JUDGMENT OF THE COURT

18 December 2014*

(Directive 2001/23/EC – Transfer of undertakings – Collective agreements – Freedom to conduct a business)

In Case E-10/14,

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 Eidsivating Court of Appeal (*Eidsivating lagmannsrett*), in the case of

Enes Deveci and Others

and

Scandinavian Airlines System Denmark-Norway-Sweden,

concerning the interpretation of Council Directive 2001/23/EC 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,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Christiansen and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- Enes Deveci and Others ("the appellants" or "the transferred employees"), represented by Sigurd-Øyvind Kambestad, advokat, and Christen Horn Johannessen, advokat;

* Language of the request: Norwegian.

- Scandinavian Airlines System Denmark-Norway-Sweden ("the defendant" or "the transferee"), represented by Frode Martin Toftevåg, advokat, and Bjørnar Alterskjær, advokat;
- the Swedish Government, represented by Anna Falk, Director, Charlotta Meyer-Seitz, Deputy Director, Ulrika Persson, Emil Karlsson, Lars Swedenborg, Natacha Otte-Widgren, Legal Advisers, as well as Fredrik Sjövall, Special Adviser, and Karin Sparrman, Desk Officer, within the Legal Secretariat of the Ministry of Foreign Affairs, acting as Agents;
- the EFTA Surveillance Authority ("ESA"), represented by Maria Moustakali, Officer, and Janne Tysnes Kaasin, Temporary Officer, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Johan Enegren, Member of its Legal Service, acting as Agent,

having heard oral argument of the appellants, represented by Christen Horn Johannessen and Nina Kroken, advokat; the defendant, represented by Bjørnar Alterskjær and Frode Martin Toftevåg; the Norwegian Government, represented by Ketil Bøe Moen, advokat, Office of the Attorney General (Civil Affairs); ESA, represented by Janne Tysnes Kaasin and Maria Moustakali; and the Commission, represented by Johan Enegren, at the hearing on 28 October 2014,

having regard to the Report for the Hearing,

gives the following

Judgment

I Introduction

1 Spirit Air Cargo Handling Norway AS is a former subsidiary of Spirit Air Cargo Handling AB, itself wholly owned by a company belonging to the SAS Group. It was active in terminal operations and cargo handling. After a failed attempt to sell the Spirit Group of which Spirit Air Cargo Handling Norway AS was a member, it was decided to transfer the business of Spirit Air Cargo Handling Norway AS to the defendant. The transfer of undertaking became effective on 1 March 2012.

2 The Norwegian collective bargaining system is a three-tier system. At the highest level there are basic agreements (tier one). These are supplemented by nationwide agreements applicable to certain industries or occupational groups (tier two). Finally, there are special agreements in a particular legal entity (tier three). The system represents a hierarchy of agreements. Following the transfer of the undertaking, it is disputed in the case before the national court whether the transferred employees could

be paid in accordance with the special agreements that applied from 1 May 2012 in the transferee's undertaking.

II Legal background

EEA law

3 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 (OJ 2001 L 82, p. 16) ("the Directive") was incorporated into Annex XVIII to the EEA Agreement at point 32d by Decision of the EEA Joint Committee No 159/2001 of 11 December 2001 (OJ 2002 L 65, p. 38, and EEA Supplement No 13, p. 22).

4 Article 3 of the Directive reads:

> *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 shall, by reason of such transfer, be transferred to the transferee.*
>
> *Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.*
>
> *2. Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under this Article, so far as those rights and obligations are or ought to have been known to the transferor at the time of the transfer. A failure by the transferor to notify the transferee of any such right or obligation shall not affect the transfer of that right or obligation and the rights of any employees against the transferee and/or transferor in respect of that right or obligation.*
>
> *3. Following the transfer, 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.*

National law

5 The Directive has been implemented in Norwegian law through Chapter 16 of the Act of 17 June 2005 No 62 relating to working environment, working hours and employment protection etc. (*lov om arbeidsmiljø, arbeidstid og stillingsvern mv.*) ("the Working Environment Act").

6 Article 3(1) and (3) of the Directive has been implemented by subsections (1) and (2) of Section 16-2 (Pay and working conditions), which reads as follows:

> *(1) The rights and obligations of the former employer ensuing from the contract of employment or employment relationship in force on the date of transfer shall be transferred to the new employer. Claims pursuant to the first sentence may still be raised against the former employer.*
>
> *(2) The new employer shall be bound by any collective pay agreement that was binding upon the former employer. This shall not apply if the new employer at the latest within three weeks after the date of transfer declares in writing to the trade union that the new employer does not wish to be bound. The transferred employees have nevertheless the right to retain the individual working conditions that follow from a collective pay agreement that was binding upon the former employer. This shall apply until this collective pay agreement expires or until a new collective pay agreement is concluded that is binding upon the new employer and the transferred employees.*

7 The first sentence of subsection (1) reflects the first subparagraph of Article 3(1) of the Directive and subsection (2) reflects the first subparagraph of Article 3(3) of the Directive, albeit with certain addenda concerning the applicability of the collective agreement in force in the transferor's undertaking.

