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from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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to: Mr Javier SOLANA, Secretary-General/High Representative

Subject: Commission report on Council Directive 2001/23/EC of 12 March 2001 on the
approximation of the laws of the Member States relating to the safeguarding of
employees' rights in the event of transfers of undertakings, businesses or parts
of undertakings or businesses

Delegations will find attached Commission document COM(2007) 334 final.

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18.6.2007
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COMMISSION REPORT

on Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses

[SEC(2007) 812]

COMMISSION REPORT

on Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses

1. INTRODUCTION

Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses¹ codifies Council Directive 77/187/EEC², as amended by Council Directive 98/50/EC³. Article 7b) of Directive 98/50/EC states: "The Commission shall submit to the Council an analysis of the effects of the provisions of this Directive before 17 July 2006. It shall propose any amendment which may seem necessary." That Article was incorporated into Directive 2001/23/EC as Article 10. The object of this report is therefore to examine the provisions of the Directive in the light of the experience which has been acquired and, in particular, of the case-law of the Court, taking into account the answers of the Member States and the social partners to the questionnaire which was sent to them by the Commission (cf. Annex I) with a view to proposing possible changes. A detailed report on the implementation of the Directive in each of the 25 Member States will be prepared by the Commission departments in 2007.

The Directive, which is based on Article 94 of the EC Treaty, is aimed at protecting a business' employees in the event of a change of employer and, in particular, ensuring that the employees' rights are safeguarded. It works on the premise that there are differences in the Member States regarding the protection of employees in this area and stresses the impact that these differences can have on the operation of the single market. Consequently, it concludes that it would be advisable to harmonise that protection. The aim of harmonisation is twofold: to ensure comparable protection of employees' rights in the Member States and to approximate the obligations which the rules of protection place on European undertakings.

The Court of Justice has indicated on several occasions that the rules of the Directive are to be regarded as mandatory, in that it is not permitted to derogate from them in a manner which is detrimental to employees. Consequently, an employee cannot waive his rights under the Directive, and those rights cannot be limited, not even with the employee's agreement, nor if the disadvantages resulting from renunciation are compensated for in such a way that the employee is not placed in a less favourable overall situation.

¹ OJ L 82, 22.3.2001, p. 16.

² OJ L 61, 05.3.77, p. 26. This Directive is one of the measures provided for in the EEC's Social Action Programme of 21 January 1974.

³ OJ L 201, 17.7.1998, p. 88.

As of 31 August 2006, the Directive had formed the basis for 44 judgements of the Court of Justice, 40 of which concerned preliminary questions. 30 of these judgements concern the scope of the Directive and, in particular, the concept of "transfer". Directive 98/50/EC, referred to above, refines this concept in the light of the considerable volume of Court of Justice case-law. This would appear to explain why there has been only one judgement in this connection for transfers carried out after 17 July 2001 (the deadline for transposition of the Directive).

2. SCOPE (ARTICLES 1 AND 2)

2.1. Personal scope

2.1.1. The entities concerned

The Directive applies to transfers of undertakings, businesses, or parts of undertakings or businesses. These can be grouped together under the more general heading "economic entity", which, for the purposes of the Directive, is understood to mean an organised grouping of resources which has the objective of pursuing an economic activity.

In terms of the activity, the essential feature which characterises an entity as an undertaking or business is the pursuance of an economic activity, in other words, the fact that it provides goods or services on the market. Activities involving the exercise of public authority do not fall within the scope of the Directive.

Transfers involving seagoing vessels are explicitly excluded from the Directive. Nevertheless, national provisions transposing the Directive also apply to seagoing vessels in 12 Member States (cf. Annex I, question 1.5).

2.1.2. Protected employees

The term "employee" refers to any person who, in the Member State concerned, is protected as an employee under national employment legislation. All employees are protected, including those employed under a fixed-term contract, and part-time employees.

2.2. Material scope

For a transfer to be deemed to exist, two conditions must be met: a) there must be a change of employer and b) the transferred entity must retain its identity.

2.2.1. Change of employer

There must be a change, in terms of contractual relations, in the legal or natural person who is responsible for the performance of the activity and who assumes the obligations of an employer with respect to the employees of the entity.

The transfer of ownership of the majority of the shares in an undertaking or a change in the majority of shareholders does not constitute a transfer because the legal personality of the employer is unchanged. The Commission considers that a revision of the Directive, extending the definition of "transfer" to include a change of control,

as proposed by the European Confederation of Trade Unions (cf. Annex I, question 4), is not justified at this stage. Although a change of control can lead to changes in the undertaking, the employees' legal position *vis-à-vis* the employer is unchanged. In any case, Directive 2002/14/EC⁴ makes such changes subject to appropriate information and consultation procedures.

2.2.2. *Retention of identity*

Retention of identity is marked both by the continuation by the new employer of the same activities and by the continuity of its workforce, its management staff, the way in which its work is organized, its operating methods or the operational resources available to it. It is up to the national courts to judge, in the light of the following criteria, whether or not there has been a transfer:

- the type of undertaking or business;
- transfer or otherwise of tangible assets, such as buildings or movable property;
- the value of intangible assets at the time of the transfer;
- employment of the majority of employees by the new employer;
- transfer or otherwise of customers;
- degree of similarity between the activities carried out prior to and after the transfer;
- where appropriate, the period during which activities were suspended.

