ADVISORY OPINION OF THE COURT

25 September 1996[*]

(Council Directive 77/187/EEC – transfer of rights to pension benefits)

In Case E-3/95,

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 by Stavanger byrett (the Stavanger City Court), Norway, for an Advisory Opinion in the case pending before it between

Torgeir Langeland

and

Norske Fabricom A/S

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,

after considering the written observations submitted on behalf of:

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

– Torgeir Langeland, represented by Christopher Hansteen, Advocate, Oslo;

– Norske Fabricom A/S, represented by Ola J Strømsmoen, Advocate, Oslo;

– the Government of Norway, represented by Irvin Høyland, Assistant Director General, Royal Ministry of Foreign Affairs, acting as Agent;

– the Government of Sweden, represented by Erik Brattgård, Assistant Under-Secretary, Ministry for Foreign Affairs, Trade Department, acting as Agent;

– the Government of the United Kingdom, represented by John Collins, Treasury Solicitor's Department, acting as Agent and Eleanor Sharpston, Barrister;

– the EFTA Surveillance Authority, represented by Håkan Berglin, Director of its Legal & Executive Affairs Department, acting as Agent, assisted by Trygve Olavson Laake, Officer of that Department;

– the EC Commission, represented by Hans Gerald Crossland and Maria Patakia, both Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Langeland, Norske Fabricom A/S, the Government of Norway, the Government of the United Kingdom, the EFTA Surveillance Authority and the EC Commission at the hearing on 7 May 1996,

gives the following

Advisory Opinion

Facts, legal background and the questions referred to the Court

1 By orders of 5 October and 27 November 1995, registered at the Court on 1 December 1995, Stavanger byrett in Norway made a request for an Advisory

Opinion in the case brought before it by Mr Torgeir Langeland (hereinafter "Langeland") against Norske Fabricom A/S ("Norske Fabricom").

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 EEA Agreement. The Directive is thus, according to Article 2(a) of the Agreement, to be considered as a part of that Agreement as the Directive has been adapted by way Protocol 1 to it. According to Article 6 of the EEA Agreement and Article 3(2) of the Surveillance and Court Agreement the jurisprudence of the EC Court of Justice ("the ECJ") is therefore relevant when interpreting the provisions of the Directive.

3 The following questions were referred to the EFTA Court:

"1. Does the exception clause contained in Article 3(3) of Council Directive 77/187/EEC cover the right of an employee to coverage of insurance premiums to non-statutory pension schemes or does the exception only apply to the right to pension insurance payments from such schemes?

2. Is Article 3(1) of Council Directive 77/187/EEC mandatory in the sense that an employee may not legally accept a disadvantageous amendment to his employment contract when the reason for the amendment is to be found in a transfer of an enterprise?"

4 The questions from Stavanger byrett presuppose that the transaction in question constitutes a transfer within the meaning of Article 1(1) of the Directive. The following remarks are based on this assumption.

5 By order dated 27 November 1995, registered at the Court on 29 November 1995, Gulating lagmannsrett (the Gulating Court of Appeals) in Norway made a request to the EFTA Court for an Advisory Opinion in a case brought before it by Mr Eilert Eidesund against Stavanger Catering A/S. This request was registered at the Court as Case E-2/95 and concerns the interpretation of the same Directive. Although the two cases were not joined for the purposes of the hearing or the Court's opinions, oral hearings in the two cases were held consecutively on 7 May 1996, with the common understanding that arguments made in one case may also be considered in the other without the need for repetition. The advisory opinions in the two cases are delivered simultaneously. For the sake of convenience the Court's findings are included in full in both opinions.

6 The case before Stavanger byrett concerns a claim of Langeland to the effect that his present employer Norske Fabricom shall pay certain pension insurance premiums. Langeland's former employer, GMC Offshore Partner AS ("GMC"), had paid such premiums into an insurance scheme.

7 Langeland was until June 1994 employed by GMC. On 16 June 1994 the enterprise of GMC was transferred to Norske Fabricom. The employees of GMC were offered employment with Norske Fabricom. Langeland accepted this offer on 28 June 1994, by signing an employment contract issued by Norske Fabricom.

8 As an employee of GMC Langeland was covered by collective pension insurance and personnel insurance agreements that the company had signed for their employees with the insurance company UNI Storebrand. The personnel insurance scheme comprises group insurance covering occupational injury and disease in accordance with the Norwegian Act relating to Industrial Injury Insurance (lov om yrkesskadeforsikring), group life insurance with disability capital, group accident insurance and group travel insurance. Compensation under this scheme is made in the form of a lump-sum payment. The benefits under the pension insurance scheme are an old age pension, a spouse's pension, a children's pension, a disability pension and a waiver of premium in the event of incapacity for work. Under the pension insurance scheme the beneficiaries are entitled to regular payments in the future. Premiums for the said schemes were paid by GMC.

