

STUDY ON THE APPLICATION OF DIRECTIVE 2001/23/EC TO CROSS BORDER TRANSFERS OF UNDERTAKINGS

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STUDY

ON THE APPLICATION OF DIRECTIVE 2001/23/EC
TO CROSS BORDER TRANSFERS OF UNDERTAKINGS

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CHAPTER 1

Legal and Technical Issues arising in Cross Border Transfers: general overview and overview of Directive 2001/23/EC

1.1 Introduction

According to Art. 1 (2) of Directive 2001/23/EC (in the following “Directive”) the Directive is applicable “where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty”.

Therefore, the provisions of the Directive cover each transfer in the boundaries of the Member States having signed or acceded to the Treaty establishing the European Community¹, i.e., cross-border transfers from one Member State to another Member States are subject to the Directive. Moreover, since the Directive only refers to the place of origin of the business unit “to be transferred” and gives no regard to the destination of the transfer, the Directive is – according to its wording – also applicable to transfers outside the territory of the European Union (EU) and to a transferor from outside the EU, who has a subsidiary in a Member State subject to a transfer.² According to the Agreement on the European Economic Area the Directive also applies to members of this area, i.e. Liechtenstein, Iceland and Norway, which also extends the territorial scope of the Directive.³

Yet, as the Member States have a wide margin of discretion regarding the implementation of the Directive a uniform application of national law on cross-border transfers, i.e. a transfer, where the transferor and the transferee are governed by the laws of different Member States⁴, is not guaranteed. The legal problems resulting of this are aggravated where there is a transfer to a Non Member State who is not bound to the provisions of the Directive. The Directive – though, in principle, covering cross-border transfer situations – does not provide for solutions of conflicting laws. The same goes with regard to the Directive 2005/56/EC on cross-border mergers of limited liability companies⁵ because it is mainly focused on company law aspects and co-determination issues at board level and does not apply to asset deals but only to cross-border mergers.

Therefore, the intent of this study is to identify the main legal and technical problems arising from the extensive applicability of the Directive to cross-border transfers. This aim will be traced by a comparative law approach. Furthermore, this chapter will give an overview on the solutions provided for by international private law and/or the relevant national law. Finally, the study will give an outlook to the potential need to amend the Directive to establish a seamless legal framework for cross-border transfers.

¹ Treaty establishing the European Community (consolidated version), Official Journal (OJ) C 325 of 24 December 2002.

² Cf. *Hepple*, Report for the European Commission DG-V, May 1998, p. 5 et seq.

³ Cf. Art. 68 Agreement on the European Economic Area, No. 32d of Annex XVIII to the EEA Agreement.

⁴ Cf. *Hepple*, Report for the European Commission DG-V, May 1998, p. 3.

⁵ OJ L 310 of 25 November 2005.

1.2 Implementation of the Directive in the Member States

1.2.1 Austria

The Directive was implemented in Austria in 1993, to coincide with the entry into force of the Agreement on the European Economic Area ('EEA') on 1 January 1994. The implementation was effected by a new statute, the Employment Contract Law Adaptation Act 1993 (*Arbeitsvertragsrechts-Anpassungsgesetz* – 'AVRAG') and by amendments to the Collective Employment Regulatory Act (*Arbeitsverfassungsgesetz* – 'ArbVG'). These provisions came into force on 1 July 1993. The only substantial amendment to Austrian business transfer law since then occurred in 2002, when Directive 98/50/EC regarding *inter alia* employee information and consultation was implemented. The implementing legislation also reduced the transferor's potential liability in business transfer situations, after legal commentators had raised concerns that Austrian law might have infringed transferors' fundamental human rights.

The national implementing legislation (AVRAG) is not restricted to domestic transfers. In fact, the AVRAG does not contain a rule regulating its geographical scope. In legal writing (there is no case law yet) it is submitted that the automatic transfer of employment (and other contractual issues) is governed by the law that is applicable under the relevant conflict rules (e.g. Article 6 of the Rome Convention). However, any works council issues are subject to the territoriality principle (place of the establishment).

Therefore, in accordance with general conflict rules Austrian business transfer law will partially (contractual issues) apply to cross-border transfers involving the (simultaneous) relocation of the business from Austria to another country, even to Non-EC-Countries. Inward transfers will generally not be caught by the Austrian transfer rules unless the regular place of work has been in Austria before the transfer or the Austrian law has been chosen by the parties in the employment contract.

1.2.2 Belgium

The Collective Bargaining Agreement (CBA) no 32*bis* of 7 June 1985, modified by the CBA 32*ter* and the CBA 32*quinqüies*, implements the Directive. The CBA covers the transfer of acquired rights in the event of a change of employer resulting from the transfer of undertakings effected by contract and in the event of the repossession of assets after a bankruptcy order.

The obligation to inform and consult with employees is not regulated by CBA no 32*bis* itself (except in the absence of a Works Council and Trade Union delegation). The obligations result from the CBA of 9 March 1972 concerning Works Councils, the Royal Decree of 27 November 1973 concerning the economic and financial information to be provided to Works Councils, and CBA no 5 of 24 May 1971 concerning Trade Union delegations.

These regulations do indeed pre-date the Directive; however they must be interpreted "in the light of the text and the objective of the Directive to achieve the results it pursues"⁶.

⁶ ECJ of 7 December 1995, Case C-472/93– Spano, JTT, 167 ; and, ground no 20 ECJ of 16 December 1993, Case C-334/92 – Wagner Miret, JTT, 284.

The CBA 32 bis applies to the employers subjected to the law of December 5, 1968, by virtues of their geographical location which is the Belgian territory whatever their nationality (see CT Liege June 10, 1993, JTT 93, 371).

1.2.3 France

The principle laid down in the Directive was implemented in French law under Article L.122-12 § 2 of the French Labour Code. Pursuant to Article L. 122-12 § 2 “*wherever a change in the legal situation of the employer occurs, such as a successor in interest, sale, merger, transformation of the going business, or incorporation of the business, all employment contracts in effect on the day of the change remain in effect*”. This public policy rule has been in force in France for a long period and was introduced by a law of 19 July 1928.

Neither French legislation nor French case law deal expressly with the issue of the application of Article L. 122-12 § 2 of the French Labour Code (which lays down the principle of automatic transfer of employment contracts) in the event an autonomous economic entity is transferred from France to another EU country.

French legal commentators have diverging views on this issue.

Traditionally, it was considered that the transfer of an enterprise from France to another EU country could not give rise to automatic transfer of employment contracts because of (i) the general principle of territorial application of French law, (ii) the absence of supranational nature and direct effect of the Directive and (iii) the serious doubts existing as to the survival of transferred business' identity.

This being said, the above analysis is now challenged by certain authors who raise three main arguments to support the theory of an automatic transfer of employment contracts from France towards another EU country : (i) the EU law primacy principle combined with the conforming interpretation principle of Directives, (ii) the "legal continuum" existing between the various EU countries and (iii) the analysis according to which the relocation abroad should not per se result in the loss of the transferred entity's identity.

In conclusion, failing any express French legal provision and French case law concerning this issue and considering the lack of unified position of commentators, there is at present an indubitable legal uncertainty concerning the application of Article L. 122-12 § 2 in connection with the transfer of an autonomous economic entity from France towards another EU country

1.2.4 Germany

The central employment law provision applicable to any business transfer, implementing Articles 3 and 4 of the Directive, is § 613 of the German Civil Code (*Bürgerliches Gesetzbuch* - BGB).

Continuation of employees' representation and its right to information and consultation, as provided for in Articles 6 and 7 of the Directive, is subject to the provisions of the Works Council Constitution Act (*Betriebsverfassungsgesetz* - BetrVG) and the German Transformation Act (*Umwandlungsgesetz* - UmwG).

The application of § 613 a BGB is generally not restricted to the territory of Germany.

1.2.5 Hungary

In September 1992 the Supreme Court firstly introduced the concept of ‘business transfer’ into Hungarian law without formal legislative support by issuing its (binding) ruling no 154 of the labour law senate of the Supreme Court (‘MK 154’). In MK 154, the Supreme Court gave a wide interpretation to the term ‘business transfer’, which closely resembled the one adopted by Directive 77/187/EC.

In 1997 the Hungarian Parliament harmonised Act XXII of 1992 on the Hungarian Labour Code (‘Labour Code’) with the requirements of the European Union. In Hungary, the law treats a business transfer as a special case where the employment contract is modified without the formal consent of the parties affected.

Currently, the Labour Code contains the three main principles of contemporary EC rules on the protection of workers’ acquired rights in the case of a transfer of undertakings:

- automatic transfer of employment relationships by virtue of the transfer itself (Labour Code, s 85/A (2));
- protection against dismissal (the business transfer does not constitute a good cause for dismissal (Labour Code, s 89(4)); and
- employees and/or their representatives must be consulted before the transfer actually takes place (Labour Code, s 85/B (1)–(5)).

Business transfer rules in the Hungarian Labour Code shall apply basically to transfers i) within the home country, ii) to the home country and iii) to the home country from non-EU countries. The Hungarian labour Code applies to all employment relationships on the basis of which work is performed in Hungary as well as to work temporarily performed by an employee abroad.

1.2.6 Italy

In the Italian legal system the phenomenon of transfers and cross-border transfers of businesses is regulated by Article 2112 of the Civil Code and Article 47 of Law No. 428 of 1990, as amended first by Legislative Decree No. 18 of 2001, and lastly by Article 32 of Legislative Decree No. 276 of 2003 as “corrected” by Article 9 of Legislative Decree No. 251 of 2004 (‘Transfer of Business Regulation’).

While the provisions contained in Article 2112 of the Civil Code regard the effects that transfers of businesses and parts thereof have on individual employment relationships, Article 47 of Law No. 428 of 1990 contains the general rules regarding the information and (possible) trade-union consultation procedure that precedes the transfer, and the special procedure applicable in case of a business being in critical economic state.

Italian Transfer of Business Regulation has to be applied to all the transfers involving businesses or part of businesses that operate in Italy.

1.2.7 The Netherlands

The rights of employees when an undertaking is transferred are laid down in Dutch legislation in Article 7:662-666 of the Dutch Civil Code (“BW”), the Dutch Transfer of Undertaking Act

(“DTUA”). Definitions of the terms ‘employee’, ‘transfer’ and ‘economic entity’ are set out in Article 7:662 DTUA. The key rules on the safeguarding of employees’ rights in the event of a transfer of an undertaking are laid down in Article 7:663 DTUA.

The applicability of the DTUA is generally not restricted to the territory of the Netherlands.

1.2.8 Spain

Transfers of businesses are governed in Spain by Article 44 of the Spanish Employees’ Statute, approved by royal decree 1/1995, 24 March (“ES”). The said section was amended by law 12/2001, 9 July, in order to fulfil the transposition of Directive 98/50/EC.

After the amendment, Article 44 ES remained without alteration, but it has been collaterally affected by law 22/2003, 9 July, introducing a new Article 57 bis ES, with regard to bankruptcy and insolvency proceedings.

Article 44 ES applies to all employees rendering their services to companies located in the national territory. Therefore, it would definitively apply in case of transfers in Spain and transfers to Spain. Regarding transfers from Spain to other countries, and according to section 1.4 ES, Spanish labour law will be applicable to the employment relationship of those Spanish employees employed in Spain, who are rendering their services abroad for Spanish companies, without affecting the mandatory laws of the place of work.

Nevertheless, and regarding transfers from Spain to other countries, and bearing in mind the existing procedure requirements to be done before the transfer take place, and that the employment relationship has begun in Spain and, according to Spanish labour law, this will remain the same, from the Spanish point of view, section 44 ES will apply. Notwithstanding, the country of destination may vary this criteria.

The above explanation will also apply for transfers in relation from/to Non-EC-Countries.

1.2.9 United Kingdom

In Great Britain, the Directive was first implemented by the Transfer of Undertakings (Protection of Employment) Regulations 1981, as amended in 1993, 1995 and 1999 (“the TUPE Regulations”). The Government has stated that no further amendment is necessary for compliance with the 2001 Directive. However, consultation has taken place since September 2001 on changes to the TUPE Regulations, in part to decide whether to take advantage of certain flexibilities first allowed by Directive 98/50/EC.

In February 2006, new TUPE Regulations were published by the Department of Trade & Industry (“DTI”) on behalf of the UK Government and the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006 No 246) came into legal force for transfers on or after 6 April 2006 and replace the 1981 TUPE Regulations.

The 2006 TUPE Regulations apply only to economic entities (or parts of them) situated within the United Kingdom at the relevant time.

1.3 Identifying a relevant transfer

1.3.1 Economic Entity

An undertaking, a business, or part of an undertaking or a business as a possible object of a transfer is defined by Art. 1 (1.b) of the Directive as 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. The European Court of Justice (ECJ) has held that it is necessary to make an overall assessment including all aspects of the individual case in order to determine whether the conditions for a transfer of business are satisfied. This includes the type of undertaking or business in question, whether or not the business's tangible assets, such as buildings and movable property or the entitlement to use such assets, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried out before and after the transfer and the period, if any, for which those activities were suspended.⁷

With regard to this jurisdiction the general requirements of a transfer of a business might be summarised as follows:

- an autonomous economic entity,
- a transfer of this entity, i.e., its significant business assets and/or the essential personnel, in terms of number and skills, to a new employer,
- the transferee must carry on the same or similar activities with the personnel and/or the business assets without substantial interruption.

In this context, special consideration must be given to the type of business and the activity carried on in the relevant undertaking, business or part of a business. According to the jurisdiction of the ECJ, in certain labour-intensive sectors in which activities are based essentially on manpower a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity. Such an entity is thus capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task. Consequently, if an activity is not based essentially on manpower since it, e.g., requires a significant amount of equipment, it is decisive, whether the transferee takes over the tangible assets needed for the activity in question.⁸

Though most of the national employment courts do apply the main criteria developed by the ECJ there is generally a tendency of the national courts to reluctantly apply the national transfer of business law to entities, which merely consist of the workforce in a labour-intensive type of business. Examples may be found in French, German, Italian, Dutch or Spanish case law. Therefore, the different understanding of a business transfer will lead to a possible conflict in a cross-border situation in case national jurisdictions involved have

⁷ ECJ of 18 March 1986, Case C-24/85 – Spijkers; ECJ of 11 March 1997, Case C-13/95 – Süzen.

⁸ ECJ of 11 March 1997, Case C-13/95 – Süzen; ECJ of 10 December 1998, Joined Cases C-173/96 and C-347/96 – Ziemer and Hidalgo; ECJ of 20 November 2003, Case C-340/01 – Abler.

differing requirements for the application of business transfer law. This goes in particular if the employee asserts his claim in different Member States with incongruent national law.

1.3.1.1 Austria

So far, most Austrian case law and a great deal of legal commentary in this area, has focused on the concept of a ‘business transfer’. The wide interpretation given to certain provisions of the Directive by the ECJ, which culminated in the *Christel Schmidt* case⁹, caused considerable concern and even irritation in Austria. One possible reason for this concern was the apparent conflict between the Austrian system of works councils and the ‘functional’ approach to business transfers espoused by the ECJ. However, since the ECJ reaffirmed the importance of an ‘economic entity’ retaining its identity following a ‘business transfer’ in *Süzen*¹⁰, the Supreme Court has referred to European case law much more frequently. The broad statutory definition of a ‘relevant transfer’ in s 3(1) of the AVRAG has facilitated a purposive approach, whereby the Austrian courts interpret the Directive in accordance with ECJ case law.

The Supreme Court has consistently held that a ‘business transfer’ occurs whenever an ‘economic entity’ is transferred to another employer whilst retaining its identity. The ‘economic entity’ itself is defined by the Supreme Court as ‘an organised grouping of persons and assets exercising an economic activity which pursues a specific objective’. The economic activity does not necessarily have to be pursued for a profit, although it must be more than a ‘one-off’ activity, such as the construction of a building. Whilst there is no test for determining whether a grouping of persons and assets is ‘organised’ within this definition, it would seem that at least one employee must be assigned to the specific activity being carried out.

1.3.1.2 Belgium

The commentary on Article 6 of CBA no 32*bis* defines an “undertaking” as either a legal entity, or an autonomous business unit as defined in the Law of 28 June 1966 regarding the indemnification of dismissed workers in the event of the closure of an undertaking. It seems now that the reference to the Law of 28 June 1966 is not appropriate.

First, this law does not define the term “undertaking”. Furthermore, this law is only applicable when the undertaking has at least 20 workers (Article 1 of the above-mentioned law). Some authorities consider, therefore, that CBA 32*bis* would only be applicable to transfers of undertakings having at least 20 workers. Others maintain on the contrary that this numerical condition would give to the Directive a limit that it does not contain and therefore that this criterion should be turned down¹¹. This second opinion has been confirmed by the ECJ who explained that the circumstance in which the activity is carried out before a transfer by one single employee is not a sufficient advantage to set aside the application of the directive, which does not depend upon the number of employees affected within the undertaking that is the object of the transfer.¹²

Stricto sensu, CBA 32*bis* is only applicable to any employer who falls within the scope of the Law of 5 December 1968 on collective bargaining agreements and joint committees. This law

⁹ ECJ of 14 April 1994, Case C-392/92 – Schmidt.

¹⁰ ECJ of 11 March 1997, Case C-13/95 – Süzen.

¹¹ L. Peltzer, *Transfert conventionnel d’entreprise*, (2003) EDS 26.

¹² ECJ of 14 April 1994, Case C-392/92 – Schmidt, point 15 ; (1994) *Rec.*, I, 1311, concl. Van Gerven.

is not applicable to persons employed by the State, provinces, communes, public institutions and public interest organs¹³. However, the Directive states explicitly that the economic activity of the undertaking or of part of an undertaking can be exercised by a private or public entity. This lack would need the intervention of the legislator along with the National Labour Council. Nevertheless, in the event of action being taken by the workers of a public undertaking, it is important to note that these workers have the right to lead their action against the Member State who is failing to implement the Directive correctly (vertical effect of the Directive)¹⁴.

1.3.1.3 France

The application of Article L. 122-12 § 2 of the French Labour Code assumes, according to French courts, the transfer of an "autonomous economic entity that retained its identity with the new employer". The "autonomous economic entity" is defined by French case law as "an organisation with its own dedicated personnel and tangible and/or intangible assets, which carries out an economic activity having specific goals of its own".¹⁵ This implies that:

- the economic entity must be autonomous (i.e., it may be separated from the company on the basis of its organisation, its hierarchy, its specialised personnel, its geographical situation and/or its equipment, as opposed to an activity spread out through the whole company);
- the entity must be transferred. The French courts seem to be more restrictive than the European judgements in cases where the "economic entity" is composed only of a workforce, without tangible or intangible assets being transferred. While the ECJ considers that a community of employees with common activities may in itself constitute an economic entity that automatically transfers to the new operator of the business, it appears that the French courts are reluctant to apply Article L. 122-12 § 2 in cases where no tangible (e.g., premises, equipment, inventory, tools, etc) or intangible (e.g., goodwill, licence, commercial lease, etc.) assets are transferred at all.¹⁶ However, the position of the French Supreme Court seems to vary depending on the particular circumstances of each case: for example, in *SA Serca v Vasseur* (Supreme Court 24 September 2002), the court ruled that a community of qualified employees assigned to a specific marketing and promotion activity constituted an 'autonomous economic entity', so that the company which had actually hired 200 out of the 213 qualified employees should have taken over all 213 existing employment contracts (together with the employees' continuity of service) pursuant to Article L. 122-12 § 2, regardless of the fact that no tangible or intangible assets were transferred.
- the entity must be kept as such (i.e., it should not, after the transfer, be immediately broken up and instantly disappear within the organisation of the transferee). As regards this last criterion, special consideration must be given to the doctrinal divergences

¹³ Article 2, § 3, 1 of the Law of 5 December 1968 on the collective bargaining agreements and the joint committees.

¹⁴ C. Engels, *Overdracht van onderneming en outsourcing – arbeidsrechtelijke aspecten*, Larcier, 2000, 23; L. Peltzer, *Transfert conventionnel d'entreprise*, (2003) EDS 28; C. Wantiez, *Transferts conventionnels d'entreprise et droit du travail*, Larcier, 2003, 11.

¹⁵ Supreme Court of 7 July 1998, n° 4069 PB, Supreme Court of 18 July 2000, n° 3699 FS-PB and Supreme Court of 30 April 2002, n° 1468 F-D.

¹⁶ Supreme Court of 19 July 2000, n° 3425 F-D, Supreme Court of 17 December 2002, n° 3868 FS-D and Supreme Court of 31 May 2005, n° 1181 F-D.

concerning the possibility for the transferred autonomous economic entity of retaining its identity in the event of a change of countries within the European Union (see below 1.3.2.2).

1.3.1.4 Germany

According to the definition given by the Directive a relevant transfer requires a change of ownership (employer) and the transferred economic entity must maintain its identity. The German Federal Labour Court (FLC) follows this definition and the subsequent jurisdiction of the ECJ setting up an overall assessment based on seven criteria¹⁷ as a requirement to determine a relevant transfer. In line with the ECJ, the FLC dropped its former opinion that taking over employees should not be a selection criterion but merely a legal consequence of a relevant transfer. Until recently there was one major discrepancy between the application of the Directive by the ECJ and the FLC. Whereas the FLC held that tangible assets are only substantial for an economic entity if the transferee can decide whether and how he likes to operate with it (independent commercial use) the ECJ held this jurisdiction to be inconsistent with European Law.¹⁸ Meanwhile the FLC has dropped its opinion and shares the view of the ECJ.¹⁹

In labour intensive businesses the extent to which the take-over of employees is deemed to be a transfer is a question of the facts in each individual case. With respect to complex tasks, the take over of all key employees – even if only a small number of the total workforce – can mean there is a transfer. In the case of “simple” activities, even the take over of 75 %²⁰ of the former workforce, according to the case law of the FLC, does not necessarily mean that the economic entity maintains its identity.

In contrast to the express exclusion in Art. 1 (3) of the directive, § 613 a BGB does also apply to sea-going ships. The FLC²¹ recently held that a single sea ship has to be considered as an undertaking or part of an undertaking in the meaning of § 613 a BGB. To this extent it is not necessary that the registered owners of the vessel sell or transfer the ship to another owner. Even a mere bareboat charter agreement may constitute a transfer of the employment to the bareboat charterer, if the sea ship transfer qualifies as an economic entity in the sense of the Directive.²²

1.3.1.5 Hungary

The Hungarian Labour Code does not provide for an express statutory list of criteria to identify business transfers, which leaves courts open to interpret the scope of the transfer of

¹⁷ Type of undertaking or business, whether or not tangible assets such as buildings and movable property are transferred, the value of intangible assets at the time of transfer, whether or not the majority of employees are taken over by the new employer, whether or not the customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended (see ECJ of 18 March 1986, C-24/85 – Spijkers).

¹⁸ ECJ of 15 December 2005, Joint Cases C 232/04 and C-233/04 – Güney-Görres and Demir; FLC of 11 December 1997, 8 AZR 426/94, NZA 1998, 532; FLC of 22 January 1998, 8 AZR 775/96, NZA 1998, 638.

¹⁹ FLC of 6 April 2006 – 8 AZR 222/04, FLC of 6 April 2006 – 8 AZR 249/04, FLC of 13 June 2006 – 8 AZR 271/05.

²⁰ FLC of 10 December 1998, 8 AZR 676/97, NZA 1999, 420 (delivery service / kitchen cleaning service in a hospital).

²¹ FLC of 2 March 2006 – 8 AZR 147/05; FLC of 18 March 1997, 3 AZR 729/95, BAGE 95, 291 – 306;

²² FLC of 26 April 1990, 2 AZR 170/89 - unpublished; juris.

undertakings rules broadly, the case law of the ECJ and especially the list of criteria established in *Spijkers* will presumably be applied in the future.

1.3.1.6 Italy

Starting from the second half of the 1980s, the Italian Supreme Court (Suprema Corte di Cassazione) has been stating that, in order for the Transfer of Business Regulation to apply, it should not be considered whether all assets and goods constituting the business have been transferred, but whether or not the transferee has been put in the position of ‘substituting’ for the transferor in his relations with third parties, and particularly with clients, as a consequence of the transfer (cfr. Italian Supreme Court, no 1829/1986. See also Italian Supreme Court, nos 1921/1981; 7338/1986; and 3167/1990). Though not expressly mentioning the *Spijkers* judgment the Italian Supreme Court applied in judgment no 11622/2002, the criteria as set out in the ECJ judgment even in the same order. In particular, the Italian Supreme Court stated in this judgment that trade unions cannot be considered businesses for the purpose of the Transfer of Business Regulation because unions are neither profit-oriented entities nor entities organised on an economical basis. Furthermore, in judgment no 5550/2000, the Italian Supreme Court clearly stated that, for the purpose of the Transfer of Business Regulation, the involved entities have to carry out organised activities aimed at the production and/or trade of goods for a profit or at least economical orientation. In fact, further to the latest amendments to the Transfer of Business Regulation, it seems likely that the mere transfer of a number of employees may be considered a business transfer. In the past, in order for a business transfer to exist, tangible and/or intangible assets had to be transferred together with employees.