These are, however, merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation.

The Irish authorities have proposed revising the definition of "transfer" in order to clarify how the Directive should be applied to cases where activities are outsourced, i.e. where an undertaking outsources a function or service to another undertaking.

The Commission is of the opinion that the definition of "transfer" contained in the Directive, as interpreted by the Court of Justice, is sufficiently broad to achieve its aim of protecting employees in the event of a change of employer in the very different situations which are likely to exist in 25 Member States. Consequently, the Commission considers that a revision of this concept is not justified at present.

2.3. **Territorial scope**

The Directive 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" (Article 1(2)) and in the Member States of the European Economic Area

⁴ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 23.3.2002, p. 29.

(Norway, Iceland and Liechtenstein) (Article 68 of the Agreement on the European Economic Area⁵).

The Commission and some Member States (cf. Annex I, questions 1.1-1.4) have noted that national measures transposing the Directive on cross-border transfers can give rise to problems for which the Directive does not provide a solution. Contrary to the Commission proposal of 1974, the Directive does not contain provisions relating to conflicts of law. However, some of its provisions refer specifically to national law: for example, the concept of "employee" (Article 2(1)(d)), or the definition of "employment contract" (Article 2(2)). Similarly, the Court of Justice has referred to the legislation of the Member States in ruling on certain aspects of business transfers. Lastly, the Directive leaves a number of options open to the Member States. Although private international law, particularly the Rome Convention,⁶ offers some solutions with regard to individual employment relationships in the event of a cross-border transfer, the collective aspects of these transfers (collective agreements, protection of employees' representatives, obligations regarding information and consultation) are not regulated. Consequently, the Commission considers that cross-border transfers could be given specific attention in the Directive.

3. SAFEGUARDING OF EMPLOYEES' RIGHTS (ARTICLES 3-5)

3.1. Transfer of rights and obligations to the transferee

The rights and obligations arising for the transferor from an employment contract or employment relationship existing on the date of the transfer are, by reason of such transfer, transferred to the transferee.

The transfer of these rights and obligations takes place automatically, by virtue of the transfer of the undertaking, and cannot be made contingent on the intention of the transferor or transferee, nor on the agreement of the employees, without prejudice, however, to the employee's right not to continue his employment relationship with the transferee.

The transfer covers all the employees' rights referred to in Article 3(1) which are not covered by the limitations provided for in Article 3(4) (cf. section 3.4 below).

3.2. Possible joint liability of the transferor and transferee

In theory, the transferor is released from his obligations as an employer by the mere fact of the transfer, without this legal effect requiring the agreement of the employees concerned. Member States may, however, provide that, after the date of the transfer, the transferor continues to be jointly liable with the transferee in respect of obligations arising from an employment contract or employment relationship existing on the date of the transfer. 14 Member States have made provision for the joint liability of the transferor and transferee (cf. Annex I, question 2.1).

⁵ OJ L 1 of 3.1. 1994, p. 3.

⁶ Rome Convention of 1980 on the law applicable to contractual obligations (consolidated version), OJ C 27 of 26.1.1998, p. 34-46.

3.3. Applicable collective agreement

Article 3(3) of the Directive requires the transferee to continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement. Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year. In any case, the latter limitation comes into play only if none of the situations referred to above occurs within a year of the transfer. Ten Member States have made use of the option of limiting this period (cf. Annex I, question 2.2).

The transferee is bound only by the collective agreement in force on the date of the transfer; the Directive does not safeguard benefits which might arise from future developments in collective agreements.

At this stage, the Commission does not see the need for clarification of the Directive as proposed by the authorities of the Slovak Republic to take account of situations in which the transfer would lead to the application of several collective agreements. In these situations, the conclusion of a new collective agreement, as permitted by Article 3(3), should lead to the standardisation of working conditions.

3.4. Non-application of the Directive to benefits other than those awarded under statutory social security schemes

Unless Member States provide differently, the transfer does not apply to employees' rights to old age, disability or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States. Consequently, the transferor's obligations which are based on non-statutory schemes are not transferred. In 13 Member States, these rights are transferred just as any other right, either because they are specifically included, or because they are not specifically excluded. The Commission notes, however, that in some Member States, the fact of not being specifically included is interpreted as exclusion (cf. Annex I, question 2.3).

It should be noted at this juncture that on 20 October 2005, the Commission presented a proposal for a Directive of the European Parliament and of the Council on improving the portability of supplementary pension rights⁷. This proposal is now the subject of inter-institutional discussions.

3.5. Changes in terms and conditions of employment

Since the transferee takes the place of the transferor with regard to the rights and obligations arising from the employment relationship, the Directive does not prevent the transferee from amending the employment relationship insofar as applicable national law admits such amendment in cases other than transfers of undertakings.

If the employment contract or employment relationship is terminated because the transfer, within the meaning of the Directive, involves a substantial change in the

⁷ COM (2005) 507 final

terms and conditions of employment to the detriment of the employee, this termination is regarded as having been brought about by the employer. It is up to the national courts to determine if the employment contract proposed by the transferee involves a substantial change in the terms and conditions to the detriment of the employee.