9 Langeland has claimed that he is entitled to the continued payment of insurance premiums by Norske Fabricom, his new employer, to the same extent as his former employer, GMC, paid such premiums.

10 Norske Fabricom has rejected Langeland's claim. Norske Fabricom has not concluded an agreement with an insurance company on group pension insurance for its employees. The group personnel insurance policy that the company has taken out contains only those types of insurance which the employer is obliged to take out according to the Act relating to Industrial Injury Insurance.

11 Since 16 June 1994 Langeland has a pension insurance agreement with UNI Storebrand on an individual basis. He pays the insurance premium himself. Langeland has not been able to continue his membership of a personnel insurance scheme, since this is only possible through a group insurance agreement.

12 Langeland's claim before Stavanger byrett consists of three points: that Norske Fabricom be ordered to reimburse him for the pension insurance premiums he has himself advanced prior to the delivery of the judgment, to pay him an annual amount corresponding to the premiums he has to pay in order to maintain his pension insurance scheme on an individual basis, and to pay him an annual amount corresponding to the difference between the premium GMC paid and the premium Norske Fabricom pays for Langeland's membership of a personnel insurance scheme. Norske Fabricom rejects his claim on all three points.

13 Although these are matters of dispute in the case before the national court, Stavanger byrett has asked the EFTA Court to base its opinion on the assumptions that the entitlement to coverage of premiums was actually a right under Langeland's employment contract with GMC and that Langeland, by signing the employment contract offered to him by Norske Fabricom, renounced the right to have the insurance premiums paid by his employer.

14 The facts of the case and the procedure before Stavanger byrett are further described in the Report for the Hearing.

15 The first and second recital of the Directive's preamble reads:

"Whereas economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of businesses to other employers as a result of legal transfers or mergers;

Whereas it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded;"

16 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."

17 Article 3 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.

3. Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer within the meaning of Article 1(1) in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary schemes referred to in the first subparagraph."

18 Article 4 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.

2. 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 shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship."

General remarks

19 The relevance of national legislation and decisions by national courts of law has been the subject of discussion, both in the written observations and at the oral hearings.

20 In the case of advisory opinions, as opposed to direct actions before the Court, the sole task of this Court is to interpret provisions of EEA law. It is not the role of this Court in such cases to interpret provisions of national law or to ascertain to what extent provisions of EEA law have been transposed into national law. Nor is this Court in any way bound by findings or decisions by national courts of law.

21 However, in the interpretation of EEA law, it may be a factor of some interest to ascertain how the different Member States have demonstrated, through their implementation into national law of EEA legal provisions, how they perceived and interpreted those EEA legal provisions which the Member States have adopted and which the Court is called upon to interpret. In connection herewith, the interpretation and application by national courts of implementing national legislation may cast light on the contents given to that legislation by the state's legislators. Obviously, how much reliance is to be placed on a national court decision will depend on whether the decision stands out as representative, as does, for instance, an authoritative interpretation given by the highest court of appeals in the country in question.

The first question – Interpretation of Article 3(3) of the Directive

22 As stated in the second recital of its preamble the aim of the Directive is, *inter alia*, to "provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded." To that end Article 3(1) of the Directive provides that the transferor's rights and obligations arising from a

contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee. According to Article 3(2), the transferee shall, following the transfer, continue to observe the terms and conditions agreed in any collective agreement. Furthermore, Article 4(1) provides for the protection for the employees concerned against dismissal by the transferor or the transferee on account of the transfer only.

23 It follows from the preamble and from those provisions that the objective of the Directive is to ensure, so far as possible, that the rights of employees are safeguarded in the event of a change of employer as a result of a merger or a transfer of an undertaking, a business or part of a business, by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor.

24 As a starting point there would seem to be little doubt that the expression "The transferor's rights and obligations arising from a contract of employment or from an employment relationship" in Article 3(1) includes rights and obligations in respect of insurance schemes vis-à-vis its employees. Some questions of application and adaptation may arise as a result of the transfer itself, for instance, where an insurance scheme is limited to employees of a certain company or group of companies and cannot be extended to an employee no longer in the service of that company or group of companies. However, the question relates in essence to the interpretation of Article 3(3), first subparagraph. It will be recalled that this provision reads as follows:

> "Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States."