8 Norway has not availed itself of the possibility of limiting the period for observing the terms and conditions applicable to the transferor as provided for in Article 3(3) of the Directive.

9 According to the first and second sentences of Section 16-2(2) of the Working Environment Act, the new employer is bound by the obligations stemming from the former employer's collective agreements, unless the transferee notifies the other party to the collective agreement in accordance with requirements set out in that provision. If a new employer thus exercises its right to declare itself not bound, the general principles of Norwegian collective labour law apply. According to those principles, collective agreements do not pass from the transferor to the transferee in the case of a transfer of undertaking.

10 However, according to case law in Norway, the transferee may exceptionally be bound by the collective agreements entered into by the transferor if the transfer is deemed to be non-genuine. Whether a transfer is non-genuine is decided on the basis of a case by case assessment. Elements of the assessment are whether the transferee is an

independent legal person, operations have been interrupted and the intention was to evade obligations stemming from a collective agreement.

11 The Norwegian system of collective agreements is based on a hierarchy of such agreements. Basic agreements are entered into by the general branches of employers' confederations (i.e. the Confederation of Norwegian Enterprises ("NHO")) and trade unions (such as the Norwegian Confederation of Trade Unions ("LO") and the Confederation of Vocational Unions ("YS")). They regulate permanent and general matters between the parties. Those basic agreements are supplemented by nationwide agreements often applicable to a certain industry or occupational group. Finally, the system of collective agreements is completed by special agreements entered into at the level of an individual undertaking, laying down more specific rules (i.e. pay rates). The special agreements must always comply with the more general agreements, similar to the rule of lex superior.

12 The Norwegian Act of 27 January 2012 No 9 (*lov om arbeidstvister*) ("the Labour Disputes Act") contains rules relating to collective agreements and their legal effects. Sections 4 and 5 of the Labour Disputes Act provide that a collective agreement is valid for a limited period of time and shall, as a rule, contain provisions concerning its date of expiry and period of notice.

13 According to the Labour Disputes Act, the period of notice is three months, although other periods of notice may be agreed. If notice of termination of a collective agreement has not been given on time and in the correct manner before the expiry of the collective agreement period (the agreed period of validity of the collective agreement), the agreement is deemed, by law, to have been automatically renewed for a further period of one year. A collective agreement for which notice of termination has been given can either be renewed or amended through negotiations at the time of expiry ("revision of a collective agreement"). In formal terms, a new collective agreement is then entered into for a new period.

14 According to the national court, notice of termination of a collective agreement normally reflects a wish to make changes to the agreement and not a wish for the collective agreement to lapse. The negotiations and, if applicable, arbitration will often take time, so that a new agreement will not be in place on the date on which the old agreement should have expired pursuant to the notice of termination. In order to prevent difficulties arising in such an intervening period with no collective agreement, Section 8(3) of the Labour Disputes Act gives collective agreements a statutory continuing effect, or "after-effect". Such continuing effects shall apply as long as a strike, lock-out or other industrial action cannot be lawfully instigated. From the submissions of the parties, the nature of these continuing effects and their scope appear to be disputed in the main proceedings before the national court.

III Facts and procedure

15 The appellants are former employees of Spirit Air Cargo Handling Norway AS and either members of the Norwegian United Federation of Trade Unions

("Fellesforbundet") or the Norwegian Union of Employees in Commerce and Offices ("Handel og Kontor i Norge"), both members of LO, or members of the trade union Parat, which is a member of YS. It appears that the defendants' employees and the appellants, in other words the newly transferred employees, are represented by the same trade unions.

16 The defendant is a consortium wholly owned by three Nordic limited liability companies, themselves owned by a parent company, SAS AB, and part of the SAS Group. The defendant is a member of NHO and an industry employers' confederation: Confederation of Norwegian Aviation Industries ("NHO Luftfart").

17 The SAS Group's main activities consist in the operation of passenger plane services and the provision of air cargo and other aviation-related services. Those services are carried out by different companies within the group. The defendant is one of those companies. Until 2001, the defendant operated the SAS Group's cargo services as a separate business under the name SAS Cargo.

18 The activities gradually evolved into a separate business, which was later contained in the wholly-owned subsidiary Spirit Air Cargo Handling AB, and finally became a separate sub-group of the SAS Group ("the Spirit Group"). The Spirit Group's operational activities were run by different national subsidiaries, e.g. Spirit Air Cargo Handling Norway AS.