The Commission does not consider it appropriate at this stage to accept the proposal put forward by the United Kingdom to introduce the possibility for the employer to amend the employment contract, in agreement with the employee, in order to harmonise the terms and conditions of employment of existing employees and those who have been transferred, on condition that those changes, taken overall, are not to the detriment of the transferred employees. The Commission feels that harmonisation can be achieved via collective agreements which, because of the input of the employees' representatives, provide adequate guarantees for transferred employees.

3.6. Protection against dismissal

The transfer of an undertaking or business or part of an undertaking or business does not in itself constitute grounds for dismissal by the transferor or the transferee, but this provision does not stand in the way of dismissals for economic, technical or organisational reasons entailing changes in the workforce. Consequently, the Directive is restricted to prohibiting dismissals purely as a result of the transfer.

The scope of the Directive with regard to dismissals can be restricted by the right of the Member States not to extend the protection provided to "certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal". Only four Member States make use of this possibility (cf. Annex I, question 2.4)

Employees unlawfully dismissed by the transferor shortly before the transfer of the undertaking and not re-employed by the transferee may claim, as against the transferee, that their dismissal was unlawful.

3.7. An employee's right not to continue his employment relationship with the transferee

The purpose of the Directive is to safeguard employees' rights in the event of a change of employer by giving them the opportunity of continuing to work for the transferee under the same conditions as those agreed with the transferor. Its purpose is not, however, to guarantee the continuation of the contract with the transferor if the employee does not wish to work for the transferee. On the assumption that the employee decides of his own free will not to maintain the contract or employment relationship with the transferee, it is up to the Member States to determine the status of that contract or relationship. In such cases, they may, in particular, decide that termination of the contract or employment relationship is attributable to the employee or the employer. They may also stipulate that the employment contract or employment relationship must be maintained with the transferor.

3.8. Transfers carried out as part of bankruptcy proceedings

In order to guarantee the survival of insolvent undertakings, Article 5 of the Directive gives the Member States a degree of flexibility.

In principle, Articles 3 and 4 of the Directive do not apply to bankruptcy proceedings initiated with a view to liquidation of the transferor's assets under the supervision of a competent public authority. When these two Articles apply to bankruptcy proceedings under the supervision of a competent public authority, however, Member States may, pursuant to Article 5(2), provide that: a) certain of the transferor's debts are not transferred to the transferee under the conditions set out in that Article; and/or b) that the employee's terms and conditions of employment are altered, under certain conditions.

11 Member States have national provisions which apply Articles 3 and 4 of the Directive to transfers in which the transferor is the subject of bankruptcy proceedings. Six Member States have made use of the possibilities offered by Article 5(2) (cf. Annex I, questions 2.6 and 2.7). As regards the practical effects of these provisions, the Member States do not possess any data on how many additional undertakings have been saved from bankruptcy by the application of these derogations (cf. Annex I, question 2.8).

3.9. Transfer by a transferor in a situation of serious economic crisis

Italy is the only Member State whose national legislation (as of 17 July 1998) contains a definition of a "situation of serious economic crisis" which satisfies the conditions of Article 5(3), and which could therefore legitimately permit alterations to the terms and conditions of employment pursuant to Article 5(2)(b). However, the Commission considers that Italian legislation goes well beyond simple alteration of the terms and conditions of employment, since it excludes employees of enterprises which are in crisis from the benefits of Articles 3 and 4 of the Directive. In these circumstances, the Commission decided to allow Italy to present its comments on the matter pursuant to Article 226 of the EC Treaty (infringement no. 2005/2433). Consequently, a report on the effects of this provision as provided for in the second subparagraph of Article 5(3) is not applicable.

4. PROTECTION OF THE FUNCTIONS OF THE REPRESENTATIVES OF EMPLOYEES (ARTICLE 6)

Article 6 of the Directive seeks to guarantee the continuity of the representation function and the protection of the persons concerned. As regards continuity of the representation function, it must be borne in mind that if the transferred business preserves its autonomy, in other words, it continues to exist as a distinct operational unit and is not absorbed by a more complex structure, then the status and function of the representatives or of the representation of the employees affected by the transfer, as established by the national legislation of the Member States, must be preserved. However, this provision does not apply if, pursuant to national legislation, the conditions for the re-appointment of the employees' representatives are fulfilled.

Employees' representatives who are affected by a transfer and whose mandate expires as a result of that transfer "shall continue to enjoy the protection provided by the laws, regulations, administrative provisions or practice of the Member States".

5. INFORMATION AND CONSULTATION (ARTICLE 7)

The transferor and the transferee are required to provide certain items of information to the representatives of their respective employees. Whereas the obligation to report is general, the obligation concerning consultation is limited. The latter obligation exists where the transferor or the transferee envisages any measures in relation to the employees (for example, a reduction in the workforce). The consultation takes place "with a view to reaching an agreement".

Member States are required to take all appropriate measures to ensure that the representatives of employees are appointed with a view to ensuring the information and consultation referred to in Article 7. The Directive gives the Member States considerable latitude when defining the procedures for nominating employees' representatives.

The information and consultation obligations apply irrespective of whether the decision resulting in the transfer is taken by the employer or an undertaking controlling the employer.