The notion of ‘transfer of part of a business’ is certainly one of the most controversial under Italian law. There was concern especially by unions that big companies would transfer their redundant employees to smaller entities, which could more easily dismiss the (transferred) employees. This is because, under Italian law, employees of entities with more than 15 employees have the right to be reinstated should the termination of their employment be considered unjustified, while in the same circumstances employees of entities with 15 or fewer employees only have the right to receive compensation for their loss of employment.

Possibly the most controversial issue relating to the transfer of part of a business is the determination of whether it can consist of the mere transfer of a number of employees from one employer to another. In cases 10701/2002 and 10761/2002 (*Alcatel/Pllb*), the Italian Supreme Court had to decide whether the transaction in question could be defined as the transfer of part of a business by Alcatel. In fact, Alcatel had outsourced an ‘instruments’ maintenance’ service including a number of departments with different functions. Some of the transferred employees objected, claiming that the outsourced service was not autonomous, but absolutely collateral to Alcatel’s core business and that, therefore, the transaction should not have been regulated by the Transfer of Business Regulation. On such occasions, the Italian Supreme Court held that, for the purpose of the application of the Transfer of Business Regulation, ‘part of a business’ should mean an ‘economic activity’, *even if it consisted of only employees*, if those employees, because of their shared background and expertise, could jointly perform their working activities with the new employer. To sum up, in these circumstances the Italian Supreme Court stated that even a mere transfer of employees, if specific requirements are met, may constitute a transfer of part of a business.

In cases 14961/2002 and 15105/2002 (*Ansaldo Energia/Manital Consorzio*), the Italian Supreme Court completely overruled its previous position. The court held that, in order for the Transfer of Business Regulation to apply, the transferred business must include those

material and/or immaterial assets included by Article 2555 of the Italian Civil Code in the definition of business (*azienda*). Therefore, in such circumstances, it was held that a mere transfer of employees, even if specific requirements are met, will *not* constitute a transfer of part of a business.

It should be noted that the decision in the *Ansaldo/Manital* cases can be explained by the Italian Supreme Court's concern that the transferor may artificially group a number of redundant employees together in order to transfer them as a part of a business to a smaller entity, and therefore, as indicated above, deprive them of any statutory protection against unfair dismissal. Furthermore, under Italian law there is no right of the employee to oppose the transfer. It is therefore clear that it is much easier for the employer to group a number of redundant employees together in an 'artificial' part of the business and transfer it to a smaller transferee, rather than to transfer the employees' work contracts to another employer. In this event, in fact, the consent of the transferred employees will be needed.

In the light of the above, it seems that with the decision in *Ansaldo/Manital* the Italian Supreme Court has tried to prevent a 'simulated' transfer of part of a business by stating the necessity of a transfer of some of the transferor's assets together with the employees.

However, after the amendment of the Transfer of Business Regulation by Legislative Decree in September 2003, the position of the Italian Supreme Court on the transfer of part of a business is expected to change substantially. In fact, the Transfer of Business Regulation now states that: 'The provisions of this Article also apply to the transfer of part of a business, this part being a functionally autonomous entity of an economic and organised activity, identified (as autonomous) by the parties at the moment of the Transfer'. According to this new wording, it seems that the entity to be transferred is to be identified by the parties at the moment of the transfer, meaning that the entity does not have to exist before the transfer.

1.3.1.7 The Netherlands

A relevant transfer must involve the transfer of a "stable economic entity", and that term should be construed widely. It encompasses every service or institution aimed at producing or delivering goods or providing services, regardless of profit motive. Additional activities of a company, such as cleaning and catering activities, will also fall under the definition of economic entity. However, when determining if this entity keeps its identity after a transfer the Supreme Court of the Netherlands (*Hoge Raad*) has recently adopted a reticent attitude towards the importance attributed to the type of business and the associated weighting of the transfer of personnel or material assets. In the *Process House* ruling²³ the activities in the area of designing, selling, assembling and automating process installations were ceased by Process House and taken over by an obtaining company. In answering the question of whether or not the Directive or DTUA would be applicable to this transfer, the Supreme Court did not discuss the type of business at all and took into consideration all of the other *Spijkers*-criteria that may be of importance. In the *Wesselman Bloemenexport* ruling²⁴ the Supreme Court judged that the transfer of purchase activities at a flowers and plant exporter took place neither in a labour-intensive sector nor in a non-labour-intensive sector. The Supreme Court took the position that all the relevant factors to be observed are by themselves only partial aspects of the overall assessment of a relevant transfer as determined by the European Court of Justice in the *Spijkers* ruling²⁵ for the first time.

²³ HR of 10 December 2004, *JAR* 2005/13.

²⁴ HR of 10 December 2004, *JAR* 2005/14.

²⁵ ECJ of 18 March 1986, NJ 1987/502.

Difficulties may also arise from the application of Collective Bargaining Agreement (“CAO”). When a transfer of an undertaking takes place in a labour-intensive sector, the transfer of a substantial part of the personnel – in terms of number and expertise – will determine if a relevant transfer took place. In the Netherlands there are some CAO’s containing specific rules concerning the transfer of undertakings in certain branches of activity. For example, the CAO for (window) cleaning companies provides that a company governed by this CAO which acquires a project is obliged to offer an employment agreement to every non-executive employee who worked for more than a year on this project. As a result of this provision, not only a transfer of the abovementioned employees but a transfer of all employees (including executive personnel and personnel working for less than a year on the project) will in principle be effectuated, because a substantial part of the personnel was taken over. In this manner the agreed CAO for (window) cleaning companies and the intention of the CAO-parties involved will be overruled by the result of the deciding importance of the type of business in which a transfer takes place.

1.3.1.8 Spain

Even though Article 44.2²⁶ ES literally follows the Directive in order to determine where a transfer occurred, one of the most problematic questions under Spanish practice of law has been the identification of the relevant transfer within the meaning of Article 44 ES. Recently, Spanish case law has adopted the ECJ doctrine from the *Süzen* case²⁷ with regard to the identification of the business by the relevant group of employees that carry out the activity. The Spanish Supreme Court considered that the application of the transfer depends on the effective transfer of tangible assets (i.e. machinery, technical equipment, etc), so that the economic entity to be transferred should be an entire organizational structure, including personal and material elements. On the contrary, the mere continuity of the activity, not implying the transfer of the minimum patrimonial supporting, was not understood as a transfer of undertakings within the Article 44 ES. Nevertheless, the Supreme Court has changed its position²⁸, declaring that Spanish courts are bound by the ECJ doctrine, and therefore, accepts the continuity on staff as a valid transfer of business in certain occasions.

With regard to cross border transfers, there are rarely situations of such transfers in Spain, and, consequently, practically no case law on that. However, there are a few resolutions from Labour Courts regarding cross border transfers referring to seagoing vessels, these being excluded from the application of directive 2001/23/EC, and referring to non EU countries.

1.3.1.9 United Kingdom

By Regulation 3 of the 2006 TUPE Regulations an undertaking (or part of one) has to be situated in the United Kingdom immediately before the transfer, for the 2006 TUPE Regulations to be applied to that transfer. Subject to that, the 2006 TUPE Regulations apply notwithstanding that

- a) the transfer is governed or effected by the law of a country or territory outside the UK;

²⁶ *Within the meaning of this Article, a transfer will exist whenever the transfer affects to an economic entity which retains its identity, meaning an organised grouping or resources which has the objective of pursuing an economic activity, central or ancillary.*

²⁷ ECJ of 11 March 1997.

²⁸ Supreme Court of 20 October 2004.

- b) persons employed in the undertaking or part transferred ordinarily work outside the UK; or
- c) the employment of any of those persons is governed by the law of a country or territory outside the UK.

There are, however, no provisions in the 2006 TUPE Regulations dealing with the physical transfer into the UK of an undertaking situated elsewhere within the territorial scope of the EU Treaty, where which would otherwise fall within the scope of the Directive. So, the 2006 TUPE Regulations apply to transfers out of the UK (“outward transfers”) but not to transfers into the UK (“inward transfers”).

Otherwise, in broad terms, the approach to identification of a “relevant transfer” for the purposes of the 2006 TUPE Regulations, as shown from reported decisions of the competent appellate courts (the Employment Appeals Tribunal and superior appellate courts) is consistent with sections 2.2. and 2.4 of the Commission Services’ Working Document - “Memorandum on rights of workers in cases of transfers of undertakings” (“the Memorandum”). However, the 2006 TUPE Regulations have introduced an additional category of transfer of undertaking, namely a “service provision change”. This is intended to capture the outsourcing of “activities” or a change of providing performing services.

1.3.2 Transfer

Different national understanding does not only refer to the term of the economic entity itself. An even higher degree of variation can be observed with regard to the transaction the transfer is based on. According to Article 1 (1) of the Directive a transfer must be based on a legal transfer or merger. To this extent, e.g., the relevant Belgian provisions apply to transfers of whatever kind effected by contract (including a change in the legal status of the company, formation of a partnership, disposal, merger and take-over), transfers resulting from a judicial decision or from a unilateral decision of the public authorities, but not resulting from a change of employer caused by death. The latter again will qualify as a business transfer under Spanish law, whereas Dutch, French or German law limits the scope of the relevant business transfer provisions to contractual transactions.

1.3.2.1 Austria

Austrian business transfer law encompasses all kinds of transactions that have been considered ‘business transfers’ by the ECJ. The Supreme Court has consistently held that a ‘business transfer’ occurs whenever an ‘economic entity’ is transferred to another employer whilst retaining its identity.

Unlike the Directive, the AVRAG does not specifically require that there be a ‘contractual transfer’ or a ‘merger’ in order for a ‘business transfer’ to occur. The legislative materials produced in relation to the AVRAG show that Parliament intended that it cover any form of legal transaction by virtue of which a transferor can dispose of an economic entity to a transferee. There is no need for a direct contractual link between the transferor and the transferee under the AVRAG. Therefore, transfers involving three parties, such as the change of the lessee of a restaurant or the change of service providers to a particular business, fall within Austrian business transfer legislation. In addition, it is not necessary that ownership of the business be transferred under Austrian business transfer law.

Although it appears from the legislative materials produced in relation to the AVRAG that Parliament considered that the privatisation of public services would fall within the concept of a 'business transfer', it nevertheless excluded almost all civil servants from the scope of the AVRAG (s 1(1), (2)). However, the European Community does not consider such a situation a problem, so long as there are equivalent safeguards in place in respect of the affected employees. In Austria, the majority of the legislation that provides for the transfer of certain public services to wholly state-owned companies also provides for the transfer of the employees concerned. However, in those cases where Austrian privatisation legislation does not specifically implement the principles of the Directive, the affected civil servants can rely directly on the Directive, and must be taken on by the transferee.

1.3.2.2 Belgium

CBA no32*bis* is applicable to any change of employer resulting from the transfer of undertakings or businesses of whatever kind effected by contract (including a change in the legal status of the company, formation of a partnership, disposal, merger and take-over), transfers resulting from a judicial decision or from a unilateral decision of the public authorities, but not resulting from a change of employer caused by death.

1.3.2.3 France

Article L. 122-12 § 2 of the French Labour Code expressly refers to successor in interest, sales mergers, transformation of the on going concern and incorporation of the business.

However it does not give a restrictive definition of a relevant transfer: the list of legal transactions covered by the definition is preceded with the wording "such as" (*notamment*).

Consequently French case law, construed in accordance with the ECJ's case law, has interpreted it very broadly. In practice, French case law apply Article L. 122-12 § 2 to such "non-listed" transactions as business leases (*location-gérance*), franchises, outsourcing of activities by the way of the conclusion of sub-contracts or service contracts, etc.

1.3.2.4 Germany

The mere change of the ownership of a company - having separate legal personality – by a share deal neither qualifies as a transfer nor, therefore, as a cross-border transfer even if the new shareholder is a foreigner. The party to the labour contracts and subject of the entity remains the company. A merger, spin-off or transfer of assets as a whole or in part in accordance with the German Transformation Act (Umwandlungsgesetz - UmwG) may also, from the German perspective, result in a business transfer. The legal nature of the basic agreement is insignificant. Purchase and lease agreements are covered as well as gifts, legacies, Articles of association and partnership agreements (except mere share deals).

1.3.2.5 Hungary

Per definitionem of the Labour Code, a succession between "transferor" employer and "transferee" employer ('succession') is at hand

- a) when the succession takes place by operation of law, and
- b) when an independent unit (strategic business unit, plant, shop, division, workplace, or any parts of these) or the material and non-material assets of the employer are

transferred under agreement to an organization or person within the scope of the Labour Code for ongoing or resumed operations if such transfer takes place within a sale, exchange, lease, leasehold or capital contribution to a business entity.

1.3.2.6 Italy

The Transfer of Business Regulation specifically applies on sales, usufruct and lease of a business as well as to franchising agreement. Although mergers are expressly envisaged in the new version of the Transfer of Business Regulation the Italian Supreme Court (Cf. Decision no 6177/1996) has stated that, in case of a company acquisition as universal succession, should the new company arising from the acquisition continue to perform its productive activity in the same location where it was performed before the acquisition, there is no transfer of business, and the Transfer of Business Regulation would not apply. According to Article 2504 *septies* of the Italian Civil Code, a company split can consist of the transfer of the company's assets (or part of the assets) to existing entity/entities or new entity/entities set up ad hoc followed by the transfer of the relevant shares or quotas to the shareholders or quota holders of the 'mother company'. In judgment no 9897/1998 the Italian Supreme Court ruled that even a company split may be covered by the Transfer of Business Regulation if it is verified that the business has been transferred, totally or partially, to a different owner.

With regard to the succession of a private entity to a public entity in the performance of public services the Council of State (Italy's highest administrative court) has stated that both the transferor and the transferee must be entities carrying out organised activities aimed at the production and/or trade of goods for a profit or at least economical orientation, so that the Transfer of Business Regulation does not apply in this case. Though the Directive generally applies to public undertakings (cf. Art. 1 (1.c) of the Directive the Council of State came to this decision with regard to the jurisdiction of the Italian Supreme Court and the *Spijkers* criteria established by the ECJ.

1.3.2.7 The Netherlands

Article 662 of Book 7 of the Dutch Civil Code (DCC) defines a transfer of business as "the transfer, resulting from a contract, a merger or a company split of an economic entity (unity)".

This Article in fact stipulates that a transfer of business is subject to a legal requirement. Under Dutch law and in line with ECJ jurisprudence (among others) the following transactions fall into the scope of the Directive:

- purchase agreement
- rent/lease agreement
- usufruct ("*uitgifte in vruchtgebruik*")
- a court decision/decreet/verdict
- a unilateral decision of a governmental body
- withdrawal and granting of a new mission ("*opdracht*").

1.3.2.8 Spain

Subrogation by virtue of 44 ES requires the transfer of an undertaking, business or part of the undertaking or business that may qualify as an autonomous production unit, and the continuity of the operation of the business or undertaking by the transferee. Case law has defined the circumstances by virtue of which section 44 ES and its consequences shall be taken into account: transfers *inter vivos*, of a negotiable nature (business renting, purchase,

merger, etc.) or not (execution sale) and transfers *mortis causa* are included in Spain within the concept of transfer of undertakings. In general terms, section 44 ES is also applicable in the public sector, when it affects administrative tenders. When the transfer refers only to the ownership of the shares of a company and not the company itself, this is not a transfer of undertakings as defined above, provided that the company's identity continues to exist and the parties of the employment relationship do not change²⁹. On the contrary, Article 44 ES shall be applicable to mergers, take-overs and spin-offs.

1.3.2.9 United Kingdom

The concept of transfer of the 2006 TUPE Regulations is generally consistent with sections 2.2. and 2.4 of the Memorandum. In particular, the 2006 TUPE Regulations do not apply to the transfer of ownership of shares in a company.

1.3.3. Cross-border situations

Special regard must be given to the factual situation in which a cross-border transfer may occur and may thus cause a possible conflict of opposing national jurisdiction. To this extent a take over of the business by a new foreign owner without change of the place of business, a relocation of the business and off shore or outsourcing situations are examined.

1.3.3.1 Change of ownership without relocation

Whether or not a business takeover by a foreign investor qualifies as a business transfer is subject to how the takeover has been implemented and must be determined under consideration of the criteria set up by the ECJ. Because of the different national understandings of a transfer of business this might also lead to a different application of the Directive within the each Member State. However, this inconsistency does not give rise to a legal conflict concerning the application of the Directive: If there is a transfer of business the question of the law applicable, i.e., the legal system of the foreign investor or the law governing the location of the acquired business, must be answered with regard to international private law. Where the place of business does not change, the law of the Member State, in which the business is located, will apply. Since the applicable law will be the law of the country where the employee habitually carries out his work (unless the escape provision of 6.2 of the Rome Convention applies –see Chapter 2), a mere change in the position of the employer leaving the employment relationship unchanged will not lead to a change in the applicable law. Due to this fact, a business takeover by a foreign new owner which does not affect the place of business does not give cause for any legal or technical problem with regard to a non-uniform application of the Directive.

Nevertheless, there might be national provisions restricting the business takeover by a foreign investor: E.g., under German law, the possibility of a cross border merger is restricted by § 1 (1) UmwG, which provides that a merger may only be realised by legal entities established in Germany. The ECJ recently held that this provision violates the freedom of establishment for companies under Articles 43 and 48 of the Treaty of Rome.³⁰ However, the latter does not change the fact that there is at present national law in Germany which is in contradiction with EU law and the aforementioned understanding of the ECJ and thus might complicate cross border transfers.

²⁹ Supreme Court of 19 January 1987, Supreme Court of 29 November 1994.

³⁰ ECJ of 13 December 2005, C-411/03 - *Sevic*.

1.3.3.2 Relocation

A different approach must be taken with regard to reorganisation measures which alter the place of business. Whether or not a cross-border relocation results in a transfer of business depends, at first, on the timing of the transfer. In principle, depending on the chronological order of relocation and transfer, three scenarios can be distinguished:

a) **Simultaneous relocation and transfer of business assets**

The first, and most problematic one, is when relocation and transfer of business assets are concluded simultaneously, e.g., a production site in Germany is shut down and reopened in France immediately thereafter with the same assets (machines, software, customers) having been used in Germany. Special consideration must be given to the fact that the application of the Directive and the implementing national law is subject to the economic entity in question retaining its identity. Thus, the application of the Directive might be doubtful because of the radical changes that would necessarily result from a cross-border transfer (change of country and generally language, change in the legal, economic and social context), threaten *per se* the identity of the transferred economic entity.

According to the case law distilled by the ECJ, the economic entity retains its identity when the same operations are continued to be carried out under conditions similar to those existing before the transfer. Therefore, the ECJ indicated that an autonomous economic entity must not be reduced to the operations of which it is in charge. The entity's identity also depends on other elements such as the personnel comprising it, its supervisory staff, the work organisation, the operating methods and the operational resources available to such entity. If these requirements are met, the relocation of a business to another country constitutes a transfer of business within the meaning of the Directive. To this extent the question of distance of the relocation is of minor importance: a transfer of business according to the meaning of the Directive may occur if the requirements laid down in Article 1 (1) of the Directive and illustrated by the ECJ are met regardless whether there is a long distance transfer with or without a cross-border connection or whether the place of business only moved to a close-by location.

This result, however, is not shared by all national courts within the EU.

The French Supreme Court considers that, even though operations remain identical, any changes occurring in respect of the operational management mode may also constitute an amendment to the identity of the autonomous economic entity, which, *per se*, prevents the automatic transfer of employment contracts.³¹ Moreover, the French Supreme Court found that in the event of a relocation in Brazil, employment contracts were not transferred. Indeed, according to the Court, the business transfer "to a different environment", in particular to a foreign country, results *de facto* in the termination of the positions concerned.³² With regard to this decision it could be possible to consider that a change in the "environment", i.e., the linguistic, legal, economic and social environment resulting from a relocation of operations abroad, would cause the transferred entity to lose its identity.

³¹ Supreme Court of 5 July 1983, n° 1461, Supreme Court of 18 October 1983, n° 80-42060, 80-40307 and 80-42299.

³² Supreme Court of 5 April 1995, n° 1954 PB.

Similarly, some German labour courts³³ have held that a substantial relocation can – as such – cause the loss of the economic entity's identity and, thus, denied a business transfer. These cases refer to relocations which have not even taken place on a cross border level but with regard to relocation of the company within Germany. However, these decisions are not consistent with the case law of the FLC, which demands a review as to whether a relocation constitutes a business transfer which is based upon a consistent set of criteria³⁴. In this context whether the purchaser assumes a significant proportion of the personnel is of particular importance. The FLC held, prior to a number of radical changes in case law, that where a significant number of employees is not prepared to relocate, this will not be a business transfer if the activity in question is not determined by material / tangible assets. In its judgment of 20 April 1989 the FLC had to decide the case of an employer producing floor panels in Berlin, which decided to shut down the business and to sell the machinery to a producer in Lyon, which continued with the production.. The Berlin personnel filed in claims for unfair dismissal due to a business transfer. The FLC held, that these dismissals would not violate German business transfer law, because the personnel was not willing to start working in the new location. The employment relationships of the employees affected only transfer with the contents at the time of the transfer. If a business is relocated to a place, where the employees are not obliged to work according to the contract, only the employment relationships of the employees which are ready to work at the new place of business will transfer.³⁵ The Frankfurt Regional Labour Court held, that a relocation of assets abroad (sale of shoe manufacturing facilities from a town near the Austrian border to Austria) may lead to a transfer of business if the economic entity is maintained. However, as the new owner used these assets for a different purpose of production the court has denied a transfer of business.³⁶ On the basis of these decisions, it is sometimes concluded that business relocations abroad mostly constitute a closure of business rather than a business transfer, since normally - with the exception of relocation near a border - the majority of the personnel will not be prepared to move as required. However, this may only apply where the activity in question is not determined by material / tangible assets.

Against this background, it is decisive to establish the applicable law on the transfer, which in general has to be determined with regard to international private law. However, there are national jurisdictions, which clearly indicate the application of the relevant business transfer law:

E.g., regulation 3 of the British 2006 TUPE Regulations provides that an undertaking or (or part of one) has to be situated in the United Kingdom immediately before the transfer, for the TUPE Regulations to be applied to it.

Similarly, the Belgian CBA 32*bis* is applicable to employers who are subject to the law of 5 December 1968 by virtue of their geographical location, whatever their nationality.

³³ Cf. Nuremberg Regional Employment Court of 26 August 1996, 7 Sa 981/95, LAGE German Civil Code § 613 a no. 51 (distance of 25 km); Cologne Regional Employment Court of 12 June 1997, 5 Sa 362/97 (distance of more than 200 km). On the other hand, Hamburg Employment Appeal Court held that the relocation of an office of a German news agency to Ireland would constitute a transfer of business according to s 613a BGB (cf. Hamburg Employment Appeal Court of 22 May 2003 – 8 Sa 29/03).

³⁴ FLC of 22 May 1997 – 8 AZR 101/96, NZA 1997, 1050; FLC of 13 November 1997 – 8 AZR 375/96, NZA 1998, 249.

³⁵ FLC of 20 April 1989 – 2 AZR 431/88 (relocation from Berlin to Lyon, France), DB 1989, 2334.

³⁶ Frankfurt Regional Labour Court of 27 March 2003, 11 Sa 799 /02; cf. also Berlin Regional Labour Court of 18 September 1998, 6 Sa 53/98 (possible relocation to a location 80 km away in the Czech Republic).

b) Relocate first, transfer then, and vice versa

The second scenario refers to a transfer of business, where the transferor relocates his business to another country first and then – in a second step – transfers the business to the transferee, e.g., transferor A relocates his production site from Frankfurt to Strasbourg and then transfers it – within France – to transferee B.

Finally, it might be that the business is transferred to the transferee first and then relocated by the transferee to another country, e.g., the production site in Frankfurt is transferred from transferor A to transferee B with B in a next step relocating it from Frankfurt to Strasbourg.

Under these circumstances the transfer will be governed by the law of the country where it takes place, i.e., in scenario 2 by French law and in scenario 3 by German law. However, the decisive question is when relocation and transfer are conducted “simultaneously” and when “subsequently”. To this extend a simultaneous transfer must generally be assumed if there is a timely congruence between the legal effectiveness of the transfer and the operational commencement of the business at the new location, e.g. the takeover of a Frankfurt based call centre and its removal to Strasbourg being effective on the date of purchase of the call centre activity.

Moreover, the employee protection can vary, depending on the Member State where the measures (transfer/relocation) are being completed. For example, if a company decides to transfer its production from Germany to its own plant abroad, it is, pursuant to the current understanding of the German Act Against Unfair Dismissals (which is limited to the German territory), not obliged to offer the employees affected by the job losses a vacant position in the new plant abroad. According to German employment law, the relocation amounts to a closure of the business. This applies accordingly, if, on the one hand, the entity is transferred to a foreign company first (transfer) and if this company later transfers its production to its plant abroad. If, on the other hand, the reorganisation starts in France with the business being relocated to Germany, the employer would be obliged to offer the employees affected by the relocation vacancies in Germany.