19 An attempt to sell the Spirit Group was unsuccessful. It was therefore decided that the business of Spirit Air Cargo Handling Norway AS should be transferred back to the defendant's business. The transfer of undertaking was implemented through the sale of the contents of the business of Spirit Air Cargo Handling Norway AS with effect from 1 March 2012. The employees' employment relationships were transferred with effect from the same day.

20 Both the defendant and Spirit Air Cargo Handling Norway AS are bound by a number of collective agreements. They were members of the same employer confederations (NHO/NHO Luftfart) on a national level, and bound by the same basic and nationwide collective agreements. However, those collective agreements were supplemented by third-tier special agreements on pay rates, which differed between the defendant and Spirit Air Cargo Handling Norway AS.

21 In January 2012, the trade unions to which the appellants belong gave timely notice of termination in relation to the nationwide collective agreements. The expiry date was 31 March 2012.

22 After the transfer took place on 1 March 2012, the defendant continued to pay the employees who had been taken over from Spirit Air Cargo Handling Norway AS in accordance with the rates stipulated in the special agreement for that company.

23 On 16 March 2012, the appellants' trade unions received notification pursuant to the second sentence of Section 16-2(2) of the Working Environment Act. The SAS

consortium informed the unions that it did not wish to be bound by the collective agreements that had applied in Spirit Air Cargo Handling Norway AS. However, it appears to be disputed in the proceedings before the national court whether the special agreement that applied in Spirit Air Cargo Handling Norway AS had been correctly terminated, e.g. by notification in the transferee's letter of 16 March 2012. Moreover, it appears to be contested in the national proceedings how, in general, third-tier agreements are to be terminated under Norwegian law.

24 On 30 March 2012, the SAS consortium informed the transferred employees that they would be covered by the third-tier special agreement applying to the defendant. Accordingly, individual terms would be adjusted by 1 May 2012. As of that date, the employees in question were thus paid in accordance with the special agreement that applied in the defendant's undertaking. It appears also to be disputed in the national proceedings whether the defendant was entitled to apply its special agreement to the transferred employees.

25 Pursuant to the current special agreement, the pay level in the defendant's undertaking is on average between 4% and 8% lower than for corresponding employee categories in Spirit Air Cargo Handling Norway AS. Changes were made at the individual level in the magnitude of plus 3% to minus 11.5%. When the employees were assigned a grade in the applicable pay tables in the defendant's undertaking, they were fully credited for their seniority and qualifications under their former employment relationship with Spirit Air Cargo Handling Norway AS.

26 The appellants, 129 former employees of Spirit Air Cargo Handling Norway AS, did not accept the pay reduction, which resulted from the transfer to the new collective agreement. They sought an order before Øvre Romerike District Court (*Øvre Romerike tingrett*), requiring the defendant, inter alia, to continue to apply the higher pay rates, in accordance with the special agreement entered into by Spirit Air Cargo Handling Norway AS. By judgment of 18 November 2013, the District Court found in favour of the defendant.

27 That judgment was appealed to Eidsivating Court of Appeal. On 31 March 2014, the Court of Appeal decided to seek an Advisory Opinion from the Court and referred the following questions:

> *1. Is it consistent with Article 3(1), cf. Article 3(3), of Council Directive 2001/23/EC that the transferee undertaking assigns the individual employees covered by the transfer a place in a pay table set out in a collective agreement that applies in the transferee undertaking, with effect from a date after the collective agreement that applied in the transferor undertaking has expired, even if this results in pay reduction for the individual employees?*
>
> *2. Does the answer to Question 1 depend on whether the collective agreement that applied to the employees of the transferor was still in force when the transferee's collective agreement was made applicable to the employees covered by the transfer of the undertaking?*

3. Does the answer to Question 1 depend on whether the reduction in pay is significant or not?

28 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

IV The questions

Admissibility

29 The defendant, the Government of Sweden and the Commission contend that the second question appears to be hypothetical, as the collective agreement had expired before the date of transfer, and is therefore inadmissible.

30 It follows from well-established case law that where a national court or tribunal submits a question concerning the interpretation of EEA law, the Court is in principle bound to give a ruling. Questions concerning EEA law enjoy a presumption of relevance. However, the Court may not rule on a question referred by a national court where it is quite obvious that the interpretation of EEA law sought is unrelated to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted (see Case E-9/14 *Otto Kaufmann AG*, judgment of 10 November 2014, not yet reported, paragraph 34, and case law cited).

31 In the present case, it seems clear from the national court's request that the two nationwide collective agreements expired on 31 March 2012. However, with respect to the special local agreements, it follows from the request simply that the defendant declared itself not to be bound on 16 March 2012. From the submissions of the parties, it appears still to be disputed in the national proceedings whether this was sufficient to result in the expiry of that agreement.

