefore propose that the Court should give the following answer to the questions submitted by the Arbeitsgericht Düsseldorf:

Where a contract is awarded afresh, without a transfer of assets from one service provider to the next, and where the contracting authority makes available to the successive contractors the assets required for the performance of the contract, the existence of a transfer of an undertaking from one service provider to the next, within the meaning of Article 1 of 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 undertakings or businesses, does not turn on whether those assets are transferred to the service provider for independent commercial use, but must be assessed having regard to elements – other than the assets made available – which can be directly ascribed to the service provider, such as the transfer of the essential part of the staff in terms of their skills.

---

1 – Original language: Portuguese.

2 – That directive codifies the amendments to 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 undertakings or businesses (OJ 1977 L 61, p. 26) contained in Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88).

3 – This footnote is not relevant in the English version of this Opinion.

4 – That law is cited in the version published on 27 March 1999 (BGBl. 1999 I, p. 550), last amended by the Law of 6 April 2004 (BGBl. 2004 I, p. 550).

5 – That definition is unaltered from the version contained in Directive 98/50.

6 – Case C-340/01 [2003] ECR I-14023.

7– Judgment of the Eighth Chamber of the Bundesarbeitsgericht of 11 December 1997 (8 AZR 426/94, BAGE 87, 296), order of 22 January 1998 (8 ABR 83/96), not yet published, and judgment of 25 May 2000 (8 AZR 337/99), not yet published, annexed to the German Government's observations.

8 – Case C-209/91 [1992] ECR I-5755, paragraph 17.

9 – Case C-392/92 [1994] ECR I-1311, paragraphs 12 to 14. However, subsequent to that judgment, which was fiercely criticised in academic writing, the Commission suggested, in a proposed amendment to Directive 77/187, that a distinction should be made between the transfer of an entity and the transfer of only an activity of that entity, the latter falling outside the scope of the directive. As a result of opposition from the European Parliament, the Commission amended its original proposal, deleting that clause from the text. However, the judgment in *Süzen* (Case C-13/95 [1997] ECR I-1259) takes up the distinction between an entity and what is merely an 'activity'.

10 – Cited in footnote 9 above.

11 – Joined Cases C-173/96 and C-247/96 [1998] ECR I-8237.

12 – Joined Cases C-127/96, C-229/96 and C-74/97 [1998] ECR I-8179.

13 – Case C-234/98 [1999] ECR I-8643.

14– Case C-172/99 [2001] ECR I-745.

15 – Case C-51/00 [2002] ECR I-969.

16 – For instance, according to Advocate General Geelhoed, the facts of the case in *Abler and Others* had to be analysed as 'the loss of a contract by the original service provider and the acquisition of a contract by the new service provider' (point 54) and not the transfer of an undertaking. At point 38 of his Opinion in *Temco*, cited above, Advocate General Geelhoed also stresses the importance of the economic background and argues that: '[T]he dynamics of the market might be disrupted if the existence of a transfer within the meaning of the directive were assumed too readily.'

17 – Only the second falls within the scope of Directive 2001/23. A transfer of activity is one of the elements which goes to make up a transfer of an undertaking. A stable economic entity, which underpins the activity, must also be transferred before there can be a transfer of an undertaking. As regards the concept of economic entity, see,

in particular, the Opinion of Advocate General Van Gerven in *Schmidt*, cited above, at points 13 and 14; P. Pochet,*L'apport de l'arrêt Schmidt à la définition du transfert d'une entité économique*, Droit social, 1994, p. 931, and S. O'Leary, *Employment Law at the European Court of Justice*, Oxford, 2002, p. 259.

18 – See, most recently, Case C-478/03 *Celtec* [2005] ECR I-4389, paragraphs 26 and 27. See also J. Mertens de Wilmars and H. Nyssens, 'Intégration européenne et correction des mécanismes du marché: un modèle économique et social européen', *Philosophie du droit et droit économique: Mélanges en l'honneur de Gérard Farjat*, 1999, p. 557.

19– Directive 2001/23 takes account of economic requirements more generally, since Article 5(1) of the directive provides that it is not generally applicable where the transferor is the subject of bankruptcy proceedings or [any analogous] insolvency proceedings. On the subject of the balance between the two objectives pursued by the directive, see J. Kenner, *EU Employment Law, from Rome to Amsterdam and beyond*, Oxford, 2003, p. 352.

20 – The case-law is consistent here: see *Süzen*, cited in footnote 9 above, paragraph 13; Case C-48/94 *Rygaard* [1995] ECR I-2745, paragraph 20; *Liikenne*, cited in footnote 14 above, paragraph 31; and *Abler and Others*, cited in footnote 6 above, paragraph 30.

21 – Case C-29/91 [1992] ECR I-3189.

22 – Paragraph 26 of the judgment. At point 13 of his Opinion, Advocate General Van Gerven took the view that: 'There was a de facto transfer of tangible assets, in so far as the premises leased to the Redmond Foundation by the Municipality of Groningen were leased to Sigma with effect from 1 January 1991.'

23 – See also *Abler and Others*, cited in footnote 6 above, paragraph 42, and the judgment of the EFTA Court of 10 December 2004 in Case E-2/04 *Rasmussen* (not yet published).

24 – Cited in footnote 9 above, paragraph 15.

25 – Cited in footnote 8 above.

26– Ibid., paragraph 6.

27 – Ibid., paragraph 1 of the operative part of the judgment.