The situation becomes even more complicated, if the transferee takes over parts (e.g. the field force of a distribution company) but not the head office (general manager, secretary etc.) and plans to lead the employees, who consented to the transfer of their contracts, from his head office abroad. In such cases, there may be a transfer safeguarding the continuance of the employment contracts of the employees affected, but a substantial change may take place regarding their protection against unfair dismissals and their right to keep/form a works council. For example, according to German law, a business established in Germany with a sufficient number of employees is required for the termination protection to apply and the formation of a works council. However, in accordance with the jurisdiction of the German FLC, a “business” requires the employees appointed to work in Germany to be integrated in an organisation at least partly managed from Germany. This requirement is not met, pursuant to a more recent decision of the German FLC, if field employees, who are independent from each other, are led by a distribution organisation located abroad.³⁷

The Court of Appeal of Liège has pronounced a judgement which illustrates these problems – in the framework of a transfer of the division of an undertaking established in Herstal (Belgium) to Grondsveld (Netherlands): *“It is not permitted to argue that the collective*

³⁷ FLC of 3 June 2004 – 2 AZR 386/03, NZA 2004, 1380.

employment agreement number 32bis may not have application in kind. On one hand, the absolute general terms by no means implicate the exclusion of transfers having an effect upon the geographic or cross-border plan, while for the same reason of the definition of its purpose; it effects the entire ensemble of employers and workers of the private sector in Belgium. On the other hand such an argument is not compatible with the field of application given to the directive by the ensemble of the Member States of the European Union”.

1.3.3.3 Outsourcing / Off shoring

The same principles apply to the practice of “off shoring” or “outsourcing”, i.e., typically the transfer of service functions (e.g., call centre and other back office functions), as a special form of relocation. Even where the relevant functions are organised as a stable economic entity with the “transferor” such entity must retain its identity with the transferee. It is unlikely that this test would be satisfied in a cross-border transfer where the business is no longer carried out in the original jurisdiction, as there usually will be no transfer of the material tangible assets. In the case of call centres, for example, there regularly will be entirely new facilities in the new location and thus no continuation of an economic identity.

1.3.4 Summary

Regarding business transfers in cross border situations, when a foreign entity is involved, problems will arise in case of discrepancy of the regulations in the countries affected and, principally will consist on the determination of the governing law and the competent jurisdiction to hear the conflicts cases which may arise. However, a conflict of law will regularly only occur, if a foreign company takes over a national undertaking or business or part of an undertaking or business and subsequently there is a relocation of the business abroad, or, when a national entity takes over a foreign undertaking or business or part of an undertaking or business and there is a relocation of the business into the home state. In case a transfer of business merely consists in change of ownership without a relocation of the business transferred, cross border conflicts will regularly not arise. As the content of the employment relationship remains the same, the applicable law will be the law of the country where the employee habitually carries out his work.

1.4 Safeguarding Employees’ Rights

1.4.1 Employees Affected

The Directive does not define who is to be considered an ‘employee’ for the purposes of business transfer law. Instead, it refers to the national laws of the Member States and their concepts of employment contracts and employment relationships (Article 2 (2) of the Directive). Thus, the scope of the Directive is defined by national law and may again lead to discrepancies in the application of the relevant business transfer law as the term of an employment contract or employment relationship might differ in each Member State.³⁸

E.g., under Austrian law, an employment contract is deemed to exist if a person (the ‘employee’) undertakes to provide services to another person (the ‘employer’) for a period of time, in a state of ‘personal dependence’. Essentially, ‘personal dependence’ means that the employee cannot do what he likes during his working hours – he is integrated into the

³⁸ Cf. *Hepple*, Report for the European Commission DG-V, May 1998, p. 5 et.seq.

employer's organisation, he has to comply with the employer's instructions, and is subject to the employer's supervision and disciplinary measures.

On the other hand, under Article 409 of the Italian Code of Civil Procedure an employment relationship is defined as 'other relationship of collaboration (which) consists of a continuing and co-ordinated provision of services, mostly of a personal character, even if not subordinate'.

Special problems of the different understanding of the term of an employment relationship occur with regard to executive or senior management employees, company directors or other employees in a leading function. E.g., under UK law these persons generally qualify as "employees", whereas under German law this has to be determined by an examination of the individual case. Under Spanish law senior executive labour relationships are not within the scope of section 44 ES, with the consequence that there is no legal subrogation for the transferee, unless specifically stated in their employment agreement.

Special consideration must be given to situations where only part of an undertaking is being transferred, as only the employees integrated within the entity are affected by the transfer. Under Austrian law an 'organisational' test is applied to determine which employees are subject to the transfer (i.e., it has to be considered to which department a particular employee is assigned and whether that department is being transferred). Under Spanish law the employees who will be transferred are those who are attached to the activity transferred by means of an employment relationship, provided that the contract has not been extinguished before the date of the transfer. Under German law the integration of an employee in the part of business to be transferred must be determined by a set of objective criteria. To this extent especially employees performing overhead functions (administration, human resources) are not transferred to the transferee.

1.4.2 Continuity of contractual rights and obligations

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 the transfer shall be transferred to the transferee. This provision has been adopted by all Member States and is applied in the manner that the transferee takes over the employment relationship with the employees affected or – as the Austrian contribution expresses – "steps into the shoes of the transferor", so that due to the transformation of the Directive into national law the employee's individual contractual rights are safeguarded in case of a cross-border transfer.

This safeguarding of rights under all jurisdictions effects

- remuneration and benefits of the employee,
- employment conditions (working hours, qualification, number of holiday days etc.) and
- seniority vested with the former employer.

The Directive only refers to rights stemming from a contract of employment or from an employment relationship. However, under UK law, the transfer of liabilities includes tortious liabilities, e.g. mainly for civil damages for injuries or diseases arising from the employee's work. Under Article 2112 of the Italian Civil Code, it is expressly provided that transferred

employees are entitled to the same economic treatment they had before the transfer under their individual employment agreement, which also includes statutory protection.

The scope of the Directive only affects the rights and obligations accrued at the time of the transfer. This raises the question, whether future expectations of the employee are covered in case of a business transfer, which is of special importance for obligations deriving from company pension schemes (cf. below No. 1.6)

1.4.3 Protection against dismissal

Article 4 (1) of the Directive prohibits all dismissals “on account of the business (or business part) transfer” by the former employer or the new owner. This principle applies in all Member States examined in this study. However, validity and consequences of a dismissal based on a business transfer must be seen in the light of the national law which regularly provides for certain procedural steps to be taken. Again, it is decisive to establish the applicable national law, as this might lead to a loss of the employee’s possibility to claim rights deriving from a dismissal in breach of the principles of the Directive.

- Under French law, any employee whose employment is terminated by the transferor in breach of Article L. 122-12 § 2 has a "right of option". He may bring a claim against either the new employer to ask for the continuation of his employment contract or against his former employer, and as the case may be against the new employer, in order to obtain damages for wrongful dismissal.
- Under German law, the employee is obliged to file a claim at the competent employment court within three weeks of receipt of the written dismissal notice.³⁹ Otherwise, the dismissal will be deemed valid.
- Under Spanish law, an employee dismissed as a consequence of a transfer of business, must claim against the employer within the 20 working days following the termination of employment, in order to obtain a judicial resolution declaring the unfairness of the dismissal. Should this be the case, the employee would be entitled to be reinstated in his employment or to compensation.
- As the Directive in Belgium has been adopted on the basis of a contractual bargaining agreement, a breach of the obligatory CBA 32bis constitutes an offence which, in theory, might lead to criminal sanctions. To this extent a dismissal of the employer in violation of the principles can be sanctioned. However, as yet such sanctions have never been applied⁴⁰.

Since Article 4 (1) of the Directive provides that dismissals which take place for economic, technical or organizational reasons entailing changes in the work-force are not affected and remain possible. Hence, the employer is not limited from dismissing an employee on these or other grounds (e.g. gross misconduct) provided that such dismissal has no link with the transfer. Special attention must be paid to dismissals on business related or operational reasons. In these cases the employer regularly has to establish that the need to terminate employment relationships for business related or operational reasons is not connected to the business transfer. In this context, the Italian Supreme Court has held that the termination of

³⁹ § 4 of the Protection Against Unfair Dismissals Act (*Kündigungsschutzgesetz*).

⁴⁰ C. Wantiez, *Transferts conventionnels d'entreprise et droit du travail*, Larcier, 2003, 113.

employment, which may be carried out in the event of a transfer of business, is legal when it is justified by a reason totally autonomous and independent from the transfer of business to be carried out.

Austria has not yet implemented Article 4 (1) of the Directive on a statutory basis. However, the Supreme Court has indicated on a number of occasions that any dismissal having as its 'principal reason' a business transfer will be null and void. It has also made it clear that this principle applies equally to dismissals carried out by transferors and transferees and that the burden of proof in establishing that a particular dismissal was motivated by a reason other than a business transfer is on the employer who carried it out.

1.4.4 Practical Problems with regard to different scale of employee protection

The application of the Directive may cause practical problems with regard to the employee's rights provided for by the national employment law statutes. As the standard of employee protection differs within the Member States of the EU, the question arises whether the safeguarding of employee rights, which is the primary objective of the Directive, also includes statutory rights of the employees which are not contained in the employment contract but might be held to be part of an "employment relationship". In this case the statutory rights might be preserved if an employment relationship with a high level of statutory employee protection is transferred into the scope of a national law merely offering a minor protection. In this situation further consideration must be given on the legal basis for employee protection rights. Some Member States may offer statutory rights, e.g. sick pay, maternal leave, which under other jurisdictions might regularly be granted on a contractual basis. In case of a cross-border transfer this could lead to discrepancies when the statutory rights are abrogated without an adequate contractual substitution. With reference to ECJ jurisdiction, *Hepple* confirms the general principle that Member States are not precluded to extend their legislation or the application of collective bargaining agreements to workers who are employed within their territory regardless of the country in which the establishment and the employer, respectively, are located. This principle thus favours the protection of national labour law systems. As this rule has been established with regard to the temporary provision of services by a foreign contractor, it must be determined, if and to what extent it might be applied to transfers of businesses. This would generally result in the perseverance of the mandatory rules applicable to the employment relationship before the transfer of business.⁴¹

Another practical issue is the content of the employment relationship in case of the alteration of the applicable law. Regularly an employment contract is drafted in accordance with the national employment law provisions and the case law established by the national labour courts. Consequently, there is a need for modification of these provisions when the original law does no longer apply. The question will arise, if and to what extent there is a right of the employer to modify contractual terms following a cross-border transfer.

Further, there is no clear rule which deals with the fact, that provisions in the employment contract may have a different scope at the transferee's business, when the factual framework of the employment relationship changes due to the transfer. E.g. a relocation clause in an employment contract, allowing the employer to assign the employee's workplace, can significantly gain in importance, if the transferee's company operates on a world-wide level, whereas the transferor's business activities were restricted to the core countries of the EU (for

⁴¹ Cf. *Hepple*, Report for the European Commission DG-V, May 1998, p. 17 et seqq., with reference to ECJ of 27 March 1990, Case C-113/89 – *Rush Portuguesa Lda*; ECJ of 9 August 1994, Case C-43/93 – *Van der Elst*.

further consequences of a transfer of business with regard to the place of employment, cf. below 1.7.2).

1.5 Liability of transferor and transferee

According to Article 3(1) of the Directive the Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable with respect to obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer. Most Member States chose not to restrict the liability for these obligations merely to the transferee and provide for a liability of both transferor and transferee. However, as the form of the liability is subject to the law of each single Member State, there are various national particularities, which may lead to conflict of laws.

1.5.1 Austria

In implementing the Directive, the Austrian Legislator has provided for the joint liability of transferors and transferees in relation to business transfers. Accordingly, AVRAG, s 6(1) states that both employers are jointly and severally liable vis-à-vis the transferring employees in respect of any obligations (e.g. accrued wages or bonuses not paid by the transferor) that arose before the business transfer. Thus, the risks to transferring employees of being hived-off to insolvent employers are reduced.

The principle of joint and several liabilities in Austria does not extend to obligations arising after a business transfer. Therefore, if a transferee fails to pay the wages of the transferring employees for the services they have provided after a business transfer, they cannot look to the transferor for payment in this regard.

Austrian law limits the liability of transferors in respect of severance payments and contributions to company pension schemes. These entitlements, whether contractual or statutory, are considered to be a special kind of remuneration for the services employees provide throughout the course of their employment relationships, even if they become payable only at the end of those relationships. Therefore, transferors are only liable, under AVRAG, s 6(2), for the notional value of these entitlements at the time of a business transfer. In response to concerns that making the liability of transferors unlimited in this regard would infringe their fundamental rights, s 6(2) has recently been amended so that they are only liable for entitlements in respect of severance payments and contributions to company pension schemes that accrue within five years of a business transfer. Further, it is now open to the parties to a business transfer to contract to the effect that only the transferee is responsible for any liabilities that arise in this regard provided he receives adequate securities from the transferor.

1.5.2 Belgium

Article 8 of CBA 32bis establishes that unity between a transferor and a transferee brings *in solidum* the debts existing at the date of the transfer in the sense of the CBA, and therefore the employment contracts existing at this date, with the exception of the debts in the areas of complementary and social activities described in the CBA in question. The result therefore is that the unity is only established in relation to the contracts and debts existing at the date of the transfer.

In principle the contractual debts that are satisfied prior to the transfer are not caught by this provision: these debts will be the sole charge of the transferor, except where the proximity of dismissal and a subsequent transfer has as its consequence that, at the moment of the transfer, the worker is considered as having been always employed⁴². The question of unity in relation to debts or obligations arising after the transfer is not covered by Article 8 of CBA 32bis.

Can the transferor be liable for debts arising after the transfer? If the debt came into being at a time very close to the transfer, it may be argued, by analogy to that which is said above, that it constitutes a debt existing at that moment: the transferor will be considered as being *in solidum* or jointly liable with the transferee for the payment of this debt, which it can avoid by demanding that it is reimbursed. More often the question posed is whether an advantage in relation to the debts incurred by the transferee is claimed long after the transfer. In this sense, the ECJ has clearly explained the consequences of the automatic character of a transfer in the following way: *after the date of transfer the transferor is free from its contractual obligations (...) even if (...) the workers do not consent to this effect or if it is opposed (...)*⁴³. It follows that the debt incurred after the transfer is payable by the transferee and the transferor may not therefore be made jointly liable for it. The Employment Court of Liège notably also decided this in its judgment of 10 June 1993. From then on the action of the claimant was brought against the transferor and not against the transferee, it was decided that there was not cause to examine the nature of the modification made by the transferee to the employment contract of the claimant worker. Only the transferee may be caught.

1.5.3 France

Except if agreed otherwise by the parties, Article L. 122-12-1 of the French Labour Code provides that, in the case of a transfer of business, the new employer must honour the previous employer's obligations as from the date of the actual transfer. Therefore, all salaries due before the transfer but which remain outstanding on the date of the transfer must be borne by the new employer. The previous employer must then reimburse the sums thus paid by the new employer. The purpose of this is that the transfer of business must not be detrimental to the employees, i.e., they should have only one creditor.

However, this principle does not apply when the transfer takes place after a liquidation or when there is no transfer agreement between the successive employers (e.g., successive service providers). In this case, the employee must turn to his former employer to obtain the payment of any sum relating to the period of employment before the transfer.

The principle set by Article L. 122-12-1 has given rise to numerous French case law decisions, in order to determine which financial obligations are due on the transfer date and should thus be transferred to the new employer. This is especially the case for deferred payments or rights that are acquired over a certain period of time but which become payable at a later date, such as paid vacation. In this respect, case law has ruled that the new employer is responsible for the payment of all paid vacation accrued during the annual acquisition period, and not only for the paid vacation accrued after the transfer.

⁴² CT Liège of 1 December 1994, (1995) JTT, 83 ; CT Liège of 28 March 1984, (1984) JTT, 1984, 364 ; TT Liège of 29 April 1991, (1991) JTT, 355.

⁴³ Ground 22, ECJ of 16 December 1992, (1993), *Chron. Dr. Soc.*, 105.

1.5.4 Germany

According to § 613 a BGB a business (or business part) transfer does not completely release the former employer from liability. Rather, he is jointly and severally liable with the new owner for all claims which arose prior to the business or business part transfer and which will become due within one year after the transfer. If an obligation becomes due after the transfer and is meant to compensate a certain period of time (e.g. yearly bonus), the transferor is only partially liable to the extent to which the obligation has evolved up to the date of the transfer.⁴⁴ However, the former employer is solely liable vis-à-vis all employees who left the company before the business transfer, for example, with respect to pension obligations.

1.5.5 Hungary

The Labour Code distinguishes between two types of liability with regard to transferred employees:

- Liability for debts and damages incurred prior to the date of the business transfer, provided that such claims are enforced within one year of the transfer. This liability is joint and several and does not depend on any further conditions, such as the surety described below. After the one-year period, only the transferee can be held liable within the general limitation period, which is three years in Hungary (s 11(1)–(4) of the Labour Code).
- Liability incurred if an employee is dismissed by the transferee within one year of the date of the transfer, for reasons connected with its operations or because a fix term employment has been terminated by virtue of Sub-section 2 of Section 88 of the Labour Code. In these situations, the transferor is liable, as a surety, for the employee's redundancy pay upon the termination of the employment relationship. However, this liability is conditional – the transferor is only liable if:
 - (i) the transferor;
 - (ii) a company controlled by the transferor;
 - (iii) the majority owner of the transferor; or
 - (iv) a company in which the majority owner of the transferor has a majority shareholding,together hold more than 50 per cent of the voting shares in the transferee.

1.5.6 Italy

Under the Transfer of Business Regulation, the transferor and the transferee are jointly liable for all the employer's financial obligations existing at the time of the transfer *vis à vis* the employees. Such joint liability only operates with regard to the transferor's financial obligations *vis à vis* the transferred employees existing at the moment of the transfer. Therefore, any such financial obligations originating after the transfer and relevant to the work relationship between the transferee and the transferred employees are not covered by such joint liability.

Consequently, transferred employees are entitled to enforce financial obligations, which the transferor has with them, also with the transferee, and the transferee is obliged to make any

⁴⁴ § 613 a (2) of the German Civil Code.

such relevant payment. The transferee is then entitled to require the transferor to reimburse the amount of money paid.

In the past few years, it has been controversial whether the joint liability only applies to employees transferred to the transferee, or to any employees, including those who had not continued their working relationship with the transferee. Eventually, the Italian Supreme Court stated that only the transferred employees are entitled to enforce outstanding payments against the transferee.⁴⁵

Under the Transfer of Business Regulation, transferred employees may waive their right to enforce their financial rights against the transferor. Under these circumstances, the transferee is solely responsible for such financial obligations. In order to grant the interested employees a high degree of protection, it has been provided that such waivers must be formalised before the local Employment Office. Waivers must be executed according to the procedures set out in Articles 410 and 411 of the Italian Code of Civil Procedure. Once the waivers are executed, the transferred employees are entitled to enforce their financial rights only against the transferee and not against the transferor.

According to Article 1655 of the Italian Civil Code, a joint liability of transferor and transferee is also assumed with regard to '*appalto*' contracts ('service agreement'), which is defined as a contract by means of which one party is paid to perform a particular job or to provide a particular service with its own equipment and at its own management's risk. In case the transferor should enter into an *appalto* agreement with the transferee, the performance of which is completed using the transferred part of the business, the Transfer of Business Regulation provides that the employees are entitled to claim the unpaid wages also against the transferee if the transferor-contractor does not fulfil his salary obligations. This is limited to the amount of money that the transferee owes to the transferor-contractor at the moment at which the employees' claim is brought.

1.5.7 The Netherlands

In the framework of the transfer of rights and obligations as stipulated in the existing employment contract between the employee and the transferor, the transferee will have to settle any outstanding debt to such an employee. The transferee will therefore have to pay out any as yet unpaid salary as well as unused days' holiday, and also any redundancy pay granted by the transferor to the employee. The transferee will have to comply with these obligations, albeit that the transferee who has paid a debt to an employee which dates from before the transfer may claim repayment of that debt from the transferor.⁴⁶

1.5.8 Spain

Article 44 ES states that, in case of transfers *inter vivos*, the transferor and the transferee will both be jointly and severally liable for the subsequent three years for any unsatisfied labour obligation which accrued before the transfer took place, even if the obligation arises after the transfer took place.

When the transfer is declared as being a criminal offence, both transferor and transferee are liable for the obligations created after the transfer took place. The transfer will be considered

⁴⁵ Cfr. Italian Supreme Court, case no° 12889/1997..

⁴⁶ BW, Book 6, ss 10 and 12.

as a criminal offence when any company uses it as a way to elude its obligations regarding the employees or when through such conduct the employees find their possibilities of obtaining what they are due by the company reduced.

1.6 The fate of old-age, invalidity or survivors' benefits (statutory or supplementary)

With regard to pension schemes the Member States are free to extend the application of the Directive "to employee rights to old-age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes", cf. Article 3 (4.a) of the Directive. Some Member States, e.g., Germany, have taken advantage of this option, so that pension benefits are subject to a transfer of business and will generally have to be fulfilled by the transferee. On the other hand, Belgium and the UK have expressly excluded supplementary social security schemes (occupational pension schemes) from the application of the relevant business transfer law.

As a consequence of the differing application of the Directive, the extent, to which old-age, invalidity or survivors' benefits (statutory or supplementary) are maintained after a transfer of business varies within the Member States:

- Under Belgian law, the transferee is not obliged to assume or to continue the pension plan established by the transferor, except in the event where the supplementary social security scheme is based upon a collective bargaining agreement. However, pursuant to Article 37, §2, al. 1 of the law of 28 April 2003 relating to occupational pensions the transfer of an undertaking resulting in a conventional transfer or a merger must not, however, lead to a reduction in the vested reserves at the moment of the transfer of affiliates. This is particularly important in case of a defined benefit pension scheme.
- Similarly, in the Netherlands only existing rights and obligations are part of the transfer of business and future expectations excluded.
- On the other hand, some jurisdictions, e.g. Germany, Spain or Hungary, provide that employees' benefits arising from statutory or supplementary pension schemes will be transferred to the transferee, because these are part of the transferor's rights, powers, duties and liabilities under, or in connection with, its contracts of employment. Thus, after a transfer they will be qualified as originally been made between the employee and the transferee, and include all kind of pension commitments. However, under Spanish and German law, this does not apply for those ex-employees who are receiving pensions at the moment of the transfer. In this context the liability for pension commitments stays with the transferor.
- According to UK law, there is nor transfer of pension obligations. However, the transferee is subject to certain requirements according to the Transfer of Employment (Pension Protection) Regulations 2005, which supplement the TUPE Regulations. They apply where a transferred employee has to leave the transferors occupational pension scheme, provided that scheme and his membership of it meet certain qualifying conditions laid down in Section 257 of the Pensions Act 2004. Where those conditions are met, the transferee must provide, for service after the date of transfer, at least its own financial contribution to a pension scheme working on the "money purchase" basis for the employee which must match the employee's own contribution up to 6% of the employee's basic pay. This changes the previous position, where transferees were lawfully able to provide no private pension for future service at all for transferred

employees, even where they received a high standard of private pension provision in the transferor's employment.

- As the Italian Transfer of Business Regulation does not expressly exclude rights enshrined in supplementary pension schemes from the field of application, any employee's old-age, invalidity or survivors' benefits may in general be subject to a business transfer. To this extent, recently a distinction has been proposed based upon whether the relevant pension fund is, or is not, a legal entity according to Italian law. If the relevant pension fund is a separate legal entity, with respect to pension benefits payments and their management, the employees refer exclusively to the same fund, with no involvement of the employer. In this case, the Transfer of Business Regulation would not apply. If, on the other hand, the relevant pension fund is not a legal entity, the pension scheme should be considered part of the work agreement in force between the employer and the employee: the Transfer of Business Regulation will, consequently, apply.
- Under Austrian law a transferee can refuse to take over the transferor's obligations with regard to pension schemes, in which case the employees generally are entitled to a lump sum payment.

Hence, there will be the need – irrespective of the proposal for a Directive on improving the portability of supplementary pension rights⁴⁷ – to establish the applicable law and thus the liability of the transferee for employees' rights deriving from occupational pension schemes after a cross-border transfer.

The different level of protection of employees' pension scheme benefits might lead to the situation that an employer under a national business transfer law which does not apply to these benefits firstly transfers a business to a transferee within the same Member State. As a result pension rights would only partially be transferred and thus limited. The intended transfer abroad to a Member State under whose law these benefits would have to be maintained would then be completed in a second step. If this transaction would have been executed only in one step, the application of the transferee's national law might however have led to the preservation of these pension rights.

Additionally, it needs to be decided in which way a cross-border transfer of pension obligations shall be conducted, in particular with regard to different occupational pension schemes organising the pension supply (e.g., pension trusts) which might be known only to one jurisdiction affected. Under some jurisdictions, especially France and the Netherlands, pension benefits derive from statutory pension schemes, which in case of a cross border transfer might not be maintained by the transferee. Here it is decisive if the transferee is obliged to establish a similar pension scheme to guarantee the payment of old-age, invalidity or survivors' benefits. In this context, tax and social law issue may also be relevant and regularly will complicate the transfer of pension scheme benefits.

Further need for harmonisation may arise in case the transferee has also established a company pension scheme. This gives rise to the questions, if the transferred employees are entitled to join this scheme, whether the length of service spent with the transferor will be credited and to what extent the former pension scheme of the transferor may be replaced by the transferee's one.