Member States may limit the above-mentioned obligations to undertakings or businesses which, in terms of the number of employees, meet the conditions for the election or nomination of a collegiate body representing the employees. Six Member States make use of this option (cf. Annex I, question 3.2).

In any case, in the absence of employees' representatives in an undertaking or business, the employees concerned must be informed in advance.

The French authorities believe that, notwithstanding the information which must be given to the employees' representatives, employees should be informed individually by the transferee about the various rights which become applicable after the transfer. The Commission, however, takes the view that the existing information obligations are sufficient to help employees to safeguard their rights, without imposing excessive burdens on employers. The Member States are, however, free, where they consider it appropriate, to extend these obligations at national level pursuant to Article 8 of the Directive. Consequently, the Commission considers that a revision of the Directive on this point is not justified at this stage.

6. CONCLUSION

Nearly 30 years after its adoption, the Commission believes that Directive 77/187/EEC continues to play a key role in protecting employees' rights. This text introduced the principle of the retention of employment contracts despite a change in the legal personality of the employer into the legal orders of many Member States which did not previously recognise that principle. The 1998 revision also made it possible, on the one hand, to refine the concept of "transfer" in the light of the considerable volume of Court of Justice case law and, on the other, to allow the

Member States a degree of flexibility when implementing certain provisions, particularly in cases where the transferor is bankrupt.

By achieving the correct balance between the protection of employees and the freedom to pursue an economic activity, the Directive has made a major contribution to ensuring that numerous restructuring operations in Europe are socially more acceptable.

The Commission believes, however, that the absence of explicit treatment of cross-border transfers in the Directive, which nevertheless applies to transfers in which the undertaking being transferred falls within the territorial scope of the Treaty, can cause uncertainty on the part of employers and employees. Furthermore, the Commission believes that the enlargement of the EU and the consolidation of the internal market, globalisation and the facilitation of cross-border activities by the Regulations on the European Company⁸ and on the European Cooperative Society,⁹ or by the Directive on cross-border mergers,¹⁰ are factors liable to increase the phenomenon of cross-border transfers. Consequently, the Commission believes that the Directive could be amended with a view to clarifying this point, thereby contributing to the improvement of the *acquis communautaire*. To this end, it intends to consult the social partners pursuant to Article 138(2) of the Treaty.

⁸ Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) (OJ L 294, 10.11.2001, p. 1)

⁹ Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (OJ L 207, 18.8.2003, p. 1)

¹⁰ Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ L 310, 25.11.2005, p.1)

Technical annex

Overview of the replies to the questionnaire on Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses

Questions 1.1 and 1.2	Do the national measures adopted in your country to implement the Directive apply to transfers of undertakings from your country to another Member State or to another country of the EEA (Article 1(2))? / to countries outside the EEA (Article 1(2))?
Belgium	They apply to any employer subject to the 1968 Law on Collective Agreements. In the case of cross-border transfers only the party located in Belgium will be subject to Belgian law.
Czech Republic	They apply to all labour law relationships subject to the Labour Code. Changes of place of work in connection with transfers involve termination of the employment relationship for organisational reasons with three months' notice and entitlement to severance pay.
Denmark	Yes, if the conditions are met for the employees concerned.
Germany	Yes, provided German law is applicable under private international law.
Estonia	Yes, provided the employment contract is concluded under Estonian law.
Greece	The business to be transferred must be situated within the EU.
Spain	Yes. The starting point is the Rome Convention. The applicable law will depend on the time of transfer: before or after the change of place of work.
France	In principle yes, but account should be taken of possible mobility clauses.
Ireland	Yes. They are not specifically excluded.
Italy	Yes, to the countries where the Rome Convention applies.
Cyprus	Yes, no special exclusion.
Latvia	Yes.
Lithuania	Yes.
Luxembourg	Yes, they apply to undertakings located in Luxembourg.
Hungary	Yes. Hungary's provisions apply to all employment relationships on the basis of which work is performed in Hungary and also to work performed temporarily abroad.
Malta	Yes, they apply to undertakings situated in the EEA.
Netherlands	Yes, there is no special exclusion.
Austria	Yes, but not outside Austria. Territoriality principle.
Poland	No specific provisions. Need to use international private law.
Portugal	Yes, by virtue of the Rome Convention.
Slovenia	Yes. Labour law applies to employment relationships between employers that have their registered office or residence in Slovenia and workers employed by them. It also applies to employment relationships between foreign employers and workers that are based on an employment contract in Slovenia.
Slovak Republic	Yes, no special exclusion.
Finland	No specific provision.
Sweden	Not explicitly addressed. It would be for the ECJ to rule.
United Kingdom	Yes, to transfers of businesses situated in the UK immediately before the transfer.
Iceland	They Act apply to all countries of the EEA, to the Faeroe Islands and to member states of the Convention establishing the European Free Trade Association.
Liechtenstein	They do not make a difference between transfers of undertakings from Liechtenstein to another EEA Member State or to countries

	outside the EEA. For cross-border transfers § 1173a Art. 43 ff ABGB and the regulations of the IPRG have to be considered.
Norway	The issue of cross border transfers not explicitly addressed in the national rules or in the preparatory works.

