

COUNCIL DIRECTIVE 98/50/EC

of 29 June 1998

amending 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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Having regard to the opinion of the Economic and Social Committee ⁽³⁾,

Having regard to the opinion of the Committee of the Regions ⁽⁴⁾,

- (1) Whereas the Community Charter of the fundamental social rights of workers adopted on 9 December 1989 ('Social Charter') states, in points 7, 17 and 18 in particular that: 'The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. The improvement must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundancies and those regarding bankruptcies. Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States. Such information, consultation and participation must be implemented in due time, particularly in connection with restructuring operations in undertakings or in cases of mergers having an impact on the employment of workers';
- (2) Whereas Directive 77/187/EEC ⁽⁵⁾ promotes the harmonisation of the relevant national laws ensuring the safeguarding of the rights of employees and requiring transferors and transferees to inform and consult employees' representatives in good time;
- (3) Whereas the purpose of this Directive is to amend Directive 77/187/EEC in the light of the impact of the internal market, the legislative tendencies of the Member States with regard to the rescue of under-

takings in economic difficulties, the case-law of the Court of Justice of the European Communities. Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies ⁽⁶⁾ and the legislation already in force in most Member States;

- (4) Whereas considerations of legal security and transparency require that the legal concept of transfer be clarified in the light of the case-law of the Court of Justice; whereas such clarification does not alter the scope of Directive 77/187/EEC as interpreted by the Court of Justice;
- (5) Whereas those considerations also require an express provision, in the light of the case-law of the Court of Justice, that Directive 77/187/EEC should apply to private and public undertakings carrying out economic activities, whether or not they operate for gain;
- (6) Whereas it is necessary to clarify the concept of 'employee' in the light of the case-law of the Court of Justice;
- (7) Whereas, with a view to ensuring the survival of insolvent undertakings, Member States should be expressly allowed not to apply Articles 3 and 4 of Directive 77/187/EEC to transfers effected in the framework of liquidation proceedings, and certain derogations from that Directive's general provisions should be permitted in the case of transfers effected in the context of insolvency proceedings;
- (8) Whereas such derogations should also be allowed for one Member State which has special procedures to promote the survival of companies declared to be in a state of economic crisis;
- (9) Whereas the circumstances in which the function and status of employee representatives are to be preserved should be clarified;
- (10) Whereas, in order to ensure equal treatment for similar situations, it is necessary to ensure that the information and consultation requirements laid

⁽¹⁾ OJ C 274, 1. 10. 1994, p. 10.

⁽²⁾ OJ C 33, 3. 2. 1997, p. 81.

⁽³⁾ OJ C 133, 31. 5. 1995, p. 13.

⁽⁴⁾ OJ C 100, 2. 4. 1996, p. 25.

⁽⁵⁾ OJ L 61, 5. 3. 1977, p. 26.

⁽⁶⁾ OJ L 48, 22. 2. 1975, p. 29. Directive as amended by Directive 92/56/EEC (OJ L 245, 26. 8. 1992, p. 3).

down in Directive 77/187/EEC are complied with irrespective of whether the decision leading to the transfer is taken by the employer or by an undertaking controlling the employer;

- (11) Whereas it is appropriate to clarify that, when Member States adopt measures to ensure that the transferee is informed of all the rights and obligations to be transferred, failure to provide that information is not to affect the transfer of the rights and obligations concerned;
- (12) Whereas it is necessary to clarify the circumstances in which employees must be informed where there are no employee representatives;
- (13) Whereas the Social Charter recognises the importance of the fight against all forms of discrimination, especially based on sex, colour, race, opinion and creed,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 77/187/EEC is hereby amended as follows:

1. the title shall be replaced by the following:

‘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’;

2. Articles 1 to 7 shall be replaced by the following:

‘SECTION I

Scope and definitions

Article 1

1. (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.
- (c) This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public adminis-

trative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive.

2. This Directive shall apply where and insofar as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty.

3. This Directive shall not apply to sea-going vessels.

Article 2

1. For the purposes of this Directive:

- (a) ‘transferor’ shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the undertaking or business;
- (b) ‘transferee’ shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the undertaking or business;
- (c) ‘representatives of employees’ and related expressions shall mean the representatives of the employees provided for by the laws or practices of the Member States;
- (d) ‘employee’ shall mean any person who, in the Member State concerned, is protected as an employee under national employment law.

2. This Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship.

However, Member States shall not exclude from the scope of this Directive contracts of employment or employment relationships solely because:

- (a) of the number of working hours performed or to be performed,
- (b) they are employment relationships governed by a fixed-duration contract of employment within the meaning of Article 1(1) of Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship (*), or
- (c) they are temporary employment relationships within the meaning of Article 1(2) of Directive 91/383/EEC, and the undertaking, business or part of the undertaking or business transferred is, or is part of, the temporary employment business which is the employer.

SECTION II

Safeguarding of employees' rights*Article 3*

1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer 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.

4. (a) Unless Member States provide otherwise, paragraphs 1 and 3 shall not apply in relation to 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.

(b) Even where they do not provide in accordance with subparagraph (a) that paragraphs 1 and 3 apply in relation to such rights, 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 in respect of rights conferring on them immediate or prospective entitlement to old age benefits, including survivors' benefits, under supplementary schemes referred to in subparagraph (a).

Article 4

1. The transfer of the undertaking, business or part of the undertaking or 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 organisational 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 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.

Article 4a

1. Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority).