⁴⁷ COM (2005) 507 final.

Finally, further practical and legal difficulties will arise, if the pension schemes are based on collective bargaining agreements, because the Member States provide for various differing regulations with regard to the continuity and super session of collective bargaining agreements after a transfer of business (cf. below 1.9).

1.7 Modification of Employment Conditions

1.7.1 General

Generally, the mere fact of the transfer of undertakings does not allow the transferee to modify employment conditions. Nevertheless, once the transfer has taken place, the new employer will be allowed to use legal mechanisms of the relevant Member State not being obliged to maintain indefinitely the existing previous conditions. Again, the question of the applicable law is crucial for the possible steps to be taken by the transferee to modify the terms of the employment relationship. As the following examples show, these steps differ according to the national law of the Member States involved in a cross-border transfer:

- Under Austrian law, in any case the change of contractual terms and conditions is only possible with the employee's consent. To achieve such a consent the employer might be able to declare a "dismissal pending a change of contract" (*Änderungskündigung*). Whether the employee can successfully challenge such a dismissal depends on its justification. All this applies to salary, time and place of work alike.
- In accordance with Belgian statutory law and case law, the substantial conditions of employment cannot be modified unilaterally by the employer. That relates to in particular the function, the duration of the work, the remuneration and the place of work. The employer can modify the non substantial conditions in so far as they are not contractual or that the contract reserves this possibility to him. For the place of work, case law accepts that a clause of mobility is inserted in the contract. It also accepts that a slightly displacement of the company is accepted (approximately 25 km)
- Under French law any change in an essential aspect of the employment contract is subject to the employee's consent. However, in the event of a refusal by the employee, the employer must either pursue the performance of the employment contract on the basis of the initial terms or dismiss the employee. On the other hand, a change in a mere working condition of the employee may be imposed on the employee, any refusal by the employee triggering a dismissal for misconduct.
- On modifying contractual terms the employer must under German law – where the employee does not consent to the amendment to the contract – issue a constructive dismissal. A constructive dismissal is at the same time the "last" means of altering employment conditions if a mutual agreement cannot be achieved. However, in order to be valid, such termination must satisfy the requirements of the Protection Against Unfair Dismissals Act. According to the strict standards of the FLC, a constructive dismissal is not justified by mere employer's desire to harmonise employment conditions. The contract of employment might also provide for a unilateral right of modification of the contractual terms by the employer. However, this does regularly not affect essential terms of the employment relationship, e.g. basic salary.

- For amending employment agreements after a transfer of business the general rules in the Hungarian Labour Code shall apply. To this extent the business transfer itself may not serve as a basis of an ordinary termination. A right of termination is only admissible if the employer is unable to offer a suitable position to the employee and the employment under its then-current conditions may not be upheld anymore. The only aspect where the Labour Code prescribes an explicit obligation of adapting the employment agreement is the question of having to commute to and from a new workplace (cf. below 1.7.2)
- Since under the Italian Transfer of Business Regulation the main consequence of the business' transfer is to ensure the transferred employee the continuity of the employment relationship, the transferred employee retains all the rights acquired before the transfer and the employment relationship continues unchanged. The transferee, therefore, can modify the employee's contractual level, duties, condition and employment modality only within the legal limit and in observance of Article. 2103 of the Italian Civil Code.
- Subject to Article 613 of Book 7 of the Dutch Civil Code an employer and an employee can agree in the employment agreement that the employer is entitled to unilaterally make changes to the contract during the employment. In order to protect the employees the legislature stipulated in Article 613 that the employer is only allowed making such unilateral change if he has such a weighty interest in doing so that the interests of the employee which are being affected to their detriment, must be overruled subject to the principles of reasonableness and fairness. In other words, the judge will weigh the interests of the employer against those of the employee. If the employer and employee have not agreed on a contractual right of the employer to unilaterally change the employment conditions, the general rule under Dutch law is that the employee is obliged to accept reasonable changes to his contract. With regards to changes in the remuneration (salary), and the working hours there are statutory provisions which are stipulated in the Minimum Wage Act ("*Wet Minimumloon*") and the Working Hours Act ("*Arbeidstijdenwet*"). These acts are in principle applicable and an employer and employee are not allowed to agree on employment conditions which are to the detriment of the employee (in comparison with the entitlements or rights stipulated in the said acts).
- With regard to individual or collective employment conditions, Spanish law obliges transferee and transferor to initiate a consultancy period with the employees' legal representatives prior to the adoption of employment measures. The parties are obliged to negotiate in good faith, but to reach an agreement is not compulsory. When employment measures consist on geographical mobility (cf. below 1.7.2) or substantial changes in working conditions, certain procedural steps have to be fulfilled. Under Article 41 ES substantial changes in working conditions, e.g., with regard to working time or shift work systems, must be based on economic, technological, organisational or production grounds. These grounds are understood to arise, when the steps taken improve the company's position through better organisation of resources, by promoting its competitiveness in the market and a better response to demand. The decision regarding substantial changes in working conditions must be preceded by a consultancy period with the employees' legal representatives lasting at least 15 days. The employee may accept the employer's decision or terminate his employment provided he would be disadvantaged by the changes, and the changes concern working time, working hours or

shift-work system. In such cases, the employee will be entitled to a compensation of 20 days of salary per year of service up to a maximum of nine monthly payments.

- TUPE 2006 has restated the law for the UK on changes to terms and conditions of employment in connection with the transfer of an undertaking in Regulation 4(4). The position now is that any change, even one formally agreed to by an employee or trade union on his behalf, will be void if it is by reason of the transfer itself, or for a reason connected with the transfer which is not an economic, technical or organisational reason entailing changes in the workforce. Regulation 4(5) confirms that in other circumstances, the employer and employee are at liberty to agree binding changes to terms and conditions of employment. The scope of these other circumstances is however narrow: many of the reasons for employers wanting to negotiate changes will be economic or organisational, but they are unlikely to satisfy the further requirement of “entailing changes in the workforce”. For example, an employer will often wish to harmonise the terms and conditions of transferred employees with those of his existing employees, while continuing to employ them. Such a reason will not satisfy the latter part of the requirement.

In case employment conditions are subject to a collective bargaining agreements we refer to the comments below under No.1.9.

1.7.2 Modification of Place of Work

In situations where the cross-border transfer is connected to a relocation, special consideration must be given to the place of work, which is an employment condition which necessarily has to be modified in case of a transfer. Under most national jurisdictions the place of work is considered an integral or substantial term of the contract. Therefore, in case the business in which the employee is employed is moved to another location it is doubtful if the employees are obliged to join in the relocation and if the contents of the contract may be subject to a modification. Additionally, some national laws provide for a right of the employee to terminate the employment relationship and claim a severance payment if there is a relocation of business (cf. 1.7.3). Again, with regard to cross-border transfers, it is decisive if and to what extent these principles of the relevant national law also apply, when the business is transferred to or from a Member State, which does not provide for similar regulations.

1.7.2.1 Austria

If the business transfer is linked to its relocation the new employer will generally need to change the workplace of the transferred employees. Under recent case law⁴⁸ on relocations without a business transfer the employee has to accept a change of the workplace provided such a change is “reasonable”. The reasonableness of such a change depends on various factors, such as

- the distance between the employee’s home address and the previous / new workplace;
- the public transport system;
- whether the employer offers reimbursement of additional travel costs;
- personal circumstances (e.g. the employee has to bring his/her child to the kindergarten on his/her way to work).

⁴⁸ OGH 14.6.2000, 9 Ob A 48/00z, ARD 5146/21/2000.

It is highly doubtful if the courts would ask an employee to work in another country since this would generally result in the change of the law governing the employment relationship (Art 6(2)(a)).

The situation could be different for managers whose employment contracts contain a mobility clause enabling the employer to transfer the employee also to another country. In such a case the employment contract generally also contains a (at least implicit) clause providing for the applicability of Austrian law.

1.7.2.2 Belgium

Under Belgian law the place of work may constitute an essential element of the contract, which must be analysed on a case by case basis. In accordance with Belgian jurisprudence on this matter, the transfer of an employment contract to another country may be considered as constituting a breach of contract (called in Belgian domestic law an act “*équipollent à rupture*”), which gives the employee a right to terminate the employment relationship. However, the change must be important and modify the employment contract substantially. Also, a modification to the place of work from the transfer of a division of an undertaking in Herstal (Belgium) to an undertaking in Grondveld (Netherlands) located 25 km from the original site is not considered by the courts as being an important enough change to an element of the contract.

1.7.2.3 France

French case law considers in this respect that a change in the employees' workplace does not amount to a change of his/her employment contract requiring the employee's prior consent, if (i) said employment contract contains a valid mobility clause or (ii) if the contract does not contain such a clause, when the employees' new place of work is located in the same "geographic area". Therefore, a cross border relocation would regularly amount to a change in geographic area, except for cases, when the former and the new workplace are just across the border. Subject to such a proviso, the employees' refusal to agree on the change in their workplace shall oblige the transferee to dismiss the employees and such dismissal shall be deemed made on the transferee's initiative.

1.7.2.4 Germany

Under German law an amendment to the employment contract with respect to the location where the employee has to provide his services is usually necessary. Many employment contracts expressly employ the worker only at a particular location of the company or branch. Unless the parties did expressly provide so, relocation abroad requires the consent of the employee, even if the employment contract states that the employee can be relocated to another location. Provisions expressly providing for relocation to another foreign location are rare and usually apply only to managerial staff of international groups. Where there is no such provision and the employee does not consent to the amendment to the contract, the purchaser must issue a constructive dismissal.

1.7.2.5 Hungary

Hungarian law provides for a quite detailed procedure for the amendment of an employment contract in case of a relocation. To this extent Article. 76/C (4) of the Labour code states the following:

“If there is any change in an employee's place of work due to a change in the employer's place of business, the employment agreement shall be amended if

- a) the time of daily commuting to and from work by public transportation has increased by 1,5 hours, or by 1 hour if the employee is a woman raising a child under 10 or is a single man raising a child under 10, or is a disabled (handicapped) worker using other means of transportation, or
- b) it is unreasonably or substantially detrimental to the employee in respect of personal, family or other circumstances, in particular the conditions of work and/or the duration and costs of commuting to and from work.

Such amendment of the employment shall include an agreement between the employer and employee concerning any extra travel costs.”

In case the parties fail to agree on an appropriate amendment of the labour contract or on cost splitting and the employer is unable to offer an appropriate job (place of work) to the employee, this may be giving rise to ‘notice for operational reasons’.⁴⁹

1.7.2.6 Italy

With regard to the modification of employment conditions the transferred employees are after a transfer of business subject to the general rules and legal instruments. The employer can unilaterally decide to change the place where the employees perform their duties within the limits provided by the law and the collective labour agreement. In particular, the place of work can be unilaterally changed by the employer through the legal institutes of transfer, secondment and mission.

1.7.2.7 The Netherlands

Subject to the principles described above an employer and an employee can agree in the employment agreement that the employer is entitled to unilaterally change the contract, if he has a weighty interest in doing so which overrule the interests of the employee subject to the principles of reasonableness and fairness. This also applies to a change of the place of work. In principle a relocation, or change of work place is considered acceptable if the employee can travel to the new location in 1.30 up to 2 hours single way.

1.7.2.8 Spain

Under Spanish law a modification of the employment contract which refers to “geographical mobility” may only take place for economic, technological, organisational or production reasons and a specific procedure has to be respected, where the employer must open a period

⁴⁹ In Hungarian: *”munkáltatói rendes felmondás a munkáltató működésével összefüggő okból”*.

of consultation with the legal representatives of the employees, which will last not less than 15 days, being obliged to inform the Labour Authorities with respect to commencing the period of consultations and of the positions of the parties concerned after the conclusions having been drawn up. Even if the employees' legal representatives do not reach an agreement, the employer can decide the mobility.

1.7.2.9 United Kingdom

An employee's written contract of employment may contain a provision entitling an employer to unilaterally change an employee's normal place of work and the courts will give effect to such provisions, provided they are used reasonably by the employer. In this case, reasonable use would imply a sufficient business reason, reasonable prior notice of the requirement to relocate and the offer of financial assistance for relocation where the employer provided this normally. Provisions like this are common for managers and are standard for employees working in government service as civil servants in certain grades.

In other situations, the place of work can be changed by ad hoc agreement.

The employer can of course *always* move the job unilaterally and thus create a redundancy situation, where the employee's rights are governed by UK redundancy law. Essentially however, the law does not allow the employee to challenge the employer's business prerogative to decide where to locate his business. If the employee chose not to follow the job to the new location, the employee is entitled to redundancy pay in addition to his right to notice of dismissal under his contract. Of course, where the threshold for collective redundancy consultation is reached - 20 redundancies from one establishment within a 90 day period, collective information and consultation will also be required.

1.7.3 Termination due to a substantial Change of Working Conditions

In case an 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 the termination. This provision is caused by the fact, that some Member States' jurisdictions only grant severance payments in case a termination falls within the responsibility of the employer. This is of special importance with regard to cross-border transfers because these are often connected to a change of the place of work, which is regularly seen as a substantial change of working conditions (cf. 1.7.2).

However, this principle is not common to all Member States:

- Especially under German law, a termination of the employment relationship does not – at least not according to the concept of the law – amount to the payment of a lump sum, regardless of the party declaring the dismissal. However, a payment may be stipulated to prevent court proceedings for an unfair dismissal claim. In a cross border situation, this again may lead to a conflict of laws. Additionally, the Directive is not clear on the term of the 'employer', which could mean both the transferee and the transferor. Regardless of a cross border situation the general scope of the Directive therefore offers room for a general clarification.

- The French Supreme Court considers under well-established case law⁵⁰, that, because Article L. 122-12 § 2 is a public order provision, the survival of employment contracts is binding on the successive employers and employees as well. If the employee refuses to start working for the transferee, the French Supreme Court held, that such a refusal was to be deemed a resignation.⁵¹ Provided that the resignation is valid (i.e. it is totally free and non-ambiguous), it entails the termination of the employment contract without any compensation payment for the employee, apart from the notice period indemnity (if the employee is released from its performance) and any outstanding holiday pay. The employee who resigns is not entitled to any severance indemnity.

A severance payment in case of the termination of the employment relationship in case of a substantial change of the working conditions is on the other hand provided for in the following Member States:

- Under the Italian Transfer of Business Regulation, the transferred employee may resign within three months of the transfer should his working conditions substantially change as a result of the transfer. The ‘substantial change’ in working conditions can be related to working time, location or functions. At the moment of the resignation, the employee shall have the right to be paid an ‘in lieu of notice indemnification’, according to Article 2119 of the Italian Civil Code. It should be noted that notice periods in Italy are set both by individual and collective contracts. Apart from the right to resign, no general right to object is acknowledged for employees in the event of a business transfer.
- UK law provides that in case the transferee does not continue the employee’s employment that will count as a dismissal by the transferee. The principal remedy would be a claim for unfair dismissal, which would however fail if the transferee could establish that the (principal) reason for dismissal was an economic, technical or organisational reason entailing a change in the workforce (Regulation 8(2) of the TUPE Regulations and Article 4 of the Directive 2001/23). The employee would then be entitled only to pay for contractual notice of dismissal period and statutory redundancy pay (under Part XI, Employment Rights Act 1996). This redundancy pay is determined by reference to a formula based on length of service, age and weekly pay - the maximum amount is £8700 from 1 February 2006. Alternatively, the TUPE Regulations still provide in Regulation 4 (4A & B) that an employee may object to being transferred.⁵² While that Regulation provides the employee is deemed to resign that is without prejudice to any legal claims the employee otherwise has by reason of changes in working conditions. By case law - *University of Oxford v. Humphreys* (reported 2000 IRLR 183) the employee may bring claims against the transferor if the reason for the employees’ objection is default in this regard by the transferee. Indeed in nearly all cases a requirement to relocate abroad would be in breach of employees’ contracts.
- Under Spanish law in case of geographical mobility (cf. 1.7.2) the employee may choose to accept the employer’s decision to relocate the business, receiving a compensation for the expenses incurred, or terminate the employment being entitled to a compensation of 20 days of salary per year of service up to a maximum of nine monthly payments. Additionally, without prejudicing the carrying of the mobility, the employee

⁵⁰ See in particular Supreme Court of 28 May 1997 and Supreme Court of 14 December 2004.

⁵¹ Supreme Court of 5 November 1987 and Supreme Court of 16 January 1990.

⁵² Note there is no equivalent provision in Directive 2001/23 but the authority is the ECJ decision in *Katsikas v. Konstantinidis* (C-132/91).

may present an appeal before Social Courts, and should the Court declare the mobility unfair and unjustified, the employee must be reincorporated in his original work place, provided that at least parts of the original establishment still exist. If this is not the case the employee may be entitled to financial compensation. It is also important to underline that Labour Authorities, in view of parties' positions and bearing in mind economical and social impacts may order the halt of the mobility for a period up to six months.

- Under Dutch law a request for dissolution on the grounds of “unreasonable travel distance” may be made in case the transfer of business is combined with a relocation. Based on standard jurisprudence a distance between home and workplace which is deemed to be unreasonably great can be a reason for the employee to have the employment contract dissolved by the district court. Hereby, a travel distance under 1.5 hours between home and work place is still considered reasonable. If the contract is ordered to be dissolved for that reason, the reason is imputed to the employer. In a case of this kind the district court can award the employee a reasonable severance payment, to be paid by the (new) employer.
- Belgian law provides that if the employment contract is terminated because the transfer leads to a substantial modification to the working conditions of the workers, the termination of the contract is considered as being an intervention made by the employer. This obliges the employer to pay an indemnity (lump sum) in lieu of notice as a compensation of the termination of the contract.
- The Austrian AVRAG, s 3(5) and (6), entitles employees to terminate their employment with transferees where their terms and conditions of employment are ‘substantially’ worsened as a result of changes to the collective agreements or works agreements that apply to them. An employee who resigns in such a situation is, *prima facie*, treated as if the transferee had dismissed him and is generally entitled to a severance payment. Although the Supreme Court has yet to define exactly what constitutes a ‘substantial’ change to an employee’s working conditions, there is a consensus amongst legal commentators in Austria that such a change must affect terms and conditions of employment that are ‘essential’ by their very nature (e.g. remuneration, working time, paid leave, etc); and be noticeable in quantitative terms. The Austrian courts have accordingly been granted a wide discretion to apply this provision on a case-by-case basis.
- Under Hungarian law a severance payment has to be paid if the relocation does not terminate the employment contract automatically and if the employer and the employee fail to agree on the amendment concerning the place of work. In this case the employer resolves to terminate the employment contract for operational reasons, and then a severance payment is, if applicable, due and payable.

1.8. Right of objection

Various Member States provide for a right of objection in case of a business transfer, e.g., Germany. Austrian law provides for a right of objection restricted to special cases, in which the transfer might be detrimental to the employees. A right of objection is not required by but consistent with EU law. An employee validly objecting to the transfer of his employment relationship will continually be employed by the transferor. In the UK, a relocation of a place of work creates a “redundancy” under law. So a transfer of business abroad would entitle an employee to redundancy pay.

As other Member States have not implemented such a right, e.g., France, Italy, the Netherlands, Spain or Belgium, the question is, whether the right to object applies to employees not entitled to object the transfer under the governing law of their employment relationship, which is now transferred to a Member State, which has a right to object. Similarly, the question arises, whether employees maintain their right to object, if their employment relationship leaves the scope of the national law granting this right. Generally, as the change of the place of work in connection with a cross-border transfer leads to a significant change in the employee's personal and social situation, consideration must be given to the idea of granting a general right of objection. Alternatively, in cross-border situations the general concept of an automatic transfer of the employment relationship to the transferee might be restricted: As a consequence an employment relationship would only be transferred if the employee agrees to the transfer after being informed about it. However, these concepts might generally only apply if the Directive is changed, so that there is room for legislative action to be taken on the EU level (cf. also below Chapter 3 – Measures).

Within the Member States which have adopted a right of objection, the requirements for the exercise of this right vary: Under German § 613 a (6) BGB the employee is granted a general right to object to the transfer of his employment relationship. The employee may do so in writing and within one month of receipt of the notification, which the former employer or the purchaser of the business or part of the business is obliged to post pursuant to § 613 a (5) BGB.

Under s. 3(4) of the Austrian AVRAG a right of the employees to object to the transfer is only given in two situations, where the transferee refuses to take on a transferor's obligations in relation to an occupational pension scheme arising from individual employment contracts, or where a pre-existing collective agreement is superseded by a collective agreement to which the transferee is party that provides for a weaker level of protection against dismissal and the transferee refuses to incorporate the provisions of the pre-existing collective agreement in this regard into the individual employment contracts of the transferring employees. However, transferring employees can only object to a business transfer on this basis if the transferor continues to operate a business subsequently, as otherwise the relevant provisions of the pre-existing collective agreement would automatically be incorporated into their employment contracts by statute. If, on the other hand, in such a situation employees do not object they lose their strong protection against dismissal since the transferor's collective agreement is replaced by the transferee's. In both cases specified in s 3(4) AVRAG the right of objection has to be exercised within a period of one month.

However, a general right for affected employees to object to business transfers is discussed in Austria. The Supreme Court, which has indicated that the right of employees to object to business transfers may not be restricted to the two situations covered by s 3(4), has yet to confirm the position in this regard. So far, the Supreme Court has decided that employee members of works councils have the right to object to the transfer of their employment as, otherwise, employers could end their involvement in the works councils by simply disposing of the part of the business in relation to which they were employed.

1.9. Collective bargaining agreements

1.9.1 General Difficulties

A very complex issue is the question to which extend collective bargaining agreements still apply after a cross border transfer. Firstly, there are multiple understandings of the term “collective bargaining agreements” within the Member State. This may include agreements between the employer and a trade union, with the trade union and an employers’ association or the chamber of commerce and agreements between an employer and the works council or another representative body of the employees. For the purpose of this study a distinction is drawn between “collective bargaining agreement” as an agreement with a trade union or a comparable employees’ association (cf. 1.9.2) and a collective regulation restricted to establishment level either by an agreement with the employees’ representation body or by unilateral commitment of the employer (cf. 1.9.3).

Additionally, the different standards on the application and usage have to be considered: in continental Europe collective bargaining agreements are more frequent and have a different effect on employment relationships than in the UK. In the UK only certain aspects of collective bargaining agreements may become legally binding, and only then by “incorporation” into individual employees’ contracts of employment. The basis of employment is the individual’s contract, not the normative collective agreement. However, the legal effect of collective bargaining agreements also differs in the Member States of continental Europe. E.g., in Germany a collective bargaining agreement may have impact on the employment relationship on an individual basis as a contractual term or as a collectively binding, “normative” term governing the employment relationship. Therefore, the effect of Article 3 (3) of the Directive concerning the continuity of collective bargaining agreements after a transfer of business varies according to the understanding of collective bargaining agreements in each Member State.

In case of a cross-border transfer of business with its simultaneous relocation abroad, special consideration must again be given to the question of the applicable law. As collective bargaining agreements differ from individual private law agreements it is dubious whether the applicable law can be determined by the rules of international private law:

- Where the business (or part thereof) in question is acquired by a company domiciled in another country and, at the same time, relocated to that country the majority of legal commentators in Austria submit that the transferring employees would not be entitled to rely on the terms and conditions of any pre-existing collective agreements or works agreements. The application of collective agreements would require the business in connection with which the employees are employed would need to be situated in Austria. However, some Austrian legal commentators have suggested that the relocation of a business (or part thereof) to another country would necessarily alter the national law that applied to those employees. If this were the case, the extent to which they would be protected by any pre-existing collective agreements or works agreements would depend on whether the laws of the country to which the business were relocated recognised foreign collective agreements and/or works agreements.
- Under German or Italian law, collective agreements are regularly restricted to the national territory. As for the Belgian CBA 32bis, the application of the CBA's are territorially limited to Belgium.

- The application of collective bargaining agreements in Hungary is similarly in general restricted to the national territory. However, statutory or case law on this issue is not to be found yet.
- In France, the non-application of French collective bargaining agreements after a cross-border transfer could be contended by the following two reasons: (i) collective bargaining agreements usually refer to French law. Therefore, the principle of territorial application of French law prevents an application outside France, (ii) collective bargaining agreements regularly restrict their geographical scope to a given and limited area, which per se prevents an out-of-scope application.
- Dutch collective bargaining agreements are assumed to be a national (or even a regional) matter, so the applicability is restricted to the Netherlands. This is only different for employers who are temporarily employed abroad. Cross border collective bargaining agreements are very rare. Subsidiaries of foreign company's are not obligatory bound to a collective bargaining agreement. If the Dutch subsidiary participates in a Dutch employers organisation, which is bound to a collective bargaining agreement, the Dutch subsidiary is bound too. After a transfer the collective bargaining agreement of the receiving company does apply on the new business unit, unless the business transferred was subject to another collective bargaining agreement. No indication were found, that this would be different for internationals transferred companies.
- Collective bargaining agreements under Spanish law could only with difficulty apply as regards cross border relocations since this is a question subject to territorial national law. Therefore, according to Spanish labour law, collective bargaining agreement just bind the parties which signed it, or, in case of sectorial collective bargaining agreements, this has to be negotiated and signed by duly negotiational bodies, both on the part of the employers and on the part of the trade unions or legal representatives of the employees. Furthermore, collective bargaining agreement in Spain must compulsorily determine its territorial scope, and, consequently would never apply abroad.
- Collective bargaining agreements are in any event not entered into in the UK with the intent that they should apply outside the UK, and British trade unions generally operate only within the UK. In the case of internationally mobile transport workers, mainly as seafarers and crew (flight deck and cabin staff) of civil airliners, these operate either by reference to the place of registration of the ship being in the UK or otherwise by virtue of the employees being based in the UK.