Question 1.3	Are the provisions of the Directive suitable for the cross-border transfers mentioned in points 1.1 and 1.2?
Belgium	There should be no major problems in case of transfers within the EEA. Possible problems in the case of non-EEA countries.
Czech Republic	Yes.
Denmark	Yes.
Germany	Yes.
Estonia	No problems detected so far.
Greece	Yes.
Spain	The problems raised by the Directive are general (not specific to cross-border transfers) and stem from the diversity of situations that can arise.
France	No. The absence of express provisions on conflict of law creates problems.
Ireland	No. Greater clarity is needed about the applicable law, jurisdiction and enforcement.
Italy	The Rome Convention suffices.
Cyprus	No.
Latvia	No problems detected so far.
Lithuania	Yes.
Luxembourg	Yes.
Hungary	No problem so far.
Malta	No obstacle to application of the national rules implementing the Directive.
Netherlands	No practical experience.
Austria	Yes.
Poland	Yes. The Rome Convention suffices.
Portugal	The Rome Convention applies.
Slovenia	Slovene labour law does not cover enforcement of rights in case of cross-border transfers. It would be necessary to apply the rules of the different legal systems involved.
Slovak Republic	No.
Finland	The Directive should state that it applies to cross-border situations.
Sweden	No practical experience.
United Kingdom	There would intrinsically be greater difficulties in enforcing rights against foreign-based transferees.

Iceland	No particular problems or conflicts that have arisen in connection with these specific provisions
Liechtenstein	Yes
Norway	As long as there is no court cases on cross border transfers in Norway, we do not know the effects of the provisions in the Directive (or the Norwegian implementation of the Directive). A discussion should be based on the eventual problems that do occur in practice. Therefore Norway sees the need for a study of the effects of the Directive when it comes to protection of workers in the case of cross border transfers.

Question 1.4	Do you consider that cross-border transfers from your country or to your country are increasing in number or are likely to increase in number?
Belgium	They are likely to increase.
Czech Republic	Likely to increase.
Denmark	Increase expected.
Germany	Likely to increase.
Estonia	The employers' confederation has predicted an increase.
Greece	Currently no cases.
Spain	Likely to increase.
France	No information available.
Ireland	Increase expected.
Italy	No specific information available.
Cyprus	Not likely to increase due to the geographical characteristics of the island.
Latvia	No information available.
Lithuania	No information available.
Luxembourg	No such trend has been noted.
Hungary	No data on transfers. Stabilisation of the number of foreign companies in Hungary. Increase in the number of Hungarian companies abroad.
Malta	No data available.
Netherlands	No.
Austria	Likely to increase.
Poland	No cases reported. Difficult to speculate.
Portugal	No cases reported.
Slovenia	Likely to increase.
Slovak Republic	Likely to increase.
Finland	Likely to increase.
Sweden	No statistics available.
United Kingdom	No statistics available, but likely to increase.
Iceland	No significant changes have been noted.
Liechtenstein	There are no statistics concerning cross-border transfers.
Norway	In Norway there are no specific statistics on "transfers of undertakings" available.

Question 1.5	Do the national measures adopted in your country to implement the Directive apply to seagoing vessels (Article 1(3))?
Belgium	No.
Czech Republic	Yes.
Denmark	No.
Germany	Yes.
Estonia	Yes.
Greece	No.
Spain	Yes.
France	No.
Ireland	No.
Italy	Yes, except for possible specific rules in the Navigation Code.
Cyprus	No.
Latvia	No.
Lithuania	Yes.
Luxembourg	No.
Hungary	Yes.
Malta	No.
Netherlands	No.
Austria	Yes.
Poland	Yes.
Portugal	Yes.
Slovenia	No.
Slovak Republic	No.
Finland	Specific provisions in force.
Sweden	Yes.
United Kingdom	Yes, but there are limitations if a UK-registered ship situated in the UK immediately before the transfer ceases to be UK-registered as a result of the transfer.

Iceland	No.
Liechtenstein	The Principality of Liechtenstein being a midland, the exemption in Article 1 (3) of the Directive has not been implemented into national law .
Norway	No.

Question 2.1	Do your national provisions provide for joint liability from transferor and transferee in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer (Article 3(1))?
Belgium	Yes, except debts from supplementary pension schemes.
Czech Republic	No.
Denmark	No.
Germany	Yes, for debts which arose before the transfer and are due to be met within one year after the transfer.
Estonia	Yes, for debts which arose before the transfer and are due to be met within one year after the transfer.
Greece	Yes.
Spain	Yes, for 3 years after the transfer (or 4 years in the case of social security debts).
France	Yes, except in the cases of insolvency proceedings and of successive contracts without any direct contractual link between transferor and transferee.
Ireland	No.
Italy	Yes.
Cyprus	No, only by agreement between transferor and transferee.
Latvia	No.
Lithuania	No. Only subsidiary responsibility for three years.
Luxembourg	Yes.
Hungary	Yes, provided claims are enforced within one year after the transfer.
Malta	No.
Netherlands	Yes, for one year after the transfer.
Austria	Yes.
Poland	Only for transfers of parts of undertakings. Not for transfers of whole undertakings.
Portugal	Yes, for one year after the transfer.
Slovenia	Only for claims made prior to the transfer and claims due to termination of contracts.
Slovak Republic	No.
Finland	Yes.
Sweden	Yes, except insolvency situations or old-age, invalidity or survivors' benefits.
United Kingdom	No, except: a) compensation for failure to consult or inform and b) in the case of public employers, liabilities for injuries or disease which arose before the transfer.
Iceland	Yes.
Liechtenstein	Yes.
Norway	Yes.