32 Accordingly, the second question is not hypothetical and therefore admissible.

Substance

The first and third questions

33 By its first question, the national court asks, in essence, whether it is compatible with Article 3(3) of the Directive that the conditions of the collective agreement in the transferee's undertaking are applied to the employees covered by the transfer after the expiry of the collective agreement in the transferor's undertaking, even if this results in a pay reduction. By its third question, the referring court asks whether the answer to Question 1 depends on whether the reduction in pay is significant. The Court finds it appropriate to assess these questions together.

Observations submitted to the Court

34 The appellants argue that the Directive aims, in essence, at preventing employees subject to a transfer from being placed in a less favourable position solely as a result of the transfer. They take the view that Article 3(1) and (3) of the Directive precludes the defendant from applying another local agreement, applicable within the transferee undertaking, after the expiry of the collective agreement entered into by the transferor. Under Norwegian law, formally expired collective agreements produce continuing effects until the agreement has been lawfully replaced by another collective agreement. In the view of the appellants, this continued effect is included within the Directive's protection.

35 Even if this is not the case, the appellants argue that it follows from the judgment of the Court of Justice of the European Union ("ECJ") in Case C-108/10 *Scattolon* [2011] ECR I-7491 that the Directive precludes the transferred employees from suffering a substantial loss solely as a result of the transfer. Consequently, the pay grades of these employees could not have been changed with effect from 1 May 2012. All the same, the appellants concede that the extended protection under the *Scattolon* test is not indefinite. The one-year period mentioned in Article 3(3) of the Directive and the considerations underlying the possibility of limiting the protection pursuant to that Article could serve as a guideline in this regard. The *Scattolon* test requires, in the view of the appellants, a global comparison between the conditions which the transferred employees enjoy under the collective agreement with the transferor and those laid down by the collective agreement in force with the transferee to determine whether the latter are, overall, less favourable than those applicable before the transfer.

36 The defendant argues with particular reference to the ECJ's judgment in Case C-396/07 *Juuri* [2008] ECR I-8883 that Article 3 of the Directive imposes no obligation on the transferee to continue to observe the terms and conditions deriving from a collective agreement beyond the date of expiry of that agreement. The Directive only provides for partial harmonisation and is intended to ensure that the employee is equally protected in his relations with the transferee as he was in his relationship with the transferor under the law of the EEA State in question. Hence, the question whether a transferee may apply its own collective agreements to the transferred employees is a question of national law, even if this results in a significant wage reduction for the individual employee.

37 Furthermore, the defendant argues that the ECJ's judgment in Case C-328/13 *Österreichischer Gewerkschaftsbund*, judgment of 11 September 2014, published electronically, is limited to providing for an extension of the protective effects of the Directive if and insofar as national law extends the protection of working conditions following from a collective agreement beyond its date of expiry.

38 At the hearing, the defendant claimed that, under Norwegian law, there are two types of "after-effects". First, during the negotiation of new collective agreements between the same parties, old agreements are binding even if they have expired. That first possibility is, in view of the defendant, not at issue in the present case. A second type

of after-effect is that the individual employment contracts will be interpreted as containing terms and conditions on matters such as wages resulting from collective agreements that previously applied, even though the collective agreement as such is no longer applicable. As a result, such continued effect of an individual nature has to yield to any other conflicting conditions, such as one that results from a collective agreement binding on the employees.

39 With respect to the appellants' arguments, the defendant contends that the facts underlying *Scattolon* differ from those in the case at hand. In *Scattolon*, a new collective agreement was applied to the transferred employee, even though the original collective agreement was seemingly still in force. Moreover, in the view of the defendant, it follows from *Scattolon* (paragraphs 73 and 74) and *Juuri* that the Directive itself does not require the transferee to ensure the terms and conditions laid down in the transferor's expired collective agreement. Finally, even in the *Scattolon* (paragraphs 82 and 83) situation, the ECJ did not question the application of the transferee's collective agreement. Simply, the ECJ required that the length of service of the individual employee is fully taken into account, which is the case in the current proceedings.

40 Finally, the defendant claims that the Directive must be interpreted in accordance with the Charter of Fundamental Rights of the European Union ("the Charter") and in particular with the freedom to conduct a business enshrined in Article 16 of the Charter, which finds expression also in Article 3 of the Directive. Even though the Charter has not been incorporated into the EEA Agreement, it is, in the defendant's view, relevant, in accordance with the principle of homogeneity, to the interpretation of the provision at hand, since in relation to that provision there are no differences in scope and purpose between EEA and EU law. In principle, the defendant continues, the interpretation sought by the appellants would result in the collective agreements of the transferor becoming the threshold from which subsequent collective agreements may only derogate in favour of the employees. This, however, would ignore the interests of the transferee with regard to saving costs and good industrial relations and therefore restrict a transferee's freedom to conduct a business.