Eventually, another problem in case of cross-border transfer arises with regard to employee membership in trade unions. Though the membership should generally not be affected by a cross border transfer, the question may arise, if an employee, in particular, with regard to relocation abroad is still represented by the original union after the transfer. This question must presumably be solved by the statute of the union, which regularly leads to an exclusion of the employee's representation by the union (e.g. according to the statute of the German trade union on services "verdi" the representation of employees is limited to employment relationships within Germany). So, e.g., a recognition agreement with the Transport and General Workers' Union in respect of a British undertaking could not practically be maintained if that undertaking should be transferred to France and the employees of the undertaking follow it because the Transport and General Workers' Union does not operate in

France and indeed might not be given legal recognition or any form of status in France. Equally, the union would almost certainly be unwilling to operate in an environment that is completely different from its own knowledge and understanding.

The same problems occur with regard to the employer's representation in collective bargaining. No exception is provided in Article 3 (3) of the Directive for the case where the transferee is unwilling or unable to take part or be represented in the national, regional or other bargaining forum. This problem is shown on a national level by the UK decision in the case of *Whent v. T Cartledge Ltd* [1997] IRLR 153 where there had been a transfer of an undertaking from the National Health Service to a private sector contractor. The terms and conditions which apply to the employees who transferred were in part determined through collective bargaining through the Whitley Council established for the National Health Service. The private sector employer was not, however, eligible to take any part on the employer's side of that bargaining, but was nevertheless held bound to apply changes to the collective agreement negotiated through that mechanism in respect of those employees who previously remained within the description of employees covered by the Whitley Council.

1.9.2 Continuity of Collective Bargaining Agreements

With regard to continuity of terms and conditions agreed in any collective agreement Article 3 (3) of the Directive provides that the transferee shall continue to observe these agreements on the same terms applicable to the transferor until the date of termination or expiry or the collective agreement or the entry into force or application of another collective agreement. The Member States are free to limit the period of observance. However, this may not be less than one year. In the event of a cross-border transfer of an undertaking between Member States, it will therefore be interesting to examine in what way Article 3 (3) of the Directive is implemented into national law and what effect the national law has on the collective bargaining agreement. This question offers a wide range of practical and legal problems because the Member States have established various differing and complex regulations how and to which extend collective bargaining agreements have to be preserved after a transfer of business. Conflicts of law may here especially occur with regard to the possibility of substitution of a transferor's collective agreement by a comparable agreement of the transferee and the extent of a substitution to the detriment of the employee. Additionally, the possibilities to modify working conditions on the basis of a collective agreement differ within the Member States.

1.9.2.1 Austria

Under Austrian law the continuity of a transferor's collective bargaining agreement depends on the fact whether the transferee is bound by another collective bargaining agreement or not.

Where the transferee is bound by another collective agreement when the business (or part thereof) in question is transferred to it, the working conditions provided for in the transferor's collective agreement are maintained in at least two regards according to AVRAG, s 4(2). First, it provides that the transferring employees are entitled to the minimum wages (for standard working hours) set by the collective agreement to which the transferor was party if and so long as the collective agreement entered into by the transferee provides for lower minimum wages. This rule does not apply where higher wages are provided for in the individual employment contracts entered into with the transferor. Secondly, s 4(2) provides that any terms within a collective agreement entered into by a transferor that afford the transferring employees a certain level of protection against dismissal (e.g. restriction of the

reasons for dismissal) are statutorily incorporated into their employment contracts if the transferor ceases to operate a business following the business transfer.

If the transferee is not bound by any other collective agreement when the business (or part thereof) in question is transferred to it, Austrian law provides that the collective agreement to which the transferor was party automatically transferred to the transferee in such a situation. Accordingly, the transferring employees were, and are, guaranteed the protection provided by that collective agreement until it expired or was terminated, or until another collective agreement was concluded by (one of) the employers' organisation(s) to which the transferee belonged. As most employers in Austria are obliged to be members of the Chamber of Commerce or another employers' organisation that is able to conclude collective agreements, this scenario is very rare in practice.

1.9.2.2 Belgium

The law of 5 December 1968 on Collective Bargaining Agreements and Joint Committees expressly provides in Article 20 that *in the event of a total or partial transfer of an undertaking the new employer is required to respect the agreement of the old employer until it ceases to produce these effects*. The Belgian legislator did not choose to limit the duration of the application of a transferor's collective bargaining agreement according to Article 3 (3) of the Directive. A collective agreement only ceases to apply if it has been denounced by one of the parties in case it was concluded for an indefinite period in accordance with the provisions of Article 15 of the law, or, if it expires in case it was concluded for a fixed period⁵³.

There is, however, controversy surrounding the question of whether the same principle applies to collective employment agreements concluded at the sectoral level, in the event that the new employer does not operate in the same sector. Recently, the Belgian Court of Cassation decided that Article 20 of the law does not prohibit the conditions of the transferee's collective bargaining agreement from being applied provided that the conditions of the transferee's collective bargaining agreement are more favourable to the transferred workers than those of the transferor.

1.9.2.3 France

With respect to agreements entered into with trade union representatives at national, regional and/or company level, any collective bargaining agreements applicable at the time of a transfer of business subject to Article L. 122-12 § 2 of the French Labour Code are, according to Article L. 132-8, automatically 'terminated' by virtue of the transfer, and the collective agreements applicable by the transferee become immediately applicable. The former collective agreements will, however, continue to apply during a temporary 'survival period' of 15 months maximum after the effective transfer. During this period, the transferred employees would continue to benefit from the advantages provided by these agreements together with the collective agreements applicable within their new company (the benefits of both collective agreements do not cumulate, but the employees may choose, within the same category of benefits, those that are more favourable to them considered globally, in each of the collective agreements).

Meanwhile, the new employer would have to negotiate with the trade union representatives, in order to try to reach an agreement allowing for the harmonisation of the benefits and status of

⁵³ C. Wantiez, *Transferts conventionnels d'entreprise et droit du travail*, Larcier, 2003, 120.

all its employees. If a so-called ‘harmonisation agreement’ is reached, the survival period would terminate immediately on the same date and the new provisions would become enforceable. If no agreement was reached at the end of the survival (15-month) period, the collective agreements of the former employer would cease to apply. In this case, the transferred employees would only keep individual acquired benefits (such as a seniority bonus), which would be incorporated automatically as part of their employment contract.

1.9.2.4 Germany

Collective bargaining agreements of the transferee only continue to be binding on a collective level if the transferee is bound to the collective bargaining agreement like the transferor, especially because of the membership to the employers’ association having concluded the relevant collective bargaining agreement. In this case the collective bargaining agreement will govern the employment relationship with each employee being member in the trade union, which is party to the collective bargaining agreement. If either the transferee or the employee is not bound to the collective bargaining agreement, the provisions of the agreement will regularly transform into additional provisions of the individual employment contracts.

Generally rights and obligations arising from collective bargaining agreements can be altered by other collective bargaining or works agreements.⁵⁴ This principle applies by operation of law to agreements which exist at the transferee’s business at the time of the business transfer, but also to agreements concluded after the transfer, if both parties, i.e. the assumed employees and the purchaser itself, are bound to the agreements by law.⁵⁵ With regard to modifications on a contractual basis with the individual employee, the so-called favourability principle (*Günstigkeitsprinzip*) applies: collective bargaining agreements can only suppress those individual clauses which are less favourable to the employee or – in other words – the terms and conditions more favourable to the employee override the less favourable ones.

However, the favourability principle does not apply with respect to rights and obligations in collective bargaining agreements at the transferor’s business, which were transformed into additional provisions of the individual employment contracts as a result of the transfer of business. These provisions may generally be altered to the disadvantage of the employee.

1.9.2.5 Hungary

According to the Hungarian Labour Code, if a transferor was party to a collective agreement before the transfer, the transferee is bound by the work conditions (not including working time regulations) prescribed by that collective agreement. However, this only applies to employees transferred to the transferee within one year of the date of transfer.

The situation is different if the transferee is also part of a collective agreement. In this scenario, if the work conditions is stipulated in the collective agreement applicable to the transferee are, as a whole, more favourable for the employees than those contained in the collective agreement applicable to the transferor, the former will apply. However, this choice is not available to transferred employees where the transferee enters into a collective agreement after the date of the transfer: in these circumstances, only the new collective agreement will govern their employment relationships.

⁵⁴ § 613 a (1) sentence 3 BGB.

⁵⁵ § 613 a (1) sentence 3 BGB.

A collective agreement entered into by the transferor will not apply to transferred employees if it ceases to apply within one year of the transfer, either because a new collective agreement replaces it or because its term expires.

1.9.2.6 Italy

Under Italian Law the transferee has to keep up the economic and working conditions provided by the collective contracts in force at the moment of the transfer till their expiry date unless they are substituted with different collective contracts applicable to the transferee's business. Such substitution is possible only with collective contracts of the same standard. This has been clarified by the Italian Supreme Court in judgment no 9545/1999, as the Court held, that the transferor's collective agreement shall apply to the transferred employees only if the transferee does not apply any collective contract.

In order to harmonise employment contracts, the transferee may apply a collective contract of the same standard as the one applied by the transferor before the transfer. In some cases, the transferee may propose to his employees to enter into new 'harmonisation contracts'. Such contracts are not expressly envisaged by law; and their content may substantially change from case to case. In any case, normally the relevant unions play an important role in the negotiation procedure.

1.9.2.7 The Netherlands

Dutch law provides that through the transfer of an undertaking the rights and obligations ensuing from employment law provisions of a collective bargaining agreement, which are binding on the transferor, pass to the transferee by operation of law. The aforementioned rights and obligations terminate at the time the transferee is bound by a collective bargaining agreement concluded after the date of transfer of the undertaking, and is on that basis obliged to comply with those provisions. The rights and obligations also terminate as soon as the collective bargaining agreement applicable at the time of the transfer expires. The same applies if a collective bargaining agreement is by declaration generally binding; all existing rights and obligations pass to the transferee by operation of law. To this extent the collective bargaining agreement also applies to employers and employees who are not associated with the parties to the collective bargaining agreement.

The transferee which is not a party to the transferor's collective bargaining agreement will not be bound by that collective bargaining agreement, but it will have to apply the rights included in it to the employees transferred to it. In practice, therefore, it is possible that the same employer will have to apply two collective bargaining agreements to two different groups of employees within its company. However, the transferee may no longer be bound by the collective bargaining agreement applicable to the employees transferred to it if the transferee itself becomes bound by another collective bargaining agreement. In such an instance, those provisions will apply to all employees within its company without distinction as to their origin.

The transferee only will be freed from the effect of the transferor's collective bargaining agreement if the transferee itself becomes bound to a collective bargaining agreement applicable to all employees, and if that collective bargaining agreement arranges all matters at least to the same standard as was previously the case. Even if the transferor's collective bargaining agreement is terminated by expiration the transferee continues to be bound by the 'direct effect' and 'continued effect' of collective bargaining agreement provisions. The

‘direct effect’ means that the employment conditions included in a collective bargaining agreement have a direct effect in the individual contracts of employment of employees who are not members of a trade union/collective bargaining agreement party. ‘Continued effect’ means that the employment conditions included in a collective bargaining agreement also remain in force after the end of a collective bargaining agreement between the employer and employee until the time they make other agreements or a new collective bargaining agreement takes force.

1.9.2.8 Spain

A collective bargaining agreement which applies to the transferred company, work centre or autonomous production unit at the time of a transfer, continues to apply to the affected employees unless otherwise agreed (once the transfer is completed) between the transferee and the employees’ legal representatives. This application is maintained until the collective labour agreement expires or until a new collective agreement comes into force and applies to the transferred economic entity.

Thus, Spanish regulation does not oblige the new employer to maintain indefinitely the working conditions provided by the collective agreement which applies to the transferred company at the time of transfer. Working conditions may be harmonised through a new collective agreement entered into after the transfer and through the negotiations with the employees’ representatives.

1.9.2.9 United Kingdom

The UK has never adopted Article 3 (3) of Directive 2001/23, which enables work agreements and collective bargaining agreements to be preserved by the transferee for only a year after a business transfer has taken place. Instead, the TUPE Regulations state that where, at the time of a transfer, there exists a collective agreement with a trade union recognised by the transferor, “that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if made by or on behalf of the transferee with that trade union ...”. However, collective agreements in the UK typically have a very different role to those in continental Europe. In particular, there are few industries where national collective bargaining between employer’s organisations and trade unions have a normative effect. Moreover, such agreements are not given any legally binding effect as UK law presumes that collective agreements are not legally binding between the negotiating parties. Only certain aspects of those agreements may become legally binding, and only then by “incorporation” into individual employees’ contracts of employment.

Arguably, the Directive’s emphasis on collective agreements does not produce equivalent effect in the UK system, where the basis of employment is the individual’s contract, not the normative collective agreement.

1.9.3 Collective Regulations restricted to Establishment Level

Under some jurisdictions the employment conditions are also governed by collective regulations restricted to the level of the establishment, e.g., in-house customs or agreements between employer and works council. If these regulations are maintained in case of a cross-border transfer they will move out of their home legislation. It is therefore questionable if and to what extent these provisions still apply after a transfer of business and which law will be applicable.

- Under French case law the employer's in-house customs and unilateral commitments are not integrated into the employees' employment contracts. However, they would be, according to French case law, transferred automatically to the new employer, and would thus be enforceable against the new employer. The new employer would however be able to initiate a procedure to terminate them. Such a termination would be subject to prior information of employees' representatives and employees affected and subject to a sufficient notice.
- Under German law works agreements may also continuously apply on a collective or individual basis after a transfer of business: The decisive factor is, whether the establishment constitutes an independent establishment after the transfer and preserves its autonomy. With regard to the transfer of a part of business it is required that this part is set up as an independent business.⁵⁶ Under these preconditions, the works agreements apply to the employees employed in the relevant establishment. Otherwise, the terms and conditions agreed in the works agreement will become part of the individual employment contracts.
- Under Austrian law works agreements between the individual employers and the works council operate in much the same way as collective agreements (and therefore statutory laws) in that they are legally binding on employers and employees without needing to be incorporated into individual employment contracts. Works agreements generally stick to the businesses to which they relate without much regard for their owner, such that if a particular business is being transferred the new employer would be bound by the works agreements his predecessor has concluded with the works council. Thus, employers must generally honour pre-existing works agreements following business re-organisations or business transfers and cannot 'start with a clean slate'. In practice however, it is often extremely difficult to determine whether, and to what extent, transferring employees are entitled to rely on a pre-existing works agreement where after the transfer the business (or part thereof) is fully integrated into the transferee's business.

1.10 Information and consultation obligations

Article 7 of the Directive contains certain obligations of the transferor and the transferee to inform the representatives of the employees affected by the transfer and to consult with the representatives of the employees in good time. The Directive provides that the employees' representatives have to be informed of

- 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, and
- any measure envisaged in relation to the employees.

⁵⁶ Cf. FLC of 5 February 1991 – 1 ABR 32/90, NZA 1991, 639; FLC of 27 July 1994 – 7 ABR 37/93, NZA 1995, 222.

If there are no employees' representatives in the business or undertaking to be transferred, this information must be given directly to the individual employees concerned. A duty of consultation with the employees' representatives in order to reaching an agreement is under the Directive only given if the transferor or the transferee envisages measures in relation to his employees.

Even though these obligations have been transformed to the relevant national law of the Member States there are, however, certain differences with regard to the specific duties imposed by the national legislation, as some Member States, e.g., Italy, Spain or Hungary, provide for a certain procedure of consultation which may even lead to a delay or the invalidity of the transfer. In this context, it has to be established if more restrictive duties may be passed on to a party of a cross-border transfer stemming from a jurisdiction with less limited duties, for example if employees' representatives whose national laws allow for an injunction may stop a transfer in a Member State which does not know such a claim. As both parties of the transfer of a business are affected by the Directive, it might also be possible, that different national laws apply to the same transaction depending on the national jurisdiction applicable to the transferee or the transferor. Additionally, as there are different standards of information duties and generally both, transferee and transferor, are obliged to give information about the transfer, there is a practical risk, that employees' representatives and employees receive different, sometimes even contradictory information.⁵⁷

1.10.1 Austria

In addition to the general duty to inform and consult works councils on all matters affecting employees' interests (ArbVG ss 91–92), employers are also obliged to provide detailed information to works councils in relation to business transfers (ArbVG, s 108(2a)). Such information must be provided 'on time' and before the transfer in question has taken place. The employer must inform the relevant works council of the 'measures' it intends to take in relation to the proposed business transfer, the reason(s) for those 'measures' and their likely legal, economic and social impact on the employees (ArbVG, s 108(2a)).

Where there is no works council in place, the transferor or the transferee must give the information specified above (including the proposed date of the transfer) in writing to the employees likely to be affected (AVRAG, s 3(a)).

1.10.2 Belgium

This Royal Decree of 27 November 1973 imposes upon the employer an obligation to communicate to the works council, at regular intervals, economic and financial information and the nature and the content of any internal decisions which are likely to have significant implications upon the undertaking, which also includes the decision concerning a transfer of a business unit entailing the transfer of all personnel working in that business unit.

Additionally, CBA no 9 of 9 March 1972 provides that the Works Council must be informed in due time and before any disclosure of decisions in the event of mergers, concentrations, take-overs or closures or other important structural changes made by the company.

These obligations of information and consultation fall upon the transferor and the transferee. All this information and these consultations have to be prior and effective under the Directive

⁵⁷ Cf. *Hepple*, Report for the European Commission DG-V, May 1998, p. 13 et seq.

which provides that they have to be executed in order to lead to an agreement⁵⁸. Both CBA no 9 and Royal Decree of 27 November 1973 may lead to criminal sanctions.

In the absence of a works council or trades union delegations, the workers concerned have to be informed according to the requirements laid down in Article 7 (6) of the Directive.

1.10.3 France

According to Article L 432-1 of the French Labour Code, the works council in charge must be consulted with prior to any final decision being made by the company's management regarding the organisation, the general operation and/or the management of the business. Taking into account the broad scope of this provision, the works council must be consulted prior to any transfer of an autonomous economic entity.

On this account the works council must be given written information on the contemplated decision, which must be as detailed as possible to enable it to give an opinion. The information must be forwarded within a reasonable time period before the consultation meeting with the employer's representative. As a rule of thumb, a 'reasonable' time period would be a minimum three to four weeks before the date scheduled for the consultation meeting.

The written information provided to the works council for consultation purposes, should include:

- the reasons for the contemplated transfer of business;
- the legal conditions of such transfer;
- the contemplated time schedule;
- the target organisation of the activity concerned, after the transfer;
- the consequences of such transfer on the employees concerned, namely with respect to employment agreements, collective bargaining agreements, in-house agreements, company policies, profit-sharing, retirement funds and health benefits, employee representative bodies, etc.

1.10.4 Germany

German law does not provide for a general right of the employees' representatives to information and consultation in case of a transfer of business as provided in Article 7 (1) of the directive. However, there is a broad range of special rights of information and consultation which might also apply if the transfer of business is combined with measures affecting, e.g., the personnel situation or the work organisation of the business. Of particular importance is the duty to inform the works council in an undertaking which regularly employs more than 20 employees about operational changes according to § 111 BetrVG, as this duty is combined with comprehensive rights of consultation, inspection of respective documents (if required, by external experts) and the conclusion of a reconciliation of interests (*Interessenausgleich*), which lays down the basic details of the operational change. There is no statutory obligation to reach an agreement on the reconciliation of interests, but the employer must seriously attempt it. However, a mere transfer of business does not constitute an operational change. An "operational change" is only given in case additional factors, such as a reduction or shut-down

⁵⁸ L. Peltzer, *Transfert conventionnel d'entreprise*, (2003) EDS 156.

of the whole operation or essential parts thereof or a relocation are combined with a transfer of business.

If the change in operations does result in economic disadvantages for the employees, the works council can also demand negotiations on a social plan (*Sozialplan*). However, a transfer of business itself does not lead to economic disadvantages, even if the working conditions, e.g. by a change of the applicable collective bargaining agreements, become worse. A disadvantage to the employee must be a direct consequence of the operational changes, e.g. restriction of career advancement, longer journeys etc. In contrast to the reconciliation of interests, the social plan can be enforced by conciliation proceedings.

According to § 106 BetrVG there are additional duties to give information to and to consult with the economic committee (*Wirtschaftsausschuss*), which must be established in all undertakings employing regularly more than 100 employees, and has the task of consulting with the employer on economic matters and reporting to the works council. The information must be given in a timely manner and provide full information together with the necessary documents regarding economic matters which concern the business (unless this would jeopardise the company's business and operational secrets) and set out any implications these may have for personnel planning. Therefore, regularly, if employers intend to transfer a business, the economic committee has to be informed in advance before decisions about the transfer are taken.

Infringements of obligations to inform and consult with the works council and/or the economic committee would generally not result in the steps and measures of the operational change being null and void. However, the BetrVG also provides for penalties for violation of the legal duty to involve the works council and the economic committee at an early stage.

Different from Article 7 (6) of the Directive, § 613 a (5) BGB provides for a general duty to give information to each employee about the circumstances laid down in the Directive. This duty applies to both, the transferor and the transferee, but may be carried out by each of them alone or jointly. The information must be given in textual form.⁵⁹ With the receipt of such information (even if it follows the business transfer) the period for exercising the right to object (cf. above 1.8) commences. In cases of improper notification, the employee may object to the transfer of his employment relationship to the transferee even if he started to work with the transferee – this right is only limited in forfeiture cases.

1.10.5 Hungary

Employee information and consultation is treated as a priority by the Labour Code: the representatives of the affected employees must be informed at least 15 days in advance. A consultation must be held with the representatives of the affected employees to discuss the key principles behind the 'measures', the steps that will be taken to avoid any detrimental consequences and the means by which any unavoidable detrimental consequences can be mitigated.

A breach of the consultation obligations affects the validity of a business transfer, only if there is a recognised trade union or a duly elected works council in place. In the absence of a recognised trade union or a works council, the failure of the transferor and the transferee to consult does not have a sanction (in this regard, the Labour Code is a *lex imperfecta* – if a

⁵⁹ Textual form in the meaning of § 126 b BGB requires a declaration in printing but no signature.

court establishes that there has been a breach of the duty to inform and consult employees, there are no legal consequences).

The duty to consult with the representatives of the affected employees must be complied with by both the transferor and the transferee, who are jointly liable for ensuring that the necessary consultations take place before a business transfer. A failure to consult is not excused by the fact that a parent company or another group company took the decisions relating to the transfer – even if there is a global-level transfer, consultations must be conducted on a local level. A failure to consult results in the right of a recognised trade union or the works council to “seek remedy” at court. As to the contents and effects of such remedy (nullity, challenge etc.), the Labour Code remains silent. Therefore it is up to Hungarian jurisprudence to decide, legal consequences of what gravity shall apply to the employer’s failure to consult authorized employee bodies during transfer.

Additionally, there are general employer’s duties of consultation of the works council prior to adopting a decision on plans for actions affecting a major scope of employees, such as reorganisation, transformation or privatisation as well as general duties of information of the works council, i.e. at least every 6 months on the fundamental issues affecting the employer's economic situation or on the plans for major decisions pertaining to a significant modification of the employer's sphere of activities and investment projects, which both might also concern business transfers.

1.10.6 Italy

According to Italian law the transferor must carry out an information and consultation procedure with the unions, if he employs more than 15 employees.⁶⁰ The transferor and the transferee should give notice to the unions at least 25 days before the ‘reference date’ of the transfer. The reference date is either the date of signature of the transfer agreement, the date of signature of the preliminary contract of transfer or, if these documents are not applicable, any agreements which are aimed at the transfer and are binding upon both parties. With specific reference to companies’ mergers and spin-offs the case law on determining the reference date is not clear. It has been held that the notification to the unions should be carried out 25 days before the merger (or spin-off) has been approved by the company’s board of directors or, in other cases, which the 25 days before the shareholders’ resolution in relation to the merger and/or company split.

Within seven days of receiving the notice, the relevant unions are entitled to require the management of both the transferor and the transferee to give a joint assessment of the situation. The parties to the transfer shall start the consultation/information procedure within seven days of the request of the unions. Should the consultation not be over within ten days from the starting date, it shall be considered complete.

Should the above procedure not be followed, totally or partially, the relevant unions are entitled to file a complaint with the local Employment Court. Within two days of the filing, the court may grant an injunction against the transferor and the transferee, ordering them to stop any ‘anti-union conduct’, i.e. ordering them to follow the above information/consultation procedure. Criminal consequences may follow for non-compliance with such an order.

⁶⁰ Article 47 of Law no 428/90.