Question 2.2	Do your national provisions implementing Article 3(3) limit the period for observing, following the transfer, the terms and conditions agreed in a collective agreement? If the reply is yes, please indicate the period.
Belgium	No.
Czech Republic	No.
Denmark	No.
Germany	Yes: one year.
Estonia	No.
Greece	No.
Spain	No.
France	Yes: one year plus three months' notice.
Ireland	No.
Italy	No.
Cyprus	Minimum period for observing any collective agreement is one year.
Latvia	Provisions of any collective agreement cannot be amended to the detriment of the employee for one year.
Lithuania	No, except in bankruptcy proceedings.
Luxembourg	No.
Hungary	Yes: one year.
Malta	No.
Netherlands	No.
Austria	Yes: one year.
Poland	Yes: one year.
Portugal	Yes: one year.
Slovenia	Yes: one year.
Slovak Republic	No.
Finland	No.
Sweden	Yes: one year.
United Kingdom	No.

Iceland	No.
Liechtenstein	Yes: One year.
Norway	Yes. According to Section 16-2, 2 nd paragraph, the transferee must observe the terms and conditions agreed to in a collective agreement prior to the transfer, unless the transferee explicitly declares in writing within three weeks of the transfer, that he does not want to be bound by the agreement. However, the transferred workers are entitled to keep their individual conditions of employment that arise from the collective agreement agreed to by the transferor, until the collective agreement expires, or a new collective agreement is entered into by the transferee and the transferred employees.

Question 2.3	Does the transfer of rights and obligations under the national provisions implementing paragraphs 1 and 3 of Article 3 apply in relation to employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes (Article 3(4)(a))?
Belgium	No: specifically excluded unless there is a collective agreement to the contrary.
Czech Republic	Those schemes are not regulated by legislation in the Czech Republic. At present there is only legislation on supplementary pension schemes with a State contribution.
Denmark	No, not specifically included.
Germany	Yes.
Estonia	Yes: no specific rules.
Greece	Yes.
Spain	Yes: specifically included.
France	Yes.
Ireland	No, not specifically included.
Italy	Yes: all rights are transferred.
Cyprus	No.
Latvia	Yes, not specifically excluded.
Lithuania	Yes, if they are part of a collective agreement.
Luxembourg	No, not specifically included.
Hungary	No. The supplementary pension funds regulated in Hungary are not company or inter-company pension schemes since they are not linked to employment.
Malta	Yes.
Netherlands	Yes, unless the transferee itself operates a pension scheme, in which case it can choose which of the two.
Austria	Yes, but the transferee has the right to object to the transfer sufficiently in advance.
Poland	Yes.
Portugal	Yes. Since they may be established by collective agreement, they are transferred in the same way.
Slovenia	No, there is no regulation on this matter.
Slovak Republic	No. They are not organised/managed by the employer.
Finland	Yes, they are considered employment benefits that are transferred just like all other rights and obligations.
Sweden	No. However, if they are established in a collective agreement they are transferred in the same way.
United Kingdom	No, but if there is a transfer the transferee has to provide a minimum level of pension provision to employees who were entitled to participate in a scheme run by the transferor.
Iceland	No.
Liechtenstein	No.
Norway	Yes, they are transferred to the new employer. However, the transferee has the option of applying existing pension schemes to the transferred employees after the transfer. In situations where the pension schemes cannot be transferred (e.g. transfers from public to private sector, where

	membership in the State pension fund cannot be upheld), the transferee is obliged to ensure that the transferred workers' are covered by another group pension scheme.
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Question 2.4	Has the possibility laid down in the second subparagraph of Article 4(1) ¹¹ been used in your country? If the reply is yes, in which way?
Belgium	No.
Czech Republic	No.
Denmark	No.
Germany	No.
Estonia	No.
Greece	No.
Spain	Yes: for senior managers.
France	No.
Ireland	No.
Italy	No.
Cyprus	No.
Latvia	No.
Lithuania	No.
Luxembourg	No.
Hungary	Yes: for fixed-term employment contracts.
Malta	No.
Netherlands	No.
Austria	No.
Poland	No.
Portugal	No.
Slovenia	No.
Slovak Republic	No.
Finland	No.
Sweden	Yes: for managers, relatives of the employer, employees working in the employer's household and employees who are employed for work with special employment support or in sheltered employment.
United Kingdom	Yes: for employees who do not have one year's qualifying service with their employer.
Iceland	No.
Liechtenstein	No.
Norway	No.

¹¹ The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.

Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal.