25 More specifically, the question is whether this provision excludes from automatic transfer to the transferee an obligation to pay premiums to a supplementary pension scheme which the transferor was under an obligation to pay by virtue of its employment relationship to the employee.

26 The arguments put forward in the written comments to the Court are summarised in the Report for the Hearing. At the oral hearing held on 7 May 1996 these arguments were developed further and will be set out below to the extent necessary.

27 *Langeland* is of the opinion that the exception contained in Article 3(3) of the Directive does not apply to payments of insurance premiums to supplementary pension schemes. *The Government of Norway* and *the Government of Sweden* are of the same opinion and so is *the EFTA Surveillance Authority*. *The Government*

of the United Kingdom, on the other hand, concludes that this clause, by necessary implication, exempts the transferee from paying premiums of this type. This view is shared by *Norske Fabricom* whose further arguments are set out in

the Report for the Hearing. *The Commission of the European Communities* proposes to construe Article 3(3) in accordance with the general purpose of the Directive which is to protect the rights of employees as far as possible in the event of a transfer. Any limits to or exceptions from this protection should therefore be interpreted in a restrictive way. The Commission points out, however, that as much as Article 3(3), first subparagraph, excludes certain rights from automatic transfer, employees are not necessarily deprived of all protection. The second subparagraph of Article 3(3) instead imposes an obligation on the Member States to protect the interests of employees regarding certain of these rights.

28 The Court notes that no decision of the ECJ directly concerns the scope of the exception clause in Article 3(3). The interpretation must be made on the basis of recognised methods of interpretation, bearing in mind that the ECJ, in its construction of the Directive, has consistently referred to the aim of the Directive to "ensure, as far as possible, that the employment relationship continues unchanged with the transferee" after the transfer, see, for instance, Case 19/83 *Wendelboe* v *L.J. Music* [1985] ECR 457, paragraph 15, and that the same conditions as those agreed with the transferor should continue with the transferee after a transfer, see Case 105/84 *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventor* [1985] ECR 2639.

29 The wording "employees' rights to old-age, invalidity or survivors benefits" in Article 3(3), first subparagraph, is not clear.

30 Even a narrow interpretation would seem to cover current payments to the beneficiary when or if payments become due under the supplementary pension scheme. Such payment obligations are clearly not transferred to the transferee, whether or not such payments under the pension scheme were to be made by some insurance company or by the employer directly.

31 A wider and more natural understanding of "rights to ... benefits" would, in the view of the Court, include the employee's right to enjoy the continued accrual of pension rights during the whole term of his employment. It is not unusual for a pension scheme to stipulate that the pension amounts eventually due to the beneficiary increase with the number of years the employee is in service and premiums are paid in. A finding that the expression "rights to ... benefits" covers the right to further accrual of pension rights after the date of the transfer would mean that the right to claim such further accrual is excluded.

32 In the Court's view, the wording of Article 3(3) first and second subparagraphs, read in conjunction with the general principle in Article 3(1), points to the conclusion that all rights and obligations pertaining to old-age, invalidity and

survivors' benefits have been excluded from the general transfer of rights and obligations to the transferee.

33 Although preparatory work relating to the Directive is not of direct help in defining the scope of Article 3(3), first subparagraph, Commission documents relating to the Directive elucidate the complications envisaged if the transferee were to be obliged to take over obligations of the transferor in the area of supplementary pension schemes. In view of the preparatory work and in view of the inclusion of the exception clause (Article 3(3)) in the final directive text, the Court finds support for interpreting the provision as exempting the transferee from all involvement in this specific area.

34 This does not mean, as also pointed out by the EC Commission, that the employees were left without any protective measures. As an alternative measure, the provision was introduced in Article 3(3), second subparagraph, stating that the Member States shall be under obligation to adopt the measures necessary to protect the interests of present and previous employees in respect of rights conferring on them immediate or prospective entitlements to old-age benefits, including survivors' benefits (but not invalidity benefits).

35 There is a principle of interpretation expressed by the ECJ that exemption clauses reducing rights granted to employees must be interpreted narrowly. The same principle was relied on by the EFTA Court in Case E-1/95 *Samuelsson* [1994-95] EFTA Report 145 paragraph 22 *et seq*. This principle of interpretation cannot, however, lead to a situation in which the exemption clause becomes deprived of any reasonable content or is virtually abolished.

36 On a proper interpretation of Article 3(3) it must be assumed that the transferee is not obliged to provide for further accruals of rights to old-age, invalidity or survivors' benefits, after the date of the transfer.

37 With that finding as a basis it becomes untenable to hold that the transferee is under an obligation to continue payment of pension premiums in accordance with the supplementary pension scheme established by the transferor.