1.10.7 The Netherlands

Subject to the Works Councils Act (*Wet op de Ondernemingsraden*) employers are obliged to inform and consult the works council on all “intended” decisions that could (directly or indirectly) affect the employees’ interests. An employer, who plans to transfer a business, must seek the works council’s “advice” prior to executing this decision. Subject to the WCA, the employer is obliged to inform the works council of the intended transfer of business at such a stage that the advice can actually have a relevant impact on the decision. The WCA entitles the works council to all information that it thinks is necessary for drafting its advice. The works council is furthermore entitled to seek legal or other advice from third parties if it thinks this is necessary. The employer is obliged to pay for the costs incurred. However, the employer is not obliged to seek the works council’s agreement and furthermore he is not bound by the advice of the works council.

If there is no works council or employee representation present, the employers (transferor and transferee) must (in a timely manner) inform the individual employees who shall be “affected” by the transfer of the circumstances provided for in the Directive. “Affected” employees in this context refer to both the employees who will actually be transferred as well as to employees who shall not be transferred. The obligation to inform employees creates a difficulty in cases of “small” business transfers because the transferor and the transferee are obliged to ascertain which employees are actually affected by the (minor) transfer.

Furthermore, trade unions are entitled to be involved in the decision to effect collective redundancy and in its implementation.⁶¹ An employer who intends to terminate the employment of at least twenty employees working in an area of operation, at one or more times within a three-month period, must notify the interested ‘associations of employees’ in writing for the purposes of timely consultation.

1.10.8 Spain

Both the transferor and the transferee have to inform the employees’ legal representatives of the transfer of undertaking by providing them with the relevant information. When the transfer results from a merger or spin-off both the transferor and the transferee have to provide the said information, at the latest, when the invitation for the shareholders’ meetings regarding the merger or spin-off is published.

In the event that there are no employees’ legal representatives, the information must be directly provided to the concerned employees.

Finally, should the transfer of undertakings will come as a result of a merger, takeover or any other modification of the “legal status” of the company which will affect the number of employees of the said company, the employees’ legal representatives must issue a report, such report not being binding for the employer.⁶²

Concerning obligations of consultation with regard to modifications of the working conditions due to geographical mobility or substantial changes in working conditions cf. above 1.7.

⁶¹ Section 13 of the Collective Redundancy (Notification) Act (CRNA).

⁶² Article 64.1.5 ES.

1.10.9 United Kingdom

Under the 2006 TUPE Regulations, employers have to inform (and where measures are proposed consult with) with a recognised trade union or, if there is none, with employee representatives (who themselves must be employees) in case a business transfer is proposed. Additionally, both the transferor and transferee of a business are required to give the information provided for in the Directive to any recognised trade union or elected employee representatives for any employee they represent who is affected by a transfer (including those who do not actually transfer).

There is only an obligation to consult if either the transferor or transferee intends to take any “measures” in relation to its affected employees. In UK law “consultation” means listening to representatives’ representations, considering them and replying to them (with reasons). The obligation is to consult “with a view to seeking agreement” on those “measures”.

Failure to inform and consult only results in financial penalties. Failure to inform or consult entitles a trade union or employee representative to make a complaint to an employment tribunal within three months of the completion of the “relevant transfer”. If a complaint is upheld, the employment tribunal must make a declaration and may order the employer to pay “appropriate compensation” to the affected employees – but this is subject to a maximum of 13 weeks’ (gross) pay per employee.

1.11 Employees’ representatives rights

Article 6 (1) of the Directive provides that 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 in case the undertaking preserves its autonomy. National law of the Member States contains similar provisions, as, e.g. in Austria, Belgium, France or Spain. Therefore, if an economic entity retains its identity and is transferred as a whole, the representation of the employees affected is maintained. This may create practical difficulties upon European cross-border transfers of enterprises, when the law applicable to transferees does generally not provide for employees’ representation bodies identical to those existing at the place of the transferor and benefiting from the same powers and privileges.

An employment relationship of a member of an employees’ representation body will regularly be transferred to the transferee in case of a business transfer and any special employment conditions (e.g. protection against dismissal, paid suspension from work) generally maintained. There are, however, some national particularities which might in case of a cross-border transfer lead to a conflict of laws:

- Concerning protection against dismissal of the workers’ representative, Belgian law provides that this protection ends when the worker is no longer a member of the employees’ group⁶³. However, to conform to the provisions of the Directive, the Belgian legislator has provided that protection will be maintained whenever there is a transfer by contract. This provision also applies when, following a transfer by contract, the transferee is no longer in a position to establish a new council because of its status for instance⁶⁴.

⁶³ Article 21, §2, 2°, of the Law of 20 September 1948.

⁶⁴ TT Anvers of 11 March 1998, (1998) JTT 436; C. Wantiez, *Transferts conventionnels d’entreprise et droit du travail*, Larcier, 2003, 134.

- Under French law the transfer of staff representatives' employment contracts to the new employer is automatic by virtue of law without any specific procedure, except where such employment contracts are included in a partial transfer of enterprise or establishment. In such an event, the transfer of the staff representatives' employment contracts is subject to prior approval by the Labour Inspector. Such obligation must imperatively be complied with by any company located on French territory and effecting a partial business transfer to an enterprise located on the territory of another Member State whenever the transaction involves protected employees. Indeed, such a request of a transfer's administrative approval must be made prior to the partial transfer, at a time when French law indubitably applies.
- As a general rule, Spanish law provides that the transfer of undertakings will not affect the office of the employees' legal representatives when the business unit to be transferred retains its autonomy and identity. *Sensu contrario* when the transferred business is integrated into the business of the new employer, the transferred employees will be represented by the representatives of the transferee's employees, and, therefore, the representatives of the transferor's employee will not remain in office. The special protection against dismissal for legal representatives will last up to one year after the expiration of the office.

Furthermore, in some Member States there are special rules with regard to trade union representation in the business: Under Belgian law, trade union representatives of the business will continue to hold their power of attorney until their expiration if the autonomy of the transferred undertaking is maintained, and until the moment of the reconstitution of it if autonomy is not maintained. In the UK where the undertaking remains a distinct identity from the remainder of the transferee's undertaking and an independent trade union was "recognised" as an "bargaining partner" then after the transfer the union is deemed to have been recognised by the transferee to the same extent in respect of the employees employed.

Finally, according to Article 6 (1) of the Directive the Member States are obliged to take the necessary measures to ensure employees' representation in case the business does not preserve its autonomy after the transfer. In this case most jurisdictions, e.g., Austria, Germany or Hungary, have established an interim mandate of the employees' representation body in charge before the transfer. However, this leads to the legal question of the law applicable on this interim mandate – the law of the place of the business or the law under which the employees' representation body is governed. This might result in a situation that the same representative body is subject to a different legal regulation before and after the transfer. Additionally, there may be practical difficulties to ensure a sufficient representation in case of a long distance between representation body and employees represented. The employees' representatives might not have sufficient facilities for cross-border communication and cooperation with employees' representatives and employees in other Community countries.⁶⁵

1.12 Insolvency situation

With regard to insolvency situations some Member States such as Austria, Belgium, the Netherlands and the United Kingdom, have opted to exclude the application of Articles 3 and 4 of the Directive to transfers where the transferor is subject of bankruptcy proceedings, whereas in France and Germany the relevant provisions on business transfers apply to these

⁶⁵ Cf. Hepple, Report for the European Commission DG-V, May 1998, p. 13 et seq.

situations⁶⁶, cf. Article 5 (1) of the Directive. Italy has chosen a derogation of the general provisions of the Transfer of Business Regulation under certain requirements, e.g. a ministerial declaration of a status of crisis in relation to the business to be transferred or in case of an agreement concerning the maintenance, even partial, of employment relationships between the employer and the relevant unions. Under Spanish law the effects of the transfer of business may be limited by a decision of the judge who hears the insolvency procedure.

As the law on insolvency proceedings is quite specific in each Member State there may be conflicts of law in case of a cross-border transfer. In France, even if the institution of insolvency proceedings does not bar the application of Article L. 122-12 § 2 of the Labour Code, case law admits that this Article does not apply to any employee dismissed by the receiver during the monitoring period under an authorisation granted by the bankruptcy judge or pursuant to a restructuring plan approved by the Commercial Court. Under German law the liability of the transferee is generally restricted to employees' claims incurred after the filing for insolvency proceedings. Additionally, some Member States, e.g. Germany or Spain, provide for guarantee funds, which compensate employees in case of a bankruptcy, e.g. the German Pension Guarantee Fund⁶⁷ with regard to company pension rights or the Spanish Salary Guarantee Fund (FOGASA⁶⁸) with regard to pending salaries.

With no special reference to cross border situations there is a special risk in Member States which have excluded bankruptcy or insolvency cases from the protection of the Directive, that bankruptcies might deliberately be provoked to avoid the consequences of a business transfer, as experiences in the Netherlands have shown. A non-uniform application of the Directive to insolvency situations may lead to an increase of deliberate bankruptcies: the business might be transferred to a Member State, which has opted to exclude bankruptcies from the scope of the relevant business transfer law, as an intermediate step, induce the insolvency and transfer the business to another Member State without restrictions deriving from the application of Directive or the subsequent national law. However, according to Article 5 (4) of the Directive the Member States are held to take appropriate measures to prevent the misuse of insolvency proceedings in such way as to deprive employees of the rights provided for in the Directive. Under Dutch law this led to an incorporation of a remedy for the employee in case he suspects a situation of abuse of a bankruptcy which entitles him to object within eight days after the bankruptcy at the Court.

1.13 Transfer to non-EU countries

According to its wording, the Directive is applicable to transfers of businesses to non-EU and non-EEA countries. This gives rise to the question, whether the application of the national law of the state of origin of the transfer will also apply to a transferee from outside the EU, which, however, will in practice be only of minor importance: Firstly, the relocation of a business must qualify as a business transfer according to the criteria described by the ECJ. Therefore, as personnel or tangible assets will most likely not be transferred over a large distance to non-EU undertakings, this transfer does not fall within the scope of the Directive.

It is also questionable if the identity of the economic unit is maintained, when the changes in the environment are substantial in case of an international transfer (change of country and

⁶⁶ Except, for France, in two cases described below.

⁶⁷ Pensionssicherungsverein auf Gegenseitigkeit.

⁶⁸ The FOGASA is an organisation whose function is to pay employees the amount of any salary or compensation owed but unpaid because of the insolvency, suspension of payments, bankruptcy or creditors arrangement of any employer.

generally language, change in the legal, economic and social context). In this context the French Supreme Court explicitly held that in the event of a relocation of a business from France to Brazil, employment contracts were not transferred, because the business is transferred "to a different environment".⁶⁹

1.14 Data protection

A uniform standard of data protection has been established within the EU, because all Member States have adapted directive 95/46/EC and thus guarantee a certain level of data protection. Therefore, with regard to cross-border transfers the use of employees' data during a transfer of business is already regulated by EU law.

With regard to the Directive in the event of a transfer of business, personal data of the employees affected may only be processed if the person concerned has given his unambiguous consent, or the data is required to implement an agreement to which the person concerned is a party, or is needed to comply with a statutory obligation to which the responsible person is subject. Applying these standards on business transfers submitting personal data of the employee to the transferee is generally in accordance with European law, because the transferee will be party of the employment relationship after the transfer and transmission of certain data of the employee is thus required for the purposes of this relationship (e.g. administration, human resources management). On the other hand, in a potential transfer of business proceedings with a number of potential transferees, the consent of the employees will be required, because there is no contractual or statutory obligation affected yet, which could justify forwarding personal data.

As European Community law on data protection additionally provides that any personal data may not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data, a consistent standard of data protection should be ensured in all situations of cross-border transfers.⁷⁰

1.15 Tax and social security

As questions of tax and social security do not fall under the scope of Directive 2001/23/EC these issues are only dealt with on an excursive basis in this study. Additionally, European law already provides for comprehensive guidelines based on Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community. Generally, under the principles laid down in this regulation, the transferred contracts fall under the application of the social and tax systems of the country where the transferee is established.

This however might lead to practical problems with regard to the employees affected by a change of the governing social security system. It is likely that many employees are reluctant to join the transfer, if this implies the application of a social security system they are not familiar with or which only offers a minor standard than their prior domestic system. Same issues might arise with regard to a change of tax systems. Due to the fact that the employee in principle will be taxed on his salary in the work state, there could be a difference

⁶⁹ Supreme Court of 5 April 1995, n° 1954 PB.

⁷⁰ Cf. Art. 25 Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

between the net income if the employee would have been taxed on his salary in his home state. However, because of the varying social security and tax systems within the Member States a cross-border transfer must not necessarily lead to a reduction of the net income and might in case of an increase of the income even meliorate the acceptance of the transfer by the employees.

1.16 Practical considerations

As pointed out throughout this study, the application of the rule of automatic transfer of employment contracts in connection with European cross-border transfers raises extremely thorny legal and practical issues in the current state of EU law and national laws. Indeed, the approximation achieved by the Directive is only partial in that it merely sets objectives that must be reached and the implementing terms of the rules set forth in the Directive may vary between EU Member States.

With regard to the aforementioned problems, particularly with the application of different national jurisdictions in case of cross border transfers, it is certainly a necessity to establish a regime of uniform application of EC law to cross border transfers. Harmonisation of employment conditions can generally be reached through collective bargaining and works agreements, subject to different prerequisites depending on the applicable collective or individual law. Special rules apply to company pension schemes.

However, the importance of this task and the impact of cross border transfers should be reconsidered in cases of relocations of businesses abroad, which do not merely affect the direct borderline regions, when a large part of the personnel affected will not be willing to move to the new location and to continue their employment relationship in a different social and cultural environment. Additionally, if the transfer is combined with operational changes and the probability of staff reductions in both the target and acquiring undertaking, the employees will also most likely resist integration to a high extent.⁷¹ The objective of safeguarding the employee's rights becomes aimless when the employee is not willing to preserve these rights. To this extent, there is little, if any, evidence, where undertakings or jobs are lost abroad, that employees are complaining they have no legal rights to follow their jobs. Rather, the evidence is that their desire is to prevent the transfer of jobs abroad, or at least to obtain promises of redeployment, retraining and no "compulsory" redundancies, when undertakings/jobs are lost offshore. See for example the campaigns of the Communications Workers Union (www.cwu.org/elephant) and of the Amicus trade union in the United Kingdom.

From a practical point of view, however partly, the "systematic breaches" of the matter of facts may be more critical than the ones of the law. Each corporate group sending employees abroad will, depending on the place of the work assignment, provide for remuneration adjustments, housing allowances, and health insurance etc., in order to ensure that the "living standards" of the employees do not differ seriously according to the places of assignment. Since, e.g. a remuneration calculated as adequate for a work assignment in the City of London will certainly not mirror the adequate remuneration for an assignment in Naples and vice versa. A rule of law that does not consider this and does compel employers to maintain the remuneration agreed upon in the employment contract concluded at the employee's place of origin, does not foster mobility and is unfair, because it treats different matters the same.

⁷¹ Cf. *Hepple*, Report for the European Commission DG-V, May 1998, p. 14 et seq.

If greater mobility of employees in connection with cross border transfers of businesses is politically desired and if one does not want to wait until absolute levelling of all background factors in the common market, practical obstacles (including but not limited to lack of language skills) have to be considered.

Chapter 2

Eventual solutions provided for by the existing legal instruments of international private law (including international jurisdiction)

2.1. Introduction

As stated above (chapter 1, sec 1.2.2) there are two kinds of cross-border transfers to consider in the context of this study. The first case is the transfer of an undertaking, business or part of business to another employer domiciled in a different state than the transferor without the physical relocation of the economic entity transferred. We call this an “Ownership Transfer” below. The concept of a business transfer as derived from the ECJ case law has been explained above in more detail (chapter 1, sec. 1.2.1). For the purpose of this chapter it shall be sufficient to note that the ARD applies to changes in the identity of the person or body responsible for carrying on a business or undertaking (an “economic entity”) arising from a (even indirect) contractual relationship or a legislative or administrative act.⁷² The second type of cross-border transfer involves the physical relocation of the business transferred from one state to another state. We call this a “Relocation Transfer” below.

For the sake of clarity these two situations will be dealt with separately in each subchapter.

2.2 Jurisdiction

2.2.1 General remarks:

The first question a cross-border business transfer raises is which national court has jurisdiction to hear a case against an employer that is domiciled in state A, where the affected employee is domiciled in state B? Once a court has declared itself competent to hear the case it will then go on to apply its own conflict rules in order to decide which law should be applied (cf sec 2.3.). While the conflict of law rules remain incompletely harmonised across all member states, it is therefore crucial to deal with the issue of (international) jurisdiction before reflecting on the applicable law.

In all Member States with exception of Denmark^{65a}, the international jurisdiction must be determined by reference to the EC Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgements (the “Jurisdiction Regulation”), which came into force on 1 March 2002. The Regulation applies in civil and commercial matters whatever the nature of the court or tribunal, excluding the issues mentioned in art 1 (2)⁷³.

As a matter of principle, defendants domiciled in a Member State may be sued only in the courts of that state (art 2(1)). However, sec 2 – 7 of the Regulation set out various instances where such a defendant can be sued (additionally or exclusively) in another Member State (art 3).

⁷² See ECJ 15.12.2005, Case C-232/04 - *Güney-Görres*, par 37, and many others.

^{65a} But see the decision of the Justice and Home Affairs Council Meeting on 27 and 28 April 2006 to extend the Regulation 44/2001 to Denmark by way of an agreement.

⁷³ The only relevant exception in this context seems to be insolvency proceedings.

If the defendant is not domiciled in a Member State the jurisdiction of the courts of each Member state shall be determined by the law of that Member State (art 4(1)).

2.2.2 Jurisdiction over (individual) contracts of employment (Art 18 and 19 of EC Regulation 44/2001:

For matters relating to individual employment contracts, art 18 (1) of the Regulation provides that jurisdiction shall be determined by art 18 and 19 of the Regulation without prejudice to art 4 (see above) and point 5 of art 5 (see below).

Article 19 provides that an employer domiciled in a member state within the European Union may be sued:

- (i) in the courts of the member state where he is domiciled; or
- (ii) in the courts of the member state where the affected employee habitually carries out his work or where he last did so; or - if the employee does not or did not habitually carry out his work in any one country -
- (iii) in the courts of the Member State where the business which engaged the employee is or was situated.

2.2.2.1 Ownership Transfer

a. If a business situated in Member State A is acquired by a company domiciled in Member State B (not Denmark) by way of an ‘asset sale’, the employees of that business may argue that under the national law implementing the ARD⁷⁴ in State A the acquiring company assumes all the rights and obligations arising from the employment relationships with their existing employer. Further, they should be able to sue the transferee in the country where they have been working so far - State A, at least in relation to their individual contract of employment. In addition, the employees could also sue the transferee in his home country - State B - (art 19(1) of the Regulation) at their option. If the employees should wish to sue the transferor they can do so in their home state, since that is where their former employer is situated (art 2(1) of the Regulation).

b. On the other hand, it depends on the implementing legislation whether the provisions on information and consultation of employee representatives and on the preservation of their status and function can also be enforced before the national civil courts or whether their enforcement is guaranteed by other means, e.g. administrative fines. As to the former matter, it must be noted that the transferor and the transferee only have to inform and consult with the representatives of their respective employees (art 6). Therefore, information and consultation is not itself a cross-border issue.

c. As to the effect of a cross-border transfer on the status and function of employee representatives of the business transferred, it must first be established whether in the country of the transferor, State A, employee representation is a “civil or commercial matter” within the meaning of the Regulation (art 1(1)) (see also d.). This is the case in countries where information and consultation obligations can be enforced before the employment courts (e.g. Austria, the Netherlands, Italy).

Second, it must be examined whether the special provisions of sec 5 (art 18 and 19) of the Regulation apply. We submit that they do not, since sec 5 relates to “individual contracts of

⁷⁴ As to the question whether the national law applies to such a situation see sec 2.3. for more details.

employment” and the employee representatives are not exercising rights arising from their employment relationship (if they are employees at all), but from their function as representatives.

Finally, it must be checked whether the matter of employee representation is caught by art 5 (5) of the Regulation. This provision states that a defendant domiciled in a Member State may be sued in another Member State as regards a dispute arising out of the operations of a branch, agency or other establishment situated in that other Member State. In the context of ECJ case law on the concept of a business transfer, it boils down to the question whether an “economic entity” within the meaning of art 1(1) ARD constitutes a “branch, agency or other establishment” within the meaning of art 5(5) of the Regulation⁷⁵. We submit that cross-border business transfers may result in the transferee, which is situated in another country, taking over an “economic entity” that can qualify as a branch, agency or other establishment under art 5(5) of the Regulation. Consequently, employee representatives could take a foreign employer before a national court, provided that the applicable substantive law provides for such a legal remedy in the first place.

d. In countries where employers face administrative fines if they do not comply with their obligations to involve the employee representatives regarding certain issues (e.g. Belgium, Germany, Spain), foreign employers are not necessarily exempted from receiving a fine. In essence, it depends on whether the national rules apply by reason of the employee representation being established on the national territory regardless of where the employer is situated.

e. The possibilities for employees to sue the transferee before a court of their home state may be more limited in the event of a cross-border transfer to a non-EU country. In general, a defendant domiciled in a third country (or in Denmark) can be sued only if this is provided for by the national rules on (international) jurisdiction in the respective Member State (art 4(1) of the Regulation). However, for disputes of an employee against his foreign employer regarding their individual contract of employment, the non-EU employer is deemed to be domiciled in the Member State where the branch, agency or other establishment is situated (under art 18(2) of the Regulation, see above).

2.2.2.2 Relocation Transfer

a. If the business transfer involves the relocation of the business from Member State A to Member State B, as part of the transfer of ownership, the question of jurisdiction is more difficult. As has been mentioned above, art 19 of the Regulation states that an employer can be sued in the courts of the Member State where the (last) habitual place of work of the employee is (was) situated (i.e. State A). Therefore, the courts of Member State A will generally still have jurisdiction over a case against the transferee that is situated in Member State B regarding the employment contract. The reason is that, in general, a mere change of the (contractual) employer would not, of itself, change the employees’ regular place of work. The situation is different if the parties agree that the employee will in the future generally work in the transferee’s country. In this case the employee could generally sue the transferee only in that country; since this can be considered to be the (new) “habitual” place of work.

b. On the other hand, the representatives of the transferred employees generally cannot sue the transferee before the original national court where the business has been moved physically

⁷⁵ See ECJ *Somafer*, ECR1978, 2183, 2194.

across the border. In such a case, art 5(5) of the Regulation cannot be relied on, since this provision requires that the economic entity is situated in the transferor's country (Member State A). Therefore, it depends on the national rules of international jurisdiction whether the employee representatives can bring the foreign employer before a national court in their home state. Generally, the representatives could not sue the transferee since the jurisdiction for such claims requires the business (establishment) to be situated in the state of the forum. The same rules apply, if after the transfer the business is situated in a third country which is neither the transferor's nor the transferee's.

2.3 Governing law

2.3.1 General remarks

In this part we examine the effects of a cross-border transfer on the employment relationships of the employees working in the business transferred. It is the case that Directive 2001/23/EC ("Acquired Rights Directive" - ARD) does not regulate cross-border transfers in detail. According to its art 1(2) it applies "where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty." Therefore, the Directive applies also to both Ownership and Relocation Transfers from one Member State to another Member State or to a third country but does not apply where the undertaking is situated outside the EU originally, even if the Transferor, Transferee or both of them are domiciled in the EU.

The Commission proposal for the ARD of 1974 provided that "labour laws of a Member State which are applicable to employment relationships prior to the merger or takeover shall also apply after the merger or takeover has taken place." This was not to apply where the place of work of an employee was transferred "in a valid manner" to another Member State or where the application of another law was validly agreed with the employee. This proposal was dropped from later drafts, since it was believed that the issue would be dealt with in the draft Regulation on Conflict of Laws in employment matters⁷⁶. However, the proposed Regulation has never been adopted.

At the moment, the "Convention on the Law Applicable to Contractual Obligations" (the "Rome Convention") of 1980 is the only general instrument of international private law common to the Member States that is dealing with contractual relationships, such as employment contracts. Besides, rules dealing with governing law can be found in several acts of secondary legislation of which the Directive 76/91 concerning the posting of workers (the "Posting of Workers Directive") is the most relevant in the context of this study.

2.3.2 The Rome Convention (80/934/EEC):

The Rome Convention is in force in the 15 "old" Member States. After the signature by all the Member States of the accession convention dated 14 April 2005, the Rome Convention will enter into force in the new Member States who ratified the accession convention. The new Member States committed themselves to ratify this convention within a reasonable delay, if possible by the end of 2005. In October 2006, only Poland (and some old Member States) has not yet fulfilled this commitment. Although the protocols on the interpretation of the Convention by the Court of Justice have entered into force on 1 August 2004, there is no case law yet of the ECJ on the interpretation of the Convention.

⁷⁶ OJ 1972, C 49/26.

On 14 January 2003, the European Commission presented a Green Paper⁷⁷ on the question of whether the Rome Convention should be converted into a Community instrument (regulation or directive) and modernised as to substance. A public hearing organised by the European Commission took place in Brussels on 27 January 2004. The Commission adopted a formal proposal for a “Rome I” Regulation on 15 December 2005 (COM 2005 (650)).