Question 2.5	Do your national provisions implementing Articles 3 and 4 apply to transfers of undertakings where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings mentioned in Article 5(1)?
Belgium	Not in cases of bankruptcy ("faillite"), but they apply in cases of pre-bankruptcy ("concordat judiciaire").
Czech Republic	Yes.
Denmark	Yes.
Germany	Yes.
Estonia	Yes, if the trustee transfers employment contracts.
Greece	No.
Spain	Yes.
France	Not in cases of administration ("redressement judiciaire") or receivership ("liquidation judiciaire") but they apply in cases of preservation ("sauvegarde").
Ireland	No.
Italy	No.
Cyprus	No.
Latvia	No.
Lithuania	Yes. However, the administrator can dismiss employees.
Luxembourg	Yes.
Hungary	Yes.
Malta	No.
Netherlands	No.
Austria	No.
Poland	Yes.
Portugal	Yes.
Slovenia	No.
Slovak Republic	No.
Finland	No, unless the transferor and transferee were under the same control.
Sweden	No.
United Kingdom	Yes.
Iceland	No.
Liechtenstein	No.
Norway	No.

Question 2.6	Has the possibility laid down in Article 5(2)(a) ¹² been used in your country? If the reply is yes, in which way?
Belgium	Yes. It is provided for in Article 8 bis of collective agreement (CCT) No 32 bis in cases of pre-bankruptcy ("concordat judiciaire").
Czech Republic	No. Normal rules on transfers apply.
Denmark	No. Normal rules on transfers apply.
Germany	Yes, through Court interpretations of national law.
Estonia	No.
Greece	No.
Spain	Yes.
France	Yes.
Ireland	No.
Italy	No.
Cyprus	No.
Latvia	No.
Lithuania	No. Normal rules on transfers apply.
Luxembourg	No. Normal rules on transfers apply.
Hungary	No. Normal rules on transfers apply.
Malta	No.
Netherlands	No.
Austria	No.
Poland	Yes. The purchaser of a bankrupt company purchases it free of liabilities and is not responsible for the obligations of the bankrupt.
Portugal	No. Normal rules on transfers apply.
Slovenia	No.
Slovak Republic	No.
Finland	No.
Sweden	No.
United Kingdom	Yes, for certain pre-existing debts.
Iceland	No.
Liechtenstein	No.

¹²

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

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

Question 2.7	Has the possibility laid down in Article 5(2)(b) ¹³ been used in your country? If the reply is yes, in which way?
Belgium	Yes. It is provided for in Article 8 bis of collective agreement (CCT) No 32 bis in cases of pre-bankruptcy ("concordat judiciaire").
Czech Republic	No.
Denmark	No.
Germany	Yes: the insolvency administrator can give notice of dismissals in view of the transfer.
Estonia	No.
Greece	No.
Spain	Yes.
France	No.
Ireland	No.
Italy	Yes, through use of the possibility granted by Article 5(3).
Cyprus	No.
Latvia	No.
Lithuania	Nothing stops parties from concluding a collective agreement to this effect.
Luxembourg	Yes.
Hungary	No. Normal rules on transfers apply.
Malta	No.
Netherlands	No.
Austria	No.
Poland	No.
Portugal	No. Normal rules on transfers apply.
Slovenia	No.
Slovak Republic	No.
Finland	No.
Sweden	No.
United Kingdom	Yes.
Iceland	No.
Liechtenstein	No.

¹³ Where Articles 3 and 4 apply to a transfer during insolvency proceedings which have been opened in relation to a transferor (whether or not those proceedings have been instituted with a view to the liquidation of the assets of the transferor) and provided that such proceedings are under the supervision of a competent public authority (which may be an insolvency practitioner determined by national law) a Member State may provide that:

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

Question 2.8	Do you consider that the number of insolvent undertakings that have survived in your country has increased thanks to the use of the derogations provided for in Article 5(2)?
Belgium	No information available.
Czech Republic	N.A.
Denmark	N.A.
Germany	The legislation in place was already in force in Germany before. Therefore no change has been noted.
Estonia	N.A.
Greece	N.A.
Spain	No information available, but it appears to have been useful.
France	N.A.
Ireland	N.A.
Italy	Yes, but there are no specific data.
Cyprus	N.A.
Latvia	N.A.
Lithuania	N.A.
Luxembourg	No information available.
Hungary	N.A.
Malta	N.A.
Netherlands	N.A.
Austria	N.A.
Poland	No information available.
Portugal	N.A.
Slovenia	N.A.
Slovak Republic	N.A.
Finland	N.A.
Sweden	N.A.
United Kingdom	Too early to say. Changes have only just been introduced.
Iceland	N.A.
Liechtenstein	N.A.
Norway	N.A.

Question 3.1	Has the possibility laid down in Article 7(3) ¹⁴ been used in your country? If the reply is yes, in which way?
Belgium	No.
Czech Republic	No.
Denmark	No.
Germany	Yes.
Estonia	No.
Greece	No.
Spain	No.
France	No.
Ireland	No.
Italy	No.
Cyprus	No.
Latvia	No.
Lithuania	No.
Luxembourg	No. No such recourse to an arbitration board is provided for in Luxembourg.
Hungary	No. There is no such arbitration board.
Malta	No.
Netherlands	No.
Austria	No.
Poland	No. No such recourse to an arbitration board is provided for in Poland.
Portugal	No. No such recourse to an arbitration board is provided for in Portugal.
Slovenia	No.
Slovak Republic	No.
Finland	No.
Sweden	No.
United Kingdom	No.

Iceland	No.
Liechtenstein	No.
Norway	No. The Norwegian legislation does not provide for any such arbitration board.