38 As pointed out by the Government of the United Kingdom the accrual of pension benefits and the payment of pension premiums are inseparable. In any insurance scheme each element presupposes the other. It would be without any economic sense requiring premium payments to be made when no further pension benefits are to accrue. The sole purpose of paying premiums into an insurance scheme must be the creation of new insurance coverage.

39 From this it must follow that the transferor's obligation to pay premiums for old-age, invalidity and survivors' benefits is excluded. At the oral hearing various opinions were expressed with regard to the amount of the premium payments to be made by the transferee, if ruled applicable. Some were of the opinion that the same amount should be paid as had been paid by the transferor, regardless of whether the employee was able to continue as member of the company or inter-company scheme. Others suggested that the transferee should be under an obligation to pay whatever amount, normally higher than before, that would be required to establish the same future coverage and accrual as the employee had enjoyed before. In the view of the Court, the uncertainty and unreasonableness of these alternatives illustrate the lack of logic in maintaining a payment obligation without a corresponding obligation to uphold a previous pension scheme.

40 The conclusion must therefore be that no obligation to continue payment of premium amounts relating to old-age, invalidity and survivors' benefits is transferred to the transferee.

The second question – mandatory nature of Article 3(1) of the Directive

41 As pointed out by all those who have submitted observations to the Court on this point, a similar question has previously been dealt with by the ECJ in its judgment in Case 324/86 *Tellerup* v *Daddy's Dance Hall* [1988] ECR 739. In the light of Article 6 of the EEA Agreement, the Court finds that the present question should be answered in the same manner as it has formerly been answered by the ECJ.

42 As was stressed above, the purpose of the Directive is to ensure that the rights arising from a contract of employment or employment relationship of employees affected by the transfer of an undertaking are safeguarded. Since this protection is a matter of public policy, and therefore independent of the will of the parties to the contract of employment, the rules of the Directive must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees.

43 It follows that employees are not entitled to waive the rights conferred on them by the Directive and that those rights cannot be restricted even with their consent. This interpretation is not affected by whether the employee obtains new benefits in compensation for the disadvantages resulting from an amendment to his contract of employment so that, taking the matter as a whole, he is not placed in a worse position than before.

44 However, as previously held by the ECJ, *inter alia*, in its judgment of 11 July 1985 in Case 105/84 *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar*

[1985] ECR 2639, the Directive is intended to achieve only partial harmonisation, essentially by extending the protection guaranteed to workers independently by the laws of the individual Member States to cover the case where an undertaking is transferred. It is not intended to establish a uniform level of protection throughout the European Economic Area on the basis of common criteria. Thus the Directive can be relied on only to ensure that the employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the Member State concerned.

45 Consequently, in so far as national law allows the employment relationship to be altered in a manner unfavourable to employees in situations other than the transfer of an undertaking, in particular as regards their protection against dismissal, an alternative of this nature is not precluded merely because the undertaking has been transferred in the meantime and the agreement has therefore been made with the new employer. Since by virtue of Article 3(1) of the Directive the transferee is subrogated to the transferor's rights and obligations under the employment relationship, that relationship may be altered with regard to the transferee to the same extent as it could have been with regard to the transferor, provided that the transfer of the undertaking itself may never constitute the reason for that amendment.

46 For the above reasons, the answer to the second question must be that an employee cannot waive the rights conferred on him by the mandatory provisions of the Directive, even if the disadvantages resulting from his waiver may have been offset by such benefits that, taking the matter as a whole, he is not placed in a worse position. Nevertheless, the Directive does not preclude an agreement with the new employer to alter the employment relationship, in so far as such an alteration is permitted by the applicable national law in situations other than the transfer of an undertaking.

Costs

47 The costs incurred by the Government of Norway, the Government of Sweden, 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 Stavanger byrett, by orders of 5 October and 27 November 1995, hereby gives the following Advisory Opinion:

1. **According to Article 3(3) 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) the employer's obligation to pay premiums to supplementary pension schemes for an employee is not transferred.**

2. **An employee cannot waive the rights conferred on him by the mandatory provisions of Council Directive 77/187/EEC, as integrated into the EEA Agreement, even if the disadvantages resulting from his waiver may have been offset by such benefits that, taking the matter as a whole, he is not placed in a worse position. Nevertheless, the Directive does not preclude an agreement with the new employer to alter the employment relationship, in so far as such an alteration is permitted by the applicable national law in cases other than the transfer of an undertaking.**

Bjørn Haug Thór Vilhjálmsson Carl Baudenbacher

Delivered in open court in Luxembourg on 25 September 1996.

Per Christiansen
Registrar

Bjørn Haug
President