The Convention applies to contractual obligations in any situation involving a choice between the laws of different countries (art 1(1)). Certain issues are explicitly excluded from its application (art 1(2)). Any law specified by the Rome Convention shall be applied even if it is the law of a non-contracting party (art 2).

The scope of the law applicable by virtue of the Rome Convention shall govern in particular (art 10):

- a) interpretation;
- b) performance;
- c) the consequences of breach of contract;
- d) the ways of extinguishing obligations, and prescription and limitation of actions;
- e) the consequences of nullity of the contract.

The central feature of the system established by the Convention is the principle of freedom of choice, whereby the parties are free to choose the law applicable to their contract (art 3). Where the parties have not determined what law is to be applied to their contract, it will be governed by the law of the country with which it has the closest connection (art 4).

The Convention contains special provisions for individual employment contracts. Under art 6(2)(a) the Rome Convention provides that in the absence of choice the employment contract shall be governed by the law of the country where the employee “habitually carries out his work in performance of the contract”. If the employee does not habitually carry out his work in any one country, his employment contract is deemed to be subject to the law of the country in which the business through which he is engaged is situated (art 6(2)(b)). If, however, the employment contract is more closely connected with another country, the Rome Convention states that it shall be governed by the law of that country (art 6(2) final limb). In such a case, the employee’s regular place of work is irrelevant, as is the location of the business through which he is engaged.

Even for the parties to an employment contract, a choice of law is possible provided it does not deprive the employee of the protection afforded to him by the “mandatory rules” of the law that would otherwise apply in the absence of choice as described in the previous paragraph (art 6(1)). This means that any state’s law chosen by the parties is in principle applicable to the employment contract. However, where the mandatory rules of law applicable pursuant to art 6(2) gives the employee better protection (e.g. a longer dismissal notice period), its provisions replace the corresponding provisions of the chosen law. In a majority of the countries dealt with in this report it is accepted that business transfer law falls within the category of “mandatory rules”. In some countries (e.g. Austria or Hungary) this is still to be confirmed by the Supreme courts.

⁷⁷ COM (2002) 654 final (cited as “Green Paper”).

According to the Giuliano Report⁷⁸ “mandatory rules” in the meaning of art 6⁷⁹ also consist of rules which in some Member States are part of public law, such as health and safety laws. Further, collective bargaining agreements also fall under such mandatory rules in countries where they are considered as legally binding.

The Convention also uses the term “mandatory rules” in art. 7 with a different meaning. Art 7 (2) stipulates that the courts (or other authorities) of a contracting party may apply those national rules which are applicable irrespective of the law otherwise applicable to the contract. Under art 7(1) the courts may also apply such mandatory rules of another country with which the situation has a close connection. In considering whether to apply such foreign mandatory rules, the court must take into account their nature and purpose and the consequences of their application or non-application. According to the Giuliano report the court has “the extremely delicate task of combining the mandatory provisions with the law normally applicable to the contract in the particular situation in question”. It is important to note that under art 22, contracting states can reserve the right not to apply art 7(1) (e.g. Germany).

For the sake of clarity, we shall call the rules within the meaning of art 7 “overriding (mandatory) rules” in this text. These rules are to be distinguished from the mandatory rules mentioned in art 6, since the former are to be applied by the court without referring to its conflict rules. In contrast to this, mandatory rules pursuant to art 6 can only be applied by the court if the national law, which they are part of, is applicable in accordance with the rules under art 6(2).

Finally, the application of a legal provision of a country which would normally apply under the Convention may be refused by the court if such application is “manifestly incompatible” with the public policy of the State of that court (“ordre public”, art 16).

2.3.3 The Posting of Workers Directive (96/71/EC):

The Posting of Workers Directive applies to undertakings established in a Member State which send workers to work in another Member State in the framework of the transnational provision of services (art 1). For the purposes of the Directive a “posted worker” means a worker who, for a limited period of time, carries out his work in another Member State other than the one where he normally works (art 2(1)). The definition of a “worker” is that which applies in the law of the Member State to whose territory the worker is posted (art 2(2)).

Under the Posting of Workers Directive, Member States have to ensure that, whatever the law applicable to the employment relationship, the (foreign) employers guarantee the workers posted to their territory (host country) certain terms and conditions of employment. These terms and conditions cover at least the following matters: working hours, paid vacation, minimum rates of pay, hiring-out of workers, health and safety at work, protection of pregnant women, children and young people and non-discrimination. According to the preamble of the Directive these terms and conditions of employment constitute a “nucleus of mandatory rules” (par 13).

⁷⁸ Report on the Convention on the law applicable to contractual obligations by Mario Giuliano and Paul Lagarde, OJ C 282, 31 October 1980, 1 – 50.

⁷⁹ The term „mandatory rules“ is also used in art 7, but with a different meaning (see below).

2.3.4 Questions raised by cross-border business transfers:

2.3.4.1 Ownership Transfer

Like the question of jurisdiction, we must distinguish between contractual issues that are regulated by the Rome Convention and other issues of business transfer law.

a. As to the individual employment contract, it must first be established whether or not the business transfer rules are “overriding mandatory rules” within the meaning of art 7 of the Rome Convention. In such a case, the substantive law of the forum would be applied by the court irrespective of the law otherwise applicable to the contract. With regard to the terms and conditions that are defined as a “hard core” of protective measures by the Posting of Workers Directive (see above), one would think that business transfer rules are to be treated as “overriding rules”. On the contrary, in Germany the Supreme Court in employment matters (the Federal Employment Court – Bundesarbeitsgericht) has ruled that business transfer rules are not caught by art 7 of the Convention since they do not pursue public interests⁸⁰. We are not aware of any case law in the other Members States supporting the opposite view.

b. Under Art 6 of the Convention the individual employment contract shall - in the absence of a choice of law clause - be governed by the law of the country where the employee “habitually carries out his work in performance of the contract”. In our view, this basic rule must apply for deciding which law governs the question of whether the transferee automatically takes over the employment relationships of the employees concerned. The same goes for issues of dismissal and the modification of (contractual) terms and conditions. In general, the transferor is domiciled in the country from which the business is transferred and the transferee is domiciled in the country to which the business is transferred. In this case it will be the law of the transferor that governs the above mentioned questions since in most cases the employee ordinarily works or worked in the country where the business is situated. This would also apply if the transferee of a business resides in a non-EU Member State (provided the court is situated in a country that has ratified the Rome Convention), unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

c. On the other hand, the provisions of the ARD relating to the employee representatives (status and function, information and consultation) are not governed by the Rome Convention. These matters are therefore subject to national conflict rules which generally provide for the application of the law of where the business (the employee representation) is situated (territoriality principle).

2.3.4.2 Relocation Transfer

a. It has been pointed out above (sec 2.2.2.a.) that a mere change of the (contractual) employer does not, of itself, change the employees’ regular place of work. Hence, any issues of the individual employment relationship between the employee and the transferor/transferee (automatic transfer of rights and obligations, dismissal, modification of contractual terms and conditions, etc) are generally (and in the absence of a choice of law clause) governed by the transferor’s law (law of regular place of work), albeit with the reservation set out above (no closer connection to another country).

⁸⁰ BAG 29.10.1992, 2 AZR 267/92.

b. If, however, the employee and his new employer (transferee) agree that in the future the employee shall “habitually” work in the transferee’s country [or a third country], where the transferred undertaking is now located a change of the applicable law would follow. Thus, the employment relationship would be governed by the transferee’s law [or the law of that third country]. In this context the question arises of when the change of applicable law takes place. Basically, it could be at the date of the agreement or at the date when the employee actually starts to work at his new workplace. Although this is a general question relating to change in the place of work (even without transfer), it has to be answered (also) in this context. With regard to the remaining differences between the Member States’ business transfer rules this question can be crucial. In our view, it should therefore be considered in an amendment proposal for the ARD (cf 3.13.).

c. As business transfer rules are generally considered as “mandatory law” falling under art 6(1) of the Rome Convention (sec 2.3.2.) a choice of law clause cannot deprive the employee from the protection of the law that is to be applied under art 6(2) of the Rome Convention. Thus, as far as the employment contract is concerned the business transfer law of the country where the employee regularly works generally applies even if the parties have agreed on the application of e.g. US law.

d. As the status of employee representatives and their rights of information and consultation are no contractual matter the Rome Convention does not touch on it.

Under art 6 (1) ARD the status and function of the employee representatives shall be preserved “on the same terms and subject to the same conditions as before the business transfer” provided the business preserves its autonomy. Does this mean that a foreign transferee has to observe these terms and conditions even if the business is transferred to his country?

In our view, art 6 (1) ARD has clearly been phrased without specific regard to Relocation Transfers. Since at present, the laws, as well as national practice, on employee representation differ considerably between the Member States it seems impossible or at least inappropriate to impose on the transferee the duty to preserve the status and function of the employee representatives “on the same terms and conditions” as applied in the previous Member State. Therefore art 6 (1) of the ARD cannot be understood as a conflict rule providing for the application of the transferor’s national rules on status and function of employee representatives even if the business is relocated to the transferee’s country.

The situation is completely different from e.g. art 10 of Directive 2001/86/EC (employees' involvement in the European Company), which provides that the representatives shall, in the exercise of their functions, enjoy the *same* protection and guarantees provided for employees' representatives by the national legislation and/or practice in force *in their country of employment*. In this case, the employer does not have to apply foreign law.

In the absence of a Community conflict rule regarding representation of employees, this issue is generally governed by the law of the state where the business and/or the employee representation are situated. If the whole business is transferred to the transferee’s country, the fate of the employee representatives will generally depend on the respective national substantive rules of this state.

2.4 Conclusions

Cross-border transfers are caught by the ARD where and insofar as the business transferred is situated within the European Union. Under the Directive the transfer of a business results in the automatic assumption of the employment relationship by the transferee on the same terms and conditions. Dismissals because of the business transfer are explicitly prohibited. These issues (and others) concern the individual employment relationship of the employees employed in the business. If the transferee is situated in another Member State, the employee can generally rely on the Jurisdiction Regulation in order to enforce his rights in the country of his regular workplace. The Rome Convention is the legal instrument which governs the question of which law is to be applied in such a case.

On the other hand, the ARD also contains provisions aiming at the preservation of the employee representatives (art 6). If employee representatives want to enforce their rights under the ARD they can rely on the Jurisdiction Regulation provided the business (“economic entity”) transferred has not been relocated to the transferee’s country. In the latter case the international jurisdiction is determined by national law. Equally, there is no Community instrument regulating which law is applicable if the business has been relocated across the borders.

Chapter 3

Measures at EU level that could be adopted to overcome the problems identified

Preliminary Remark

This Chapter shall summarize the legal problems identified in connection with cross border transfers and the solutions offered by the existing national and international private law instruments. The order of the issues discussed below follows the systematics of the Directive and does not indicate any emphasis of the relevant issue discussed. Furthermore, this summary is intended to illustrate how the Directive could be clarified or amended. Especially with regard to the latter the proposed clarifications or amendments are based merely on a judicial and legal valuation. A political valuation with regard to favourability and feasibility is excluded and not within the aim of this study. Therefore, it is most likely that the proposals given in this study might due to the political process on implementing amendments to the Directive differ from the eventual outcome and the future shape of the Directive.

3.1 Introduction

Reviewing the case law originating from the ECJ and based on the contributions of the different Member States featured in this study, it would appear that currently there is very little existing case law relating to cross border transfers.

Comments from the HR managers of international companies suggest that actual issues relating to cross border transfers are not common. Currently, companies are more likely to classify a cross border transfer as a closing down or as a relocation of an undertaking rather than as a transfer of an undertaking. The attitude of trade unions appears to be similar. This could explain why there are so few cases relating to cross border transfers before the national courts and even none before the ECJ. In fact, at present, the most controversial aspect of the Directive has been its application to outsourcing.

This gives rise to the question whether, in specific situations, some of these closures/relocations/outsourcings should be considered to be cross border transfers of undertakings under the Directive. Due to the fact that some provisions of the Directive are very widely drafted and/or uncertain, this possibility cannot be eliminated. Some relocations, depending on the legal nature of the transaction, could be reclassified as a cross border transfer and thus should fall within the scope of the Directive.

To ensure that the Directive is correctly applied to cross border situations, some of its provisions need to be clarified and made more precise.

One fundamental question which arises in this regard is: What is the applicable law in the case of a cross border transfer? The law of the transferor or the law of the transferee? As it will be shown in more detail below (point 3.13), on the current legal basis this question cannot be answered in the same way for all relevant issues involved by a business transfer. As far as the employees' individual rights and duties are concerned the basic rule stipulates that the law of where the transferor is situated is to be applied. The applicable law, however, changes if the employees' regular workplace is moved to the transferee's place of business.

This question then brings us to the problem identified by the Commission. This problem was confirmed in an analysis of the practical problems currently existing in the different Member States, namely, that “differences still remain between the Member States as regards the extent of the employment protection offered [in respect of transfers] and that these differences should be reduced.”⁸¹ These differences may occur in various aspects as has been shown in Chapter 1: Different standards of employment protection come about e.g. with regard to the liability of transferor and transferee, the continuation of collective bargaining agreements or the question of modification of employment conditions after a transfer of business.

Cross border transfers are currently at the centre of the EU Commission’s concerns as the EU Commission foresees that cross border transfers will occur more frequently in the future. Consequently, it intends to amend and clarify the Directive. In the Social Agenda 2005-2010 (point 2.1), the Commission announced, in the context of its initiative towards better regulation, that the Directive would be updated. The problems which arise in relation to cross border transfers were also mentioned.

3.2 Scope of the Directive and definition of transfer

3.2.1 Scope of the Directive

Article 1(1) of the Directive defines the types of transactions which will fall within its remit, but there is not the clearest linkage between the various sub-sections, particularly between Art.1(1)a and Art 1(1)b. According to the case law of the ECJ, the effect is to make the Directive apply where there is a transfer of an undertaking, business or part of an undertaking or business to another employer as a result of a legal transfer or merger, and that a transfer within the meaning of the Directive takes place where an economic entity is transferred and it retains its identity. As regards the case law of the ECJ Art 1(1)b arguably is the decisive provision to establish whether there is a transfer of business or not. It establishes that a transfer within the meaning of the Directive takes place where an economic entity is transferred and it retains its identity. Article 1(c) states that the Directive applies to both public and private undertakings. However, it specifies that the reorganisation of public administrative authorities falls outside the scope of the Directive.

Article 1(2) provides that the Directive will apply where and in so far as the undertaking to be transferred is situated within the territorial scope of the Treaty i.e. the territory of the European Union.

However, do the provisions need to be modified when a transfer is classified as a cross border transfer?

Arguably, the application of the Directive to a transfer of an undertaking located within the EU to a natural or legal person in a state outside the EU is worth examining, as the Directive will apply to a transfer within the EU, but will not apply to a State outside the EU. This will be the case e.g. for a transfer of an undertaking from France to India.

⁸¹ Preamble of the Acquired Rights Directive 2001/23/EC of 12 March 2001; Hepple, *Labour Laws and Global Trade*, Oxford and Portland, Oregon 2005, p. 172; These problems was also approached by a study made by Hepple which confirmed the analysis of the Commission in this regard: Hepple, *The legal consequences of cross border transfers of undertakings within the European Union*, May 1998.

In the proposed revised version of the Directive in 1975, it was suggested that the territorial scope of the Directive should be extended. However, the Directive as it currently stands limits the application of the Directive solely to transfers in which the undertaking or business *to be* transferred is located within the territorial scope of the treaty.⁸²

In light of this, it seems that the wording of Article 1(2) needs to be amended. The following words “provided that the undertaking is transferred within the territorial scope of the Treaty” or “from one Member State to another Member State” should be added to clarify matters. Alternatively, the application of the Directive could be restricted to transfers within a particular Member State’s territory and particular rules relating to cross border situations could be drawn up.

This amendment would avoid the Directive being applied to only one of the parties to the cross border transfer. Furthermore, there could be need for provisions to make clear that the party who was not subject to the Directive (transferor established in a third State) would not be held liable for the other party’s failure (transferee established in a Member State).

Furthermore, when implementing the Directive, most Member States have limited their law’s application to situations where the undertaking to be transferred is situated within their own territory. This means that the Directive is applied only where the undertaking to be transferred is within the territory of the Member State. However, there are some examples where National Courts may decide to apply national law which implements the Directive to a transfer with a cross border dimension. This occurred in Belgium in 1993⁸³ in relation to a transfer of part of an undertaking from Belgium to the Netherlands. Some Member States exclude from the scope of their business transfer rules concerning so called inward cross-border transfers, ie transfers of a business that is situated in another Member State, to their country (e.g. the UK). It seems that the Directive could be clarified in this regard.

3.2.2 Definition

Should the concept of a cross border transfer be defined more clearly in the Directive? With the exception of the suggestion above, we do not think that this is necessary.

However, consideration must be given to the distinctive issues which arise on the transfer of services which are essentially dependent on labour-intensive activity (manpower). Case law coming from the ECJ⁸⁴ states that such a transfer only falls within the remit of the Directive when a significant proportion of the workforce is taken over by the transferee. So it will only be when a large part of the workforce accepts relocation to another State, which the Directive will be capable of applying to this sort of transfer of an undertaking.

⁸² COM (75) 429 final, 25 July 1975, Art 1(3).

⁸³ CT Liège, 10 June 1993, (1993) JTT, 371; Here the Belgian Court of Appeal held that: “*it is not permitted to argue that the collective employment agreement number 32bis may not have application in kind. On one hand, the absolute general terms by no means implicate the exclusion of transfers having an effect upon the geographic or cross-border plan, while for the same reason of the definition of its purpose, it effects the entire ensemble of employers and workers of the private sector in Belgium. On the other hand such an argument is not compatible with the field of application given to the directive by the ensemble of the Member States of the European Union. It would be inconceivable given the Treaty’s philosophy, that the Directive only affects transfers of businesses which take place within the territory of a single Member State, thus excluding transfers from one Member State to another.*”

⁸⁴ ECJ, case C-127/96, C-229/96 et C-74/97 *Hernandez Vidal* ans case C-51/00 *Temco*.

However, certain elements of the transfer, in particular the maintaining of an undertakings' economic identity must be examined focussing specifically on the cross border aspect. As mentioned in Chapter 1 (*cf.* point 1.3.2.2. (a)) a question of particular relevance in this regard is whether the geographical relocation of an undertaking is sufficient to prevent it from retaining its identity. However, would the economic entity still retain its identity if the geographical location was shifted to another country? This is an issue which may also arise in the course of national relocations (*e.g.*, from Hamburg to Munich or Paris to Nice). Therefore, this question is not specifically related to the cross border aspect and we have already (chap.1 p. 15) expressed that it could be a factual (minor?) element to consider for the retaining of the identity of an economic identity. The ECJ already held that the change of the principal place of business was irrelevant if it is situated in a different area in the same conurbation (Brussels) provided that the contract territory remains the same.⁸⁵ Regarding international transfers there is no case law of the ECJ yet.⁸⁶

According to our understanding the cross border issues relating to the distinctive nature of a transfer of undertakings do not need to be defined further. The set of criteria established by the ECJ is sufficient to determine whether a cross border relocation constitutes a transfer of a business. It is perhaps unsatisfactory that such a significant part of the Directive's practical effect can only be found from case law of the ECJ. While, for the most part, the businesses engaging in such international activities should have appropriate legal resources to be informed of this, this issue may be neglected.

3.3 Definition of other concepts

Article 2 of the Directive contains some definitions relating to "the representatives of employees" and "the employee." Is it necessary to amend those definitions in the Directive with regards to cross border transfers?

As regards the concepts used and defined in the Directive, the Directive mentions that *this Directive shall be without prejudice to national law as regards the definition of contracts of employment or employment relationship.*

As it was noted in the report⁸⁷, the national law of each Member State does not interpret these concepts in the same manner. Problems therefore arise from the fact that the national law of each Member State has its own interpretation of these concepts and of the particular issues; it is difficult to assimilate some of them. For example, the concept of 'employee' may (or may not) according to the relevant national law applicable refer to executive employees as well.

In addition, the question of whether the transferor's or the transferee's national law should apply to the cross border transfer always arises. *E.g.* should the concept of the employee be defined by the national law of the transferor or by the national law of the transferee?

As the transfer has its origins in the transferor's Member State, and given that the aim of the Directive is to protect the rights of transferred employees, we consider that the law defining the concepts in the Directive should be that of the transferor.

Article 2 of the Directive should therefore clarify whose governing law will apply in this respect and refer to the law of the Member State applicable to the transferor.

⁸⁵ ECJ Cases C 171 and C172 *Merckx and Neuhuys v. Ford Belgium* (1996)

⁸⁶ Hepple, *Labour beyond Borders*, o.c ; p 175

⁸⁷ *Cf.* point 1.4.1.

3.4 Safeguarding of employees' rights

The basic aim of the Directive is to ensure that whatever the level of employment protection employees enjoyed before the transfer of an undertaking (the 'acquired rights'), that these rights continue to be enjoyed after the transfer. All that is safeguarded on transfer are the rights of the employees which existed under their national law before transfer.

3.4.1 Transfer of rights and liability of transferee and transferor

The Directive provides an automatic transfer of the transferor's rights and obligations arising under a contract of employment or from an employment relationship in respect of the employees undertaking's existing at the date of the transfer to the transferee. In addition, the Directive also allows Member States to provide in their national law implementing the Directive that the transferor and the transferee will, after the date of transfer, be jointly and severally responsible for the liabilities arising from the employment relationship and in existence at the date of transfer.

The application of such a provision also leads to practical difficulties relating to the definition of the rights and obligations arising from the employment contract. In reality such definitions will always depend on the national law of the Member States and therefore on the governing law.

Article 3(1) also gives rise to particular questions relating to cross border transfers arising from the fact that Member States did not make the same choices in their domestic legislation in relation to the options that the Directive offered with regards to the liabilities for debts existing before transfer. In this regard, national legislation in Hungary limits the opportunity of claiming against the transferor for a period of up to one year, whereas others Member States have not implemented any such limitation.

In our opinion, an automatic transfer should occur under the national law of the transferor, as the transfer originates from the transferor's Member State. If proceedings are commenced against a transferor, reference should be made to the national legislation of the transferor's Member State (*cf.* point 3.10).

The Directive should provide for a rule which specifies the governing law and competent jurisdiction in such cases, to avoid uncertainty for employers (transferor and transferee), employees and their representatives. With regard to this the Directive should refer to the law of the Member State applicable to the transferor.

3.4.2 Transferor's duty of information of the transferee

Article 3(2) of the Directive provides Member States with the option of adopting measures relating to the information which has to be given to a transferee by a transferor. We believe that it would be useful for the Directive to provide that the national law of the Member State in which the transferor is located should be applied in such cases.

3.4.3 Collective bargaining agreements

Applying collective bargaining agreements gives rise to very complex issues, as mentioned in chapter 1 (point 1.9.1). The application of collective bargaining agreements is even more problematic on a cross border transfer than on a transfer entirely within national boundaries.

Article 3(3) of the Directive compels the transferee to continue observing the terms of collective agreements in the same manner as the transferor, until the termination date or expiry of that agreement or the entry into force or application of another collective agreement. Member States may elect to limit the period for observing such terms, provided that the period limiting the observance of the terms is not for less than one year.

Does the international character of the transfer complicate the situation?

Actually, the collective bargaining systems of each Member State are implemented through various differing and complex mechanisms. In most states, these agreements have at least a degree of legal force or backing. But in the UK there has only recently been law enabling unions to gain “recognition” and bargaining rights. These differences lead to multiple interpretations of the term “collective bargaining agreement” (CBAs) within the Member States and differing application of the Directive with regard to the differing forms of CBAs.

For example, in some Member States (*e.g.* Belgium) collective bargaining agreements are geared to a single local administrative area at the lowest level of local government, region or plant. Consequently, the question of the transferability of collective bargaining agreements exists in national transfers in case where there is a change in sector after the transfer. This also applies to CBAs under German law, which as well are normally limited to industrial sectors. Some jurisdictions (*e.g.* the Netherlands or Italy) consider that the working conditions of the transferor’s CBA continue to apply for as long as the CBA is in force, unless it is replaced by a CBA implemented by the transferee, which provides for working conditions at least to the same standard as the previous CBA of the transferor. Additionally, some Member States also provide for special collective regulations restricted to establishment level, such as in-house customs under French law or works council agreements under German or Austrian law, which are governed by special rules not necessarily comparable to other forms of CBAs.

There is no doubt that Article 3(3) of the Directive applies to cross border transfers. The consequence of this is that the working conditions implemented by a collective bargaining agreement will apply to the transferred workers, even if they are working in another Member State. The question is whether the CBA still applies on a collective basis after the business has been transferred to a different country with a different jurisdiction. Since under the Rome Convention the mandatory law of the State where the undertaking has been transferred should prevail (Article 6 §2 of the Rome Convention) this question has to be answered by applying the national law of the transferee. To this extent a CBA will regularly not be applicable collectively as its application is generally restricted to the original national law under which it has been concluded. Additionally, the transferee may not fall in the scope of the CBA, which may be restricted to certain regional or sectoral limits. Furthermore, an application on a collective basis is excluded, if the form of the CBA, *e.g.* as a works council agreement, is not a concept to the domestic law of the transferee.