¹⁴ Member States whose laws, regulations or administrative provisions provide that representatives of the employees may have recourse to an arbitration board to obtain a decision on the measures to be taken in relation to employees may limit the obligations laid down in paragraphs 1 and 2 to cases where the transfer carried out gives rise to a change in the business likely to entail serious disadvantages for a considerable number of the employees.

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

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

Question 3.2	Has the possibility laid down in Article 7(5) ¹⁵ been used in your country? If the reply is yes, in which way?
Belgium	No.
Czech Republic	No.
Denmark	No.
Germany	Yes: undertakings with more than 20 employees.
Estonia	No.
Greece	No.
Spain	No limit for information purposes. For consultation purposes in certain circumstances: undertakings with more than 6 employees.
France	Yes.
Ireland	No.
Italy	No.
Cyprus	No.
Latvia	Consultations take place only with employees' representatives (who are elected in undertakings with more than 5 workers).
Lithuania	No.
Luxembourg	No.
Hungary	No.
Malta	Yes: undertakings with more than 20 employees.
Netherlands	No.
Austria	No.
Poland	No.
Portugal	No.
Slovenia	No.
Slovak Republic	No.
Finland	Yes: the Act on Cooperation within Undertakings applies to enterprises with at least 30 employees.
Sweden	No.
United Kingdom	No.
Iceland	No.
Liechtenstein	No.
Norway	No.

¹⁵ Member States may limit the obligations laid down in paragraphs 1, 2 and 3 to undertakings or businesses which, in terms of the number of employees, meet the conditions for the election or nomination of a collegiate body representing the employees.

Questions 4.1 and 4.2	Do you consider that any provision in the Directive needs clarification or improvement? If the reply is yes, please specify which provisions and the problems encountered. Do you have any concrete drafting proposal to overcome the problems identified?
Belgium	No.
Czech Republic	No.
Denmark	No.
Germany	
Estonia	The Estonian Employers' Confederation considers that the broad range of possible interpretations of Article 1 of the Directive cause legal uncertainty and court actions. The Confederation of Estonian Trade Unions sees no need to amend the Directive.
Greece	No.
Spain	No.
France	In addition to the information due to employees' representatives, each employee should be informed by the transferee about his or her rights after the transfer.
Ireland	Yes. The Directive does not address the issue of outsourcing. The exclusions arising as a result of application of the principles of the Süzen ECJ ruling are unfair and particularly victimise low-paid workers. It is essential that measures be introduced to recognise that the work performed by a worker is an economic asset with potential to generate profit.
Italy	
Cyprus	No.
Latvia	No.
Lithuania	No.
Luxembourg	No.
Hungary	No.
Malta	No.
Netherlands	No.
Austria	No.
Poland	No.
Portugal	The issue of cross-border transfers creates doubts.
Slovenia	No.
Slovak Republic	Yes, it is necessary to clarify Article 3(3) of the Directive in cases where several legal regimes under several collective agreements are transferred to an acquirer (transferee employer) and each of the collective agreements will have come into force on a different date. Is this a case of employee discrimination by the acquirer (transferee employer)? Does the collective agreement grant the most favourable conditions to employees, e.g. after three undertakings are merged if applicable to all employees of a newly established (merged) undertaking?
Finland	Yes, Cross-border application of the Directive could be clarified.
Sweden	No. Possible problems and solutions could be discussed within the Group of Experts.
United	The UK Government considers that Article 3(1), as interpreted by the ECJ and the UK courts, places unnecessary and unhelpful restrictions on employers and employees preventing them from agreeing to vary

Kingdom	<p>employment contracts where the purpose of the variation is to harmonise the terms and conditions of transferring employees with those of employees already employed by the transferee. Because such harmonisation is not currently permissible, transferees are required to operate at least two sets of terms and conditions following a transfer. And because some transferees (especially those providing contract services to employers) can be involved in many transfers, there is scope for three or more sets of terms and conditions to apply across a group of employees doing the same or similar jobs.</p> <p>The following new second subparagraph should be inserted in Article 3(1):</p> <p>"This Article shall not prevent the employer and his employee whose contract of employment is, or will be, transferred from agreeing a variation of that contract by reason of such transfer, provided the sole or principal purpose of the variation is to effect harmonisation and provided the employee is no worse off overall as a result. "Harmonisation" means a measure intended to increase uniformity in the terms and conditions of employees, or prospective employees, of the transferee."</p> <p>The existing second subparagraph of Article 3(1) would then become the third subparagraph.</p>
UEAPME	No.
ETUC	Some of the measures safeguarding employees' rights provided for in the Directive (Articles 3(1), 3(2), 6 and 7) should be extended to cases of change of ownership through share purchases.
Iceland	The provisions are generally clear. It is up to the courts to interpret the provisions if problems or conflicts arise.
Liechtenstein	For the moment, there is no need for clarification or improvement.
Norway	Norway first of all sees the need for more information of the practical problems with cross border transfers. A discussion should be based on the problems that do occur in cases in practical life, and especially what kind of solutions the social partners tend to reach through negotiations instead of going to court. Norway therefore welcomes the result/report from the Commission of the effect of the Directive. Hopefully the report will identify eventually problems and/or needs for clarifications or improvements that might be of interest to discuss in the group of experts in order to find possible solutions