2. Where Articles 3 and 4 apply to a transfer during insolvency proceedings which have been opened in relation to a transferor (whether or not those proceedings have been instituted with a view to the liquidation of the assets of the transferor) and provided that such proceedings are under the supervision of a competent public authority (which may be an insolvency practitioner determined by national law) a Member State may provide that:

(a) notwithstanding Article 3(1), the transferor's debts arising from any contracts of employment or employment relationships and payable before the transfer or before the opening of the insolvency proceedings shall not be transferred to the transferee, provided that such proceedings give rise, under the law of that Member State, to protection at least equivalent to that provided for in situations covered by Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (**);

and, or alternatively, that

(b) the transferee, transferor, or person or persons exercising the transferor's functions, on the one hand, and the representatives of the employees on the other hand may agree alterations, insofar as current law or practice permits, to the employees' terms and conditions of employment designed to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or business.

3. A Member State may apply paragraph 2(b) to any transfers where the transferor is in a situation of serious economic crisis, as defined by national law, provided that the situation is declared by a competent public authority and open to judicial supervision, on condition that such provisions already exist in national law by 17 July 1998.

The Commission shall present a report on the effects of this provision before 17 July 2003 and shall submit any appropriate proposals to the Council.

4. Member States shall take appropriate measures with a view to preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights provided for in this Directive.

Article 5

1. If the undertaking, business or part of an undertaking or business preserves its autonomy, the status and function of the representatives or of the representation of the employees affected by the transfer shall be preserved on the same terms and subject to the same conditions as existed before the date of the transfer by virtue of law, regulation, administrative provision or agreement, provided that the conditions necessary for the constitution of the employees' representation are fulfilled.

The first subparagraph shall not apply if, under the laws, regulations, administrative provisions or practice in the Member States, or by agreement with the representatives of the employees, the conditions necessary for the reappointment of the representatives of the employees or for the reconstitution of the representation of the employees are fulfilled.

Where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority), Member States may take the necessary measures to ensure that the transferred employees are properly represented until the new election or designation of representatives of the employees.

If the undertaking, business or part of an undertaking or business does not preserve its autonomy, the Member States shall take the necessary measures to ensure that the employees transferred who were represented before the transfer continue to be properly represented during the period necessary for the reconstitution or reappointment of the representation of employees in accordance with national law or practice.

2. If the term of office of the representatives of the employees affected by the transfer expires as a result of the transfer, the representatives shall continue to enjoy the protection provided by the laws, regulations, administrative provisions or practice of the Member States.

SECTION III

Information and consultation

Article 6

1. The transferor and transferee shall be required to inform the representatives of their respective employees affected by the transfer of the following:

- the date or proposed date of the transfer,
- the reasons for the transfer,
- the legal, economic and social implications of the transfer for the employees,
- any measures envisaged in relation to the employees.

The transferor must give such information to the representatives of his employees in good time before the transfer is carried out.

The transferee must give such information to the representatives of his employees in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment.

2. Where the transferor or the transferee envisages measures in relation to his employees, he shall consult the representatives of his employees in good time on such measures with a view to reaching an agreement.

3. Member States whose laws, regulations or administrative provisions provide that representatives of the employees may have recourse to an arbitration board to obtain a decision on the measures to be taken in relation to employees may limit the obligations laid down in paragraphs 1 and 2 to cases where the transfer carried out gives rise to a change in the business likely to entail serious disadvantages for a considerable number of the employees.

The information and consultations shall cover at least the measures envisaged in relation to the employees.

The information must be provided and consultations taken place in good time before the change in the business as referred to in the first subparagraph is effected.

4. The obligations laid down in this Article shall apply irrespective of whether the decision resulting in the transfer is taken by the employer or an undertaking controlling the employer.

In considering alleged breaches of the information and consultation requirements laid down by this Directive, the argument that such a breach occurred because the information was not provided by an undertaking controlling the employer shall not be accepted as an excuse.

5. Member States may limit the obligations laid down in paragraphs 1, 2 and 3 to undertakings or businesses which, in terms of the number of employees, meet the conditions for the election or nomination of a collegiate body representing the employees.

6. Member States shall provide that, where there are no representatives of the employees in an undertaking or business through no fault of their own, the employees concerned must be informed in advance of:

- the date or proposed date of the transfer,
- the reason for the transfer,
- the legal, economic and social implications of the transfer for the employees,
- any measures envisaged in relation to the employees.

SECTION IV

Final provisions

Article 7

This Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees.

Article 7a

Member States shall introduce into their national legal systems such measures as are necessary to enable all employees and representatives of employees who consider themselves wronged by failure to comply

with the obligations arising from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities.

Article 7b

The Commission shall submit to the Council an analysis of the effects of the provisions of this Directive before 17 July 2006. It shall propose any amendment which may seem necessary.

(*) OJ L 206, 29. 7. 1991, p. 19.

(**) OJ L 283, 20. 10. 1980, p. 23. Directive as amended by Directive 87/164/EEC (OJ L 66, 11. 3. 1987, p. 11).'

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 17 July 2001 at the latest or shall ensure that, by that date, at the latest, the employers' and employees' representatives have introduced the required provisions by means of agreement, Member States being obliged to take the necessary steps enabling them at all times to guarantee the results imposed by this Directive.

2. When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Member States shall inform the Commission immediately of the measures they take to implement this Directive.

Article 3

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 4

This Directive is addressed to the Member States.

Done at Luxembourg, 29 June 1998.

For the Council

The President

R. COOK