41 The Norwegian Government submits that the system provided for in Article 3(1) and (3) of the Directive is to balance the rights of the employees in the event of a transfer of undertaking with those of the new employer for a limited period. If the collective agreement has expired, the employees cannot rely directly on the terms and conditions specified in that agreement. However, given that the Directive only provides for partial harmonisation, the conditions for expiry and the conclusion of a new collective agreement, as well as the possible effects despite the expiry of a collective agreement are matters for national law. In the view of the Norwegian Government, that national autonomy was confirmed in *Österreichischer Gewerkschaftsbund* with respect to the effects that a collective agreement, after expiry, produces under national law until a new agreement applies to the employees transferred.

42 The Norwegian Government notes that in *Scattolon* the ECJ emphasised that the objective of the Directive is to prevent employees that are subject to a transfer from

being placed in a less favourable position solely as a result of the transfer. In its view, this appears relevant to substantial reductions in wages for any number of reasons and not simply where this results from a failure to take proper account of an employee's length of service.

43 The Norwegian Government fully acknowledges the Court's settled case law that any provision of EEA law is to be interpreted in light of fundamental rights common to the EEA States and that the European Convention of Human Rights and the case law of the European Court of Human Rights are to be considered essential sources for determining the scope of these rights.

44 However, according to the Norwegian Government, an automatic application of the Charter, which is not incorporated in the EEA Agreement, would challenge State sovereignty and the principle of consent as the source of international legal obligations. In its view, the Charter provides, in some respects, for fundamental rights beyond those common to the EEA States. That is the case with regard to Article 16 of the Charter. The right to conduct business is not, at least not in such a general manner, reflected in other international legal instruments by which the EEA States are bound. That warrants caution in equalling the scope of Article 16 of the Charter with fundamental rights common to the EEA States.

45 The Swedish Government observes that the wording of Article 3(3) of the Directive suggests, in principle, that there is an obligation on the transferee to observe the collective agreements concluded by the transferor. However, it follows from the wording of that provision that the obligation lasts only until the expiry of the collective agreement concerned. Were Article 3(3) of the Directive to be interpreted differently, the transferee would be bound indefinitely by collective agreements whose terms it could not affect. That would reduce contractual freedom to the point where it would adversely affect the very essence of the transferee's freedom to conduct a business. Moreover, the perpetuation of expired collective agreements would make it impossible for the transferee to apply, in a non-discriminatory manner, the terms of a collective agreement to transferred and non-transferred employees alike.

46 The Swedish Government submits further that the ECJ's judgment in *Scattolon* does not establish a general rule concerning the interpretation of the Directive but stems from the very specific circumstances of the case. The judgment applies to situations where the collective agreement applicable was immediately replaced upon transfer and the qualifications of the employees, such as length of service, were not properly taken into account after the transfer, leading to a substantial reduction in the remuneration of the employees concerned. Thus, *Scattolon* supports the view that the Directive aims at avoiding employees being placed, solely by reason of a transfer to another employer, in an unfavourable position compared to that which they previously enjoyed.

47 By contrast, the Swedish Government argues that in a situation, such as in the case at hand, where the transferred employees no longer enjoy rights under a previously applicable agreement, due to the fact that this agreement has expired, the loss of their right to a particular salary is not directly linked to the transfer, but to the expiry of the

collective agreement. In such a situation, the Swedish Government adds, the findings in *Juuri* are relevant.

48 In ESA's view, it follows from established case law that the Directive, while not seeking full harmonisation, strives to ensure a fair balance between the interests of transferred employees and the interests of the transferee undertaking.

49 Pursuant to the wording of Article 3(3) of the Directive, the obligation on the transferee to obey the terms and conditions of the collective agreements in force with the transferor ends when those collective agreements expire. However, the Directive does not harmonise the conditions under which an existing collective agreement expires nor does it harmonise how another collective agreement enters into force or is made applicable.

50 With reference to *Scattolon* (paragraph 75), ESA observes that national rules must be interpreted in light of the purpose of the Directive. Due account has to be taken of factors such as the length of service, education and type of experience affecting the calculation of remuneration that the employee receives in the transferee's undertaking. Provided that national rules are interpreted in light of the purpose of the Directive, ESA takes the view that the conditions of a collective agreement in a transferee undertaking may be applied to the transferred employees, even if this results in a reduction in pay.