If a collective application of a CBA is excluded after a transfer of business, the terms and conditions provided for in this agreement must be observed on the basis of the individual employment contract. The possibility to extend the Directive and provide for a collective

application of a CBA would raise difficult questions as this extension would require a uniform understanding of CBA within the Member State.

Therefore, a clarification that under Article 3(3) of the Directive the transferee's obligation to observe terms of CBA "on the same terms applicable to the transferor" also includes the application on the basis of an individual employment contract (if a collective application is not admissible according to the relevant national law) is recommended. This means, that the terms of a CBA, which after the transfer of business are not applicable on a collective basis, may be subsidiary retained as part of the individual employment contract. Analogous to Art. 3 (3) of the Directive the Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year. This does not apply to a CBA, which mentions an express choice of law, if it has a transnational dimension and thus allow to be applied collectively after a transfer of business.

Or it might be provided that the transferred CBA shall remain in force but only for one year after the transfer.

Additionally, apart from this, another question is, which regulation prevails in cases where there are contradictions between the CBA of a transferor and the CBA of a transferee or even in the case of contradictions with the mandatory law applicable in the transferee's Member State. There is a conflict between the transferee's obligation to observe terms and conditions agreed in a transferor's CBA and the aim of applying a CBA applicable to the business of the transferee. This conflict is in any case governed by the mandatory law of the State where the undertaking has been transferred (Article 6 §2 of the Rome Convention). To this extent, a transferee's CBA might prevail over the original terms and conditions of the transferor if this is in accordance with the applicable national law. This might be relevant *e.g.* if the collective agreements negotiated with the unions in the transferee's country provide for differing terms - favourable or detrimental – to an undertaking than the agreements which are in place in the country where the undertaking is currently situated. Problems such as these cannot be resolved within the framework of the Directive, because they raise far wider questions about the enforceability of collective agreements and the scope of permitted industrial action. Additionally, it would be difficult to establish a uniform regulation which could govern the particularities of the national laws on CBAs within the Member States. There is of course the important principle of "subsidiarity" to consider in such an intrusion into a Member State's own domestic affairs.

3.4.4 Mandatory period of observance of one year

Other problems relating to CBAs derive from the option of limiting the period of time in which the CBA is in force (Article 3 (3) of the Directive). The belief is that within a year an acquiring undertaking will join the appropriate employers' organisation (where that organisation is a party to the agreement) in the country in which the undertaking is situated, or will negotiate a new agreement with the trade union or workers' representatives from that undertaking. Such a belief will be frustrated where the acquirer fails to join the employer's organisation or is able to de-recognise the trade union.

Member States may or may not make use of this option and problems arise when one Member State chooses to exercise this option and the other does not.

Should this provision be examined with reference to the national law of the transferor's Member State or the national law of the transferee's Member State? As the question arises

after a cross border transfer, i.e. a transfer combined with a simultaneous relocation, we suggest that the national law of the Member State in which the transferee is located should apply. However, this interpretation could be objected to on the grounds that transferred workers must retain the rights which exist at the time of the transfer (unless they fall in the scope of a transferee's CBA) and that in this case reference should be made to the national law of the Member State in which the transferor is located.

The Directive should therefore provide a rule to determine which governing law should apply to the rights and obligations arising from the CBA. We suggest applying the national law of the Member State applicable to the transferee including the safeguarding of employee's rights at the time of the transfer. The Directive might also be more precise in relation to the way in which the CBAs coming from another collective system are preserved when transferred to a different Member State. To this extent, again a clarification might be helpful, that conditions and terms of a CBA apply on the basis of the individual employment contract, if a collective application is excluded according to the law applicable at the establishment of the transferee.

3.4.5 Old-age, invalidity or survivors' benefits (statutory or supplementary)

With regards to employees' rights to old-age, invalidity or survivors' benefits the Directive provides that the Member States have the option not to apply the provisions of the Directive (Article 3 (4)).

Once again, the option offered by the Directive results in many practical and legal problems and uncertainties as all Member States do not deal with this question in the same way.

The benefits referred to above are very specific to each Member State and they are also regulated by the national provisions of each Member State, which also related to the Member State's social security system and tax systems, which makes the combining of these benefits difficult in practice. It also makes it difficult to determine and to evaluate which benefits should be taken from each system.

In the case of cross border transfers, should the benefits deriving from occupational pension schemes be governed by the law of the transferor's Member State or by the transferee's Member State?

Once again, differences regarding the implementation of these provisions exist in the national laws of each Member State. Only providing that the applicable law is the national law of the Member State in which the transferor is located could render the situation unworkable. This is illustrated by the following example: if German law provides for the maintenance of the rights, what effect would a transfer of a German supplementary pension scheme to Belgium have on its application if this scheme is contradictory to Belgian mandatory law? Belgian mandatory law should prevail over the German scheme. Further problems occur as the Member States apply different standards on the extent of maintenance: national law of some Member States merely provide for a transfer of rights acquired at the time of the transfer, whereas national law of others obliges the transferor to be liable for future expectations, too.⁸⁸

Due to the problems which could arise from the combination of the different types of old-age, invalidity or survivors' benefits schemes, we suggest that the Directive should either refer to the national law of the Member State in which transferor is located (to protect the rights of the

⁸⁸ Cf. Chapter I, No. 1.6.

transferred employees). Alternatively, the Directive could provide that it is not applicable to the rights old-age, invalidity or survivors' benefits in cases of cross border transfers. However, this very complex issue might be facilitated after the implementation of the Directive on improving the portability of supplementary pension rights⁸⁹, which under certain conditions provides for an employee's right to transfer pension rights to the employee's new employment.

3.5 Protection against dismissal and substantial modification of the employment contract

3.5.1 Protection against dismissal

Article 4(1) of the Directive provides that the transfer shall not in itself constitute grounds for dismissal by the transferor and/ or the transferee. However, economic, technical or organisational reasons entailing changes in the workforce may justify a dismissal.

This first point does not seem to give rise to any particular questions relating to cross border transfers.

3.5.2 Substantial modification of the employment contract

In cross border situations special regard must be given to the question whether the place of work of the employment relationship automatically changes due to the transfer. In this regard Article. 3(1) of the Directive merely provides that the transferor's rights and obligations deriving from an employment relationship are transferred to the transferee. A transfer of the employment relationship to the transferee does not change the contents of the employment relationship. This result corresponds with the aim of Directive which is the safeguarding of employee's rights.

Due to this a change of these rights and obligations is not provided for in the Directive, which especially affects the employee's place of work. Due to this, the question whether a modification of the place of work after a transfer of business is admissible must be answered by the individual content of the employment contract: does the contractual place of work include the place of business of the transferee, may the place of work be changed according to the terms of the contract and, finally, does the relevant national law allow a change of the contractually agreed place of work.

In addition, Article 4 (2) of the Directive provides that a termination of the employment relationship due to a substantial change in working conditions which are connected to a transfer and detrimental to the employee is deemed to be the responsibility of the employer. This provision gives rise to many problems due to the fact that a cross border transfer (transfer with a relocation) automatically entails the relocation of a business to another Member State (a modification to the place of work) and leads to ancillary modifications to working conditions due to the relocation to the transferee's Member State, where other mandatory rules relating to social security, tax, mandatory provisions in labour law are applicable. A substantial modification of the employment contract may under some national jurisdictions, e.g. Belgium, the Netherlands or Spain, oblige the employer to certain procedural steps when changing the terms of the employment relationship or might give the

⁸⁹ Cf. Proposal for a Directive of the European Parliament and the Council on improving the *portability* of supplementary pension rights (SEC(2005) 1293) of 20 October 2005, COM(2005) 507

employee a right of termination of the contract claiming a severance or compensation payment of the transferor.

Due to these national specialties reference should be made to national legislation or case law which will determine whether a modification of employment conditions is possible and whether it can be considered as substantial or not. The problem can then be decided by the relevant governing law, which must be determined in accordance with the principles set up under No. 3.13.

3.6 Right of objection

In addition, some Member States provide workers with a “right to object”. In Germany for example, workers have the right to refuse to work in another Member State. They have to make their decision known within a certain period of time. Though not compulsory provided for in the Directive, the ECJ has held this measure to be in accordance with the business transfer principles provided for in the Directive.

This right of objection bears special significance in case of a cross border transfer: Since the transfer of business and thus the transfer of the employment relationship is combined with a relocation to another Member State, it is highly likely to be detrimental to the employee. This is caused by the social and cultural changes connected to a shifting of the place of work as well as disadvantages with regard to a change in the governing law of the employment relationship and perhaps fiscal changes, too. This, however, would contradict the aim of the Directive to provide for the protection of employees in case of a change of the employer.

Due to this, in our opinion, a general right of objection should be given to the employees with the consequence that after exercise of this right the employment relationship will not be transferred to the transferee. Alternatively, the automatic transfer of an employment relationship could be regularly suspended unless the employee exercises a “right to opt in” to the transfer.

This solution, however, has to consider the fact, that under some jurisdictions, the employees are entitled to a severance or compensation payment if the contract is terminated due to a substantial change. This right would be devalued by a right to object or to opt out without compensation or with less compensation than would apply in those other circumstances. Because of this, the Directive should provide for a reservation that employees are not deprived of their rights and remedies in connection with the termination/substantial change of the contract subject to the national law in case of the exercise of a right to object or opt-in to a cross border transfer of business.

Even if this solution seems to be very difficult to implement, in practice it would have the advantage of clarifying the situation and giving more legal certainty to both employers and employees. It should also aid the relocation of undertakings across national borders.

3.7 Insolvency procedure

Article 5 (1) of the Directive excludes the application of Articles 3 and 4 of the Directive to transfers where the transferor is the subject of a bankruptcy order unless the Member States provide otherwise.

The first problem with regards to this option stems from the fact that some Member States have made use of this exclusion whereas others have not. Therefore, the question arises as how to deal with a transfer from one Member State which excludes the application of Articles 3 and 4 to another Member State which does not and vice versa, when the transferor is subject of a bankruptcy order?

Secondly, the fact that law of insolvency is very specific in each Member State requires the non-uniform application of the Directive. A solution would be to harmonise the regulations relating to insolvency procedure, but this is outside the scope of this study.

In our opinion, and within the framework of this study, an option would be to mandatory exclude the application of the Directive from cross border transfers of insolvent undertakings which means to abrogate the current Member States' competence to provide otherwise in this regard. Furthermore, similarly as already provided for in Article. 5 (4) of the Directive, the Member States could be obliged to take appropriate measures to prevent insolvency proceedings being used as a way of depriving employees of the rights provided for in the Directive. This does of course not hinder the Member States to provide for legislative measures, which are more favourable to each employee. Thus, national law may include the application of transfer of business law on insolvency situations. Therefore, this proposal does effectively not result in a change of the current EC legislation

In addition, the Directive should specify how to deal with the different national laws relating to insolvency procedures and it should determine which law is applicable in such situations. We suggest that the Directive should refer to the national law of the Member State in which the transferor is located, as the transfer originates from this Member State.⁹⁰

3.8 Employees' representation

As regards the rights of employees' representation bodies and employees' representatives Article 6(1) of the Directive provides for the maintenance of the protection awarded to body and representatives (status and function) when the business preserves its autonomy.

3.8.1 Rights of employees' representation body

It should be clear from this Article that in the case of a cross border transfer, the status and function of representative bodies should be made with reference to the national law of the Member State in which the undertaking being transferred is originally located, even though these bodies might be operating in another State. However, problems may arise when undertakings in countries with strong participation rights are transferred to jurisdictions which have lower participation rights.

In this regard, *Hepple*⁹¹ suggests that one should refer to the applicable law of the Member State where the undertaking was established before the transfer. However, this would lead to the application of jurisdiction to a business which is not in accordance with its location. To this extent, it is recommended to establish the applicable law according to the principles to solve conflicts of law (cf. No. 3.12). If representative bodies and employees represented are

⁹⁰ In case the insolvency proceedings concerning the transferor itself has a cross-border dimension, the applicable law can be determined according to Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings, Official Journal L 160 , 30/06/2000, P. 0001 – 0018.

⁹¹ Prof. B. Hepple, *The legal consequences of cross border transfers of undertakings within the European union*, May 1998, p. 42.

equally transferred to a location abroad (which is regularly the case when a business retains its autonomy) this would lead to the application of the national law of the state in which the business is located.

Generally, a difference between the law applicable to the business and the law applicable to the employees' representation body may only occur if the business does not preserve its autonomy. In this case Article 6(1) obliges the Member State to take necessary measures to ensure the continuity of employees' representation. Since some Member States provide for an interim mandate of the original body, this could lead to the situation that this body is located in a different state from the employees represented by it *e.g.* in case of a transfer of a part of a business. To prevent a conflict of law the Directive could provide for the formation of a new employee representative body under the laws of the state in which the transferee is located after a certain period of time. This would avoid employees' rights being violated as there would be a continuous representative body. However, this additionally would create an obligation to create employees' representation bodies which will be problematic in Member State which do not provide for strong employees' representation rights.

3.8.2 Rights of employees' representatives

Similarly, the rights of employees' representatives have to be retained. In light of the above, a viable solution would be that the representatives coming from the transferred undertaking retain their role within the representatives' body that the transferee has in place, and that their role is regulated by the transferee's national law. However, they should be entitled to retain the protection that they enjoyed before the transfer, under the national law of the transferor unless there already is a representative body at the establishment of the transferee.

In the latter case the transferee is in our understanding of the current legislation only obliged to maintain rights included implicitly in an individual employment contract as a general consequence of the transfer of business. Therefore, any special protection under the national legislation of the Member State, in which the business of the transferor is located (which is not intended to be applicable under the law of the Member State, where the business of the transferee is located) and subject to the status of an employees' representative ends if the employee loses his status under the law of the Member State applicable at the place of business of the transferor.

3.9 Information and consultation

The Directive clearly provides that both the transferor's and the transferee's employees and employee representatives need to be informed generally and consulted about "measures". Each employer (transferor and transferee) should respect the information and consultation obligations provided for under the law of the Member State in which it is located.

Problems also arise due to the fact that the provisions of the Directive relating to the information and consultation obligations are implemented in each Member State through their own domestic legislation, which has its own characteristics.

For example, since the Member States provide for different sanctions in case of non-compliance with these obligations the statutory measures to ensure the observance of information and consultation obligations may vary in harshness and efficiency. The question then arises of how to deal with situations where the national law of one Member State provides for more severe sanctions as the national law of the other? This situation could lead

to a problem in the transfer procedure. Consequently, the individual transfer contract should include a provision which incorporates the obligations mentioned above. The Directive should insist on the duty of the Member States to take “appropriate measures” to compel employers to respect the information and consultation procedures.

Additionally, consideration should be given to the fact, that especially with regard to “the legal, economic and social implications of the transfer for the employees” even in the case of transfer entirely within one member state the transferee and transferor already face practical difficulties in fulfilling this obligation, as this term has a rather broad understanding and thus may contain various aspects of a transfer.

For this reason a restriction of the Directive is generally recommended. At least the transferor and respectively the transferee should not be obliged to inform about other circumstances than those with regard to their national jurisdiction nor to consult about any measures being proposed by the other. A duty to *e.g.* inform about the legal implications of a cross border transfer would thus overstrain transferor and transferee. Additionally, with regard to the duty of information concerning “the legal, economic and social implications of the transfer for the employees” and the “measures envisaged in relation to the employees” there is need for further clarification or amendment of the Directive. To this extent the duty of information should be restricted to “essential” implications of a transfer and “essential” measures envisaged in relation to the employees.

3.10 Competent jurisdiction (Council Regulation 44/2001)

The Jurisdiction Regulation (Article 19) provides that an employer domiciled in a Member State within the European Union may be sued:

- (i) in the courts of the Member State where he is domiciled; or
- (ii) in the courts of the Member State where the affected employee habitually carries out his work or where he last did so; or - if the employee does not or did not habitually carry out his work in any one country -
- (iii) in the courts of the Member State where the business which engaged the employee is or was situated.

The Jurisdiction Regulation thus refers to the “habitual place of work”. This gives rise to the question of how to determine this place in the event of a cross-border business transfer. Is it the place of work before the transfer (Member State A) or the place of work after the transfer (Member State B)? In the first place, the answer to this question depends on the interpretation of Article 19. Does Article 19 refer to the place where the employee is obliged to regularly work (by agreement or by order of the employer) or is it the fact of regularly working at one specific place that is relevant? If the first answer is correct it boils down to the question of whether the transferee (as the new employer) can order the employee to move to his place of business (where the business transferred has been relocated to). If he can then the employee would not be entitled to sue the transferee in Member State A, where he has been working before the business transfer (the former regular place of work), but only in Member State B. This solution does not seem to be in line with the purpose of Article 19 to protect the employee.

Therefore, we submit that the place of work where the employee has effectively and regularly rendered his services (Member State A) shall determine where he can sue the transferee.⁹² If, however, the employee actually starts to work at the transferee's site (Member State B) then this place shall be referred to as "habitual place of work" in determining which court has (international) jurisdiction. For the sake of legal certainty we submit that this should be set out in the Directive.

On the other hand, as it has been pointed out in chapter 2, after the business transfer the representatives of the transferred employees generally cannot rely on the Regulation for suing the transferee before the original national court. Therefore, it depends on the national rules of international jurisdiction whether the employee representatives can bring the foreign employer before a national court in their home state. In countries such as Austria, the representatives could not sue the transferee since the jurisdiction for such claims requires the business (establishment) to be situated in Austria. On the other hand, employee representatives are normally in a stronger position than employees so that there is not the same need for a privileged treatment regarding the issue of jurisdiction. Therefore, we think that it is not necessary to amend the Directive in order to enable the employee representatives' to enforce their rights before the transferor's courts.

3.11 European Works Council (Council Directive 94/45/EC of 22 September 1994)

The adoption of the European Works Council Directive 94/95/EEC has placed the problems relating to the information and consultation obligations in transnational undertakings in a completely new light. The aim of this directive is not the harmonisation of national information and consultation requirements but the creation of an EU-wide framework for information and consultation within 'Community-scale' undertakings or groups. To that end, a European Works Council has to be established in undertakings with a European dimension and in the groups of undertakings with a European dimension.

As from its implementation date, an information and consultation procedure has to be negotiated through a 'special negotiating body' composed of employee representatives from each Member State in which the undertaking operates.

As a cross border transfer is a decision having a significant effect on the interests of employees, the information and consultation procedures of the employee's representatives of the European Works Council would also be taken into account.

Although this directive deals with transnational information and consultation obligations, it devolves to national-level regulation in the relevant Member State(s) many of the key rules concerning the European Works Council or alternative procedures. Once again, the national measures adopted (as well as existing national practices in relation to employee representation) differ significantly in the different Member States.

⁹² Cf also the rulings of the ECJ on the Brussels Convention, art 5 (1): e.g. case C-437/00 *Pugliese* [2003] ECR I-3573, with many other references.

Finally, the question of the governing law applicable to this information and consultation procedure and its modalities will arise, as the implementation of the Directive to the European Works Council differs in the Member States. However, this problem can be solved by applying the national law of the country in which the parent company of the group is established or of the country in which the company which under the Directive is presumed to be the controlling company is established.

A problem which might arise in connection with cross border transfers is the consequence of a transfer in case both transferee and transferor are members of the same group of companies which has formed a European Works Council. Which law will be applicable? However, this issue is a question which should preferably be dealt with in connection with Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.⁹³

3.12 Tax and social security systems (schemes)

Even though questions of tax and social security do not fall within the scope of the Directive as such, we do believe that these questions are relevant in the case of cross border transfers, particularly with regard to modifications to the employment contract which can occur as a result of a cross border transfer. Because of the mandatory nature of the national tax and social security law, the law of the Member State in which the transferee is located should apply after the transfer.

However, the question arises as to whether or not the modification of the social security and tax rules combined with a cross border transfer constitutes a substantial modification of the working conditions of the employment contract. As the change of the applicable law is a statutory and not a contractual change, this cannot be seen as substantial or unlawful modification, especially if the new legislation is as favourable as the other. This result is confirmed by the jurisdiction of Belgian courts⁹⁴ and leads to the conclusion that the modification of social security schemes because of the cross border transfer should not be seen as a substantial modification of the working conditions of the employment contract.

3.13 Applicable law to the employment contract (Rome Convention 80/934/EEC)

As it has been mentioned in chapter 2, the Directive does not contain any conflict of laws rules (in contrast to the Commission proposal of 1974). On the other hand, there is the Rome Convention (RC), which sets out special provisions for individual employment contracts in general.

First it must be established whether the business transfer rules are considered to be “overriding mandatory rules” within the meaning of Article 7 RC. In such a case, the substantive law of the forum would have to be applied by the court irrespective of the law otherwise applicable to the contract. We have mentioned the case law of the German Federal Employment Court under which they are not such rules. However, with regard to the terms and conditions that are defined as a “hard core” of protective measures by the Posting of Workers Directive (see above), one can also be of the opposite view. We, therefore, think that

⁹³ Official Journal L 254 , 30/09/1994 P. 0064 – 0072:

⁹⁴ TT Liège, 10 Januray 1990, (1990) JTT, 221- 223.

for the sake of legal certainty it shall be explicitly provided for by the Directive that its provisions are not to be treated as “overriding rules” within the meaning of Article 7 RC.

In Chapter 2 it has been pointed out that in the absence of choice and unless there is a closer connection to the law of another country the individual employment contract shall be governed by the law of the country where the employee “habitually carries out his work in performance of the contract” (Article 6 RC). In our view, this basic rule must apply for deciding which law governs the question of whether the transferee automatically takes over the employment relationships of the employees concerned. The same goes for issues of dismissal and the modification of (contractual) terms and conditions. If the business is transferred to a non-contracting state the employees could still rely on the Rome Convention, provided they pursue their claims at a court of a contracting state.

If, however, the employee and his new employer (transferee) agree that the employee shall regularly work in the transferee’s country [or a third country], where the transferred undertaking is now located a change of the applicable law could follow. Thus, the employment relationship would be governed by the transferee’s law [or the law of that third country].

In this context the question arises of when the change of applicable law takes place. Basically, it could be at the date of the agreement or at the date when the transferring business is being operated by the transferee and the employees actually start to work at the new workplace. With regard to the remaining differences between the Member States’ business transfer rules this question can be crucial. As the special provisions on employment issues in the RC and in the Jurisdiction Regulation use both the term “habitual” place of work it should be interpreted in the same way. Therefore, we submit that under the RC the applicable law changes at the date the transferring business is being operated by the transferee and the employees actually start to work at the new workplace. Of course, this shall not change the “principle of closest connection” under which the contract could be governed by the law of another country.

On the other hand, the Rome Convention does not touch on the status of employee representatives and their rights of information and consultation, since these issues are not contractual matters. In the absence of a Community conflict rule regarding representation of employees, this issue is generally governed by the law of the state where the business and/or the employee representation are situated. If the whole business is transferred to the transferee’s country, the fate of the employee representatives will generally depend on the respective national substantive rules of this state.

3.14 Conclusion

Due to commercial practices within the economic world, and as a result of a clear understanding of the rules applicable to cross border transfers, it seems that more and more transfers with an international dimension will occur.

As noted in this chapter, the essential questions which will arise in the future are in relation to the governing law applicable to the parties who participate in the transfer. In this regard we have tried to suggest a solution for each of the Articles in the Directive.

From a judicial point of view there is according to our opinion special need to clarify the Directive with regard to two essential questions:

First, given that the main problems arising from the application of the Directive on cross border transfers stem from determining which national law applies to the transfer, the Directive should introduce rules aimed at determining the law applicable to employment contracts in situations where there may be a conflict between the laws of different Member States.

As a general rule, except when the applicable law of both Member States can be observed (for example concerning the information and consultation obligation of the workers where each employer has to respect the applicable law of the Member State in which it is located) we consider that the governing law (for contractual issues) should, in most cases, be the applicable law of the Member State in which the transferor is located (unless the undertaking is not located in the same Member State, in which case the law of the undertaking's member State should apply), since the Directive is intended to protect the rights of the transferred workers. Their rights should then be preserved in line with the protection offered by their Member State (the initial conditions.) However, a transitional period could be provided for, to give the transferee the opportunity to harmonise the employment conditions.

If the relocation, on the other hand, the transfer has resulted in a shift of the habitual workplace to the transferee's country (see below), the acquired rights of the transferred workers must fall in line with the mandatory law of that State.

However, these rules only provide for a guideline on the application of law. The applicable law may only be established considering all relevant factors of the individual case. Especially with regard to the Rome Convention there might be cases when the applicable law differs from the principles laid down in the preceding paragraphs, e.g. expatriates working temporarily abroad or an explicit choice of law by the parties of the employment contract.

The second issue refers to the question if the place of work is automatically changed in connection with the transfer of business. Although a change of the place of work only because of the transfer would not correspond with the wording and the aim of the Directive (cf. above No. 3.5.2), this issue needs further clarification as the national contributions, discussions with colleagues and HR managers of international companies have shown. To our understanding the possibility to change the place of work depends on the individual content of the employment contract and the relevant national rules of law, which may allow the employer to unilaterally change the workplace even without an explicit clause in the contract.