28 – Opinion in *Temco*, cited in footnote 15 above, point 25. We should note that, in that case, the Court held that an undertaking had been transferred from one service provider to another because the new contractor took over an essential part of the staff in terms of their skills.

29 – *Abler and Others*, cited in footnote 6 above, paragraph 36.

30 – It should be noted that, at point 77 of his Opinion, Advocate General Geelhoed advanced a contrary solution: 'Since the contracting authority owns the operational resources, it will itself regain these resources in full once the contract has expired.'

31 – That conclusion could be explained in terms of the Court's desire to prevent the parties from excluding the application of Directive 77/187 under the terms of the contract.

32 – *Süzen*, cited in footnote 9 above, paragraph 16: '[T]he mere loss of a service contract to a competitor cannot therefore by itself indicate a transfer within the meaning of the directive. In those circumstances, the service undertaking previously entrusted with the contract does not, on losing a customer, thereby cease fully to exist, and a business or part of a business belonging to it cannot be considered to have been transferred to the new awardee of the contract.'

33 – As regards the risks of such confusion, see, for example, the article by J. Déprez, RJS, 1995, No 5, p. 315; or P. Bailly, *Le flou de l'article L. 122-12, alinéa 2, du Code du travail*, Droit social, 2004, p. 366.

34 – G. More, 'The Acquired Rights Directive: Frustrating or Facilitating Labour Market Flexibility?', *New Legal Dynamics of European Union*, 1995, p. 129.

35 – German academic writers have, however, identified a risk of contradiction between the judgment in *Abler and Others* and the criterion of independent commercial use: R. Adam, 'Betriebsübergang – Der Übergang materieller Betriebsmittel als Tatbestandsmerkmal des 613a BGB', *Monatsschrift für Deutsches Recht*, 2004, No 16, p. 909; H.J. Willemsen and G. Annuss, 'Auftragsnachfolge – jetzt doch ein Betriebsübergang?', *Der Betrieb*, 2004, No 3, p. 134.0

36 – That distinction corresponds to the distinction made earlier between the transfer of activity and the transfer of an undertaking.

37 – See also *Hidalgo and Others*, cited in footnote 11 above, paragraph 27: '[T]he presence of a sufficiently structured and autonomous entity within the undertaking awarded the contract is, in principle, not affected by the circumstance, which occurs frequently, that the undertaking is subject to observance of precise obligations

imposed on it by the contract-awarding body. Although the influence which the contract-awarding body has on the service provided by the undertaking concerned may be extensive, the service-providing undertaking nevertheless normally retains a certain degree of freedom, albeit reduced, in organising and performing the service in question, without its task being capable of being interpreted as simply one of making personnel available to the contract-awarding body.'

38 – Case 24/85 *Spijkers* [1986] ECR 1119, paragraph 13.

39 – That is the danger that resides in the judgment in *Abler and Others* which can be construed as basing the existence of a transfer of an undertaking on the sole fact that the contracting authority has made assets available to a service provider. It is not, however, precluded that assets made available may be passed from one service provider to the other, particularly in order to prevent the parties to the contract from attempting to exclude the application of Directive 2001/23 to their activity.

40 – Cited in footnote 38 above, paragraph 13: '[I]t is necessary to consider all the facts characterising the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property have been transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended.'

41–

Süzen, cited in footnote 9 above, paragraph 18; *Hernandez Vidal and Others,* cited in footnote 12 above, paragraph 31; *Hidalgo and Others,* cited in footnote 11 above, paragraph 31;*Liikenne,* cited in footnote 14 above, paragraph 35; and *Abler and Others,* cited in footnote 6 above, paragraph 35.

42–

Süzen, cited in footnote 9 above, paragraph 21. The Court introduced that distinction in order to prevent workers being accorded a lesser degree of protection if they are employed in a sector in which the workforce itself is the essential element.

43 – Ibid.

44 – By way of example, the Court has held that 'bus transport cannot be regarded as an activity based essentially on manpower, as it requires substantial plant and equipment' (*Liikenne*, cited in footnote 14 above, paragraph 39). Consequently, '… the absence of a transfer to a significant extent from the old to the new contractor of such assets, which are necessary for the proper functioning of the entity, must lead to the conclusion that the entity does not retain its identity' (ibid., paragraph 42). Consequently, there was no transfer of an undertaking between the two bus companies, since the second company did not take over the vehicles of the first.

45 – *Hidalgo and Others*, cited in footnote 11 above, paragraph 26.

46– That criterion is established in *Süzen* and is taken up in *Temco*, paragraph 33.

47– See, for instance, point 80 of the Opinion of Advocate General Cosmas in *Hernandez Vidal and Others*. Academic writers also point to this paradox: Davies, *Taken to the cleaners? Contracting out of services yet again*, 1997, 26 ILJ 193; C. Engels and L. Salas, 'Cause and consequence, what's the difference in respect of the EC Transfer Directive?', *Labour Law and industrial relations at the turn of the century*, 1998, p. 275; A. Garde, *Recent developments in the law relating to the transfer of undertakings*, 39 CMLRev, 2002, p. 523. In his commentary on *Abler and Others* in *Revista de direito e de estudos sociais*, 2004, p. 213, J. Gomes puts forward a persuasive counter-argument to this line of reasoning. He points out that the undertakings which are party to the transaction will naturally have the power to decide which particular assets their transaction will cover.

48 – Article 3 of Directive 2001/23.

49– Article 4 of Directive 2001/23. See also J. Hunt, 'The Court of Justice as a policy actor, the case of the Acquired Rights Directive', 1998, *Legal Studies*, p. 336.