51 With regard to the third question, ESA emphasises that a significant reduction in remuneration may entail a substantial change in working conditions within the meaning of Article 4(2) of the Directive. Thus, if the employment relationship is terminated because of this change in working conditions, Article 4(2) imposes responsibility for this termination on the employer, the consequences of which have to be determined by national law. Therefore, Article 4(2) limits the employer's discretion to adjust working conditions to the detriment of the transferred employees. In response to a question posed by the Court, ESA clarified at the hearing that this Article is to be understood as a source of inspiration.

52 At the hearing, ESA also submitted that, in accordance with case law, the EEA Agreement has to be interpreted in light of fundamental rights. The right to conduct a business is safeguarded in the EEA irrespective of the Charter's provisions. One of the main objectives of the EEA Agreement is to contribute to trade liberalisation and to the fullest possible realisation of the four freedoms, for which the right to conduct a business is an indispensable prerequisite. However, the Charter and Article 16 thereof do not seem to provide any additional guidance in the interpretation of the Directive and in answering the questions of the national court.

53 The Commission submits that after the transfer the SAS consortium was obliged to observe the terms and conditions resulting from the agreement at issue in the national proceedings only until the date of its expiry of 31 March 2012. This interpretation results from the fact that the first subparagraph of Article 3(3) of the Directive cannot override the intentions of the parties to a collective agreement as expressed therein.

Thus, if the parties have limited the enjoyment of certain rights guaranteed by an agreement to a particular date, Article 3(3) cannot impose an obligation on the transferee to observe those working conditions after that specific date. Should the relevant collective agreements that applied in the transferor's undertaking produce continuing effects as a matter of national law, the judgment in *Österreichischer Gewerkschaftsbund* would be of relevance.

54 The Commission argues that *Scattolon* does not support an alternative interpretation of the Directive. Moreover, it is not disputed in the present case that the transferred employees were fully credited for their seniority and qualifications, unlike the situation in *Scattolon*.

55 The Commission submits further that it is for the national court to decide whether the special agreements applicable to the employees transferred had expired for the purposes of Article 3(3) of the Directive. Finally, on the question of the impact of the Charter in the case at hand, the Commission notes that the ECJ found in Case C-426/11 *Alemo-Herron and Others*, judgment of 18 July 2013, published electronically, that Article 3 of the Directive must be interpreted in accordance with Article 16 of the Charter.

Findings of the Court

56 By its first and third questions, the referring court seeks guidance on whether it is consistent with Article 3(3) of the Directive that terms and conditions of pay specified in the collective agreement applicable in the transferee's undertaking are applied to the transferred employees after the collective agreement applicable in the transferor's undertaking has expired, even if this results in a significant reduction in pay.

57 The Directive is intended to achieve partial harmonisation and not to establish a uniform level of protection within its scope throughout the EEA. The Directive does however strive to ensure a fair balance between the interests of transferred employees and of the transferee undertaking (see *Österreichischer Gewerkschaftsbund*, cited above, paragraph 29, and case law cited). Thus, the Directive can only be relied on to ensure that employees are protected in their relation to the transferee to the same extent they were in their relation to the transferor under the legal rules of the EEA State concerned (see, to that effect, Case E-2/04 *Rasmussen* [2004] EFTA Ct. Rep. 57, paragraph 23).

58 Under Article 3(3) of the Directive, the transferee shall continue to observe the terms and conditions agreed in a 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.

59 If conditions of pay enjoyed by the transferred employees under the collective agreement with the transferor are replaced with conditions of pay laid down by the collective agreement in force with the transferee only after the expiry of the former agreement, the loss of the entitlement to a particular salary is not linked to the transfer,

but to the expiry of the collective agreement. The Directive safeguards employees' rights and obligations in force on the day of the transfer. It is not intended to protect mere expectations to rights and, therefore, hypothetical advantages flowing from future changes to collective agreements (compare Case C-499/04 *Werhof* [2006] ECR I-2397, paragraph 29). The issue of whether the application of new conditions results in a pay reduction – whether significant or not – can therefore have no influence on the assessment under the Directive.

60 However, should the referring court find that national law provides for continuing effects after the expiry of the collective agreement, the issue must be examined further.

61 Article 3(3) of the Directive does not prescribe the application of a collective agreement as such but is related to its terms and conditions, governing matters such as pay.

62 It follows that, in principle, the rates of pay put in place by a collective agreement fall within the scope of Article 3(3) of the Directive. This applies whether or not those conditions are applicable to the persons concerned by virtue of the collective agreement as such or a national rule maintaining effects of a collective agreement after its expiration. It is sufficient that such terms and conditions have been put in place by a collective agreement and effectively bind the transferor and the employees transferred (compare *Österreichischer Gewerkschaftsbund*, cited above, paragraph 25). However, given the limited level of harmonisation, the scope of protection is defined by national law and cannot be extended by Article 3(3) of the Directive.

63 In the interest of the employees, a national rule may give continued effects to a collective agreement in order to avoid a rupture of the framework governing the employment relationship. In that case, it must be assessed whether such a rule complies with the main objective of the Directive. That objective is to ensure a fair balance between the interests of the employees and those of the transferee. The transferee must be in a position to make adjustments and changes necessary to carry on its operations (compare, to that effect, *Alemo-Herron and Others*, cited above, paragraph 25). Since continued effects applicable after the expiration of a collective agreement limit the freedom of action of the transferee, such a national rule must be limited in its duration. Otherwise, it would bind the transferee indefinitely.

64 The Court finds no reason to address the question of Article 16 of the Charter. The EEA Agreement has linked the markets of the EEA/EFTA States to the single market of the European Union. The actors of a market are, inter alia, undertakings. The freedom to conduct a business lies therefore at the heart of the EEA Agreement and must be recognised in accordance with EEA law and national law and practices.

65 In these circumstances, the answer to the first and third questions must be that it is consistent with Article 3(3) of the Directive if conditions of pay enjoyed by the transferred employees under the collective agreement with the transferor are replaced, in conformity with national law, by conditions of pay laid down in the collective agreement in force with the transferee after the expiry of the former collective

agreement. A pay reduction – whether significant or otherwise – cannot influence this assessment.

66 However, the national court must examine whether the applicable national law provides for continuing effects in a situation such as the present. Article 3(3) of the Directive has to be interpreted as meaning that terms and conditions laid down in a collective agreement to which such continuing effects apply constitute "terms and conditions agreed in any collective agreement" so long as those employment relationships are not subject to a new collective agreement or new individual agreements are not concluded with the employees concerned.

The second question

67 By its second question, the national court asks, in essence, whether it is compatible with Article 3(1) and (3) of the Directive that the conditions of the collective agreements in the transferee's undertaking are applied to the employees covered by the transfer, even if this results in pay reduction, at a time when the collective agreement that applied to the employees of the transferor is still in force.

Observations submitted to the Court

68 The appellants submit that the collective agreement that is applicable in the transferor's undertaking can only be replaced by applying the procedures provided for under the Directive and Norwegian law, as Norway has not limited the period of protection under Article 3(3) of the Directive. However, in the view of the appellants, the procedure applied by the defendant to replace the collective agreement's terms and conditions was in line neither with Norwegian law nor with the Directive.

69 The appellants submit further that even if the replacement was lawful and continuing effects were not protected under the Directive, the protection of employees provided for in *Scattolon* did not permit the replacement of the collective agreement's terms and conditions in the manner and at the time the defendant did so in the present case.

70 The Norwegian Government submits that if the collective agreement was still in force, at least two issues remain. The first is whether the employees are bound by this new collective agreement applied by the transferee. That must be decided under national law. The second issue is whether the employees are protected against substantially lower wages in the collective agreement applicable in the transferee's undertaking. That depends on the interpretation of *Scattolon* and whether there has been a substantial reduction of wages solely as a result of the transfer. Were *Scattolon* to be seen as relevant, the national court would have to make the assessment based on all the circumstances of the case.

71 According to ESA, there are two aspects to the second question, as it concerns both the conditions for the application of another agreement and the content of such an agreement.

72 ESA contends that, if the collective agreement that applied in the transferor undertaking is still in force, it follows from the wording of Article 3(3) of the Directive that one of the alternative conditions mentioned therein will, when fulfilled, end the obligation of the transferee to observe the terms and conditions of the collective agreement that applied in the transferor undertaking. The Directive does not rank the alternatives but presents them as equal in value and effect.

73 As the Directive harmonises neither the conditions under which an existing collective agreement expires nor the manner in which another collective agreement enters into force or is made applicable, it is for national law to regulate such situations.

74 Hence, ESA continues, if the national rules for replacing the collective agreement applicable in the transferor's undertaking by the agreement applicable in the transferee's undertaking are fulfilled, the conditions of the collective agreement applicable in the transferee undertaking will apply and a reduction in pay will be possible. The same conclusion must be reached if the national rules governing the replacement of an existing collective agreement by a new collective agreement are fulfilled. However, if the national rules governing the replacement of collective agreements are not fulfilled, the terms and conditions of the existing collective agreement will continue to apply after the transfer.

75 In light of the submissions made at the hearing by the parties to the national proceedings, the Commission acknowledges that there seems to be disagreement whether the collective agreements at issue had expired for the purposes of Article 3(3) of the Directive. This is a matter for the national court to decide. If the collective agreement had not expired, it appears that the answer to the second question lies more in the direction of *Scattolon*.

Findings of the Court

76 The first aspect of this question concerns the conditions for the application of another collective agreement pursuant to Article 3(3) of the Directive. The second aspect concerns the conditions for the application of the collective agreement applicable in the transferee's undertaking two months after the transfer, if said application leads to a pay reduction for the transferred employees.

77 Pursuant to the first subparagraph of Article 3(3) of the Directive, the transferee shall continue to observe the terms and conditions agreed in a 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. Those alternatives under the Directive are equal in value and effect.

78 The second subparagraph of Article 3(3) provides that an EEA State may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year. Whether or not the EEA State in question has availed itself of that

possibility, the rule contained in the second subparagraph cannot deprive the first subparagraph of Article 3(3) of its substance.

79 The Directive does not, therefore, prevent the terms and conditions in the collective agreement, to which the employees concerned were subject before the transfer, from ceasing to apply within one year after the transfer, including immediately on the date on which the transfer takes place, provided that the agreement has been terminated or has expired or another collective agreement has entered into force or become applicable (compare *Scattolon*, cited above, paragraph 73; and *Juuri*, cited above, paragraph 34).

80 Consequently, it is not contrary to Article 3(3) of the Directive for the transferee to apply, from the date of the transfer or, as in the present case, two months after the transfer, the terms and conditions laid down by the collective agreement in force, including those concerning pay.

81 Before the expiry of a collective agreement, it depends on the conditions set out in national law at what time another collective agreement enters into force or becomes applicable to the transferred employees. By contrast, if the national rules governing the replacement of collective agreements are not fulfilled, the terms and conditions of the non-expired collective agreement will continue to apply after the transfer.

82 The Directive leaves a margin of manoeuvre allowing the transferee and the other parties involved to arrange the salary integration of the transferred employees, taking the circumstances of the transfer into account. However, the arrangement chosen has to respect the aim of the Directive.

83 In this light, Article 3 of the Directive precludes the possibility that transferred employees suffer a substantial loss of income, in comparison with their situation immediately prior to the transfer, because the duration of their service with the transferor is not sufficiently taken into account when their starting salary position at the transferee is determined, considering the equivalent duration of service of those employees already in the service of the transferee, and when the conditions for remuneration under the newly applicable collective agreement have regard *inter alia* to length of service.

84 It appears from the request and the parties' submissions that the transferred employees were fully credited for their competence and length of service, equivalent to that completed by employees in the service of the transferee. However, this is for the national court to examine.

85 The answer to the second question must therefore be that Article 3(3) of the Directive does not prevent the transferee from applying to the transferred employees the transferee's collective agreement two months after the transfer, if that collective agreement is made applicable in accordance with national law. However, Article 3 of the Directive precludes the possibility that transferred employees suffer a substantial loss of income, in comparison with their situation immediately prior to the transfer,

because the duration of their service with the transferor is not sufficiently taken into account when their starting salary position at the transferee is determined and where the conditions for remuneration under the newly applicable collective agreement have regard inter alia to the length of service. In that determination the equivalent duration of service of those employees already in the service of the transferee must be taken into consideration. It is for the national court to examine whether the conditions of pay under the transferee's collective agreement take due account of the length of service.

V Costs

86 The costs incurred by the Norwegian Government, the Swedish Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before Eidsivating Court of Appeal, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Eidsivating Court of Appeal hereby gives the following Advisory Opinion:

1. **It is consistent with Article 3(3) of Directive 2001/23/EC when terms and conditions of pay enjoyed by the transferred employees under the collective agreement with the transferor are replaced, in conformity with national law, by conditions of pay laid down in the collective agreement in force with the transferee after the expiry of the former collective agreement.**

   A pay reduction – whether significant or otherwise – cannot influence this assessment.

   However, the national court must assess whether the applicable national law provides for continuing effects in a situation such as the present. Article 3(3) of Directive 2001/23/EC has to be interpreted as meaning that terms and conditions laid down in a collective agreement to which such continuing effects apply constitute "terms and conditions agreed in any collective agreement" so long as those employment relationships are not subject to a new collective agreement or new individual agreements are not concluded with the employees concerned.

2. **Article 3(3) of Directive 2001/23/EC does not prevent the transferee from applying to the transferred employees the transferee's collective agreement two months after the transfer, if that collective agreement is made applicable in accordance with national law.**

   However, Article 3 of Directive 2001/23/EC precludes the possibility that transferred employees suffer a substantial loss of income, in comparison with their situation immediately prior to the transfer, because the duration of their service with the transferor is not sufficiently taken into account when their starting salary position at the transferee is determined and where the conditions for remuneration under the newly applicable collective agreement have regard inter alia to the length of service. In that determination the equivalent duration of service of those employees already in the service of the transferee must be taken into consideration.

   It is for the national court to examine whether the conditions of pay under the transferee's collective agreement take due account of the length of service.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 18 December 2014.

Gunnar Selvik
Registrar

Carl Baudenbacher
President