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COMMISSION SERVICES' WORKING DOCUMENT

Memorandum on rights of workers in cases of transfers of undertakings

1. INTRODUCTION

Council Directive 2001/23/EC¹ 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 part of undertakings or businesses, codifies Council Directive 77/187/EC² as amended by Council Directive 98/50/EC³.

According to its preamble, the aim of the Directive is "**to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded**". To this end, the Directive provides in the main a) that the transferor's rights and obligations arising from an employment relationship existing on the date of a transfer are transferred to the transferee, b) that the transfer is not in itself to constitute grounds for dismissal by the transferor or the transferee and c) that workers' representatives have certain rights to be informed and consulted.

In 1997 the Commission issued a Memorandum on acquired rights of workers in cases of transfers of undertakings⁴. It contained guidelines on the application of Directive 77/187/EEC, based on the case-law of the Court of Justice of the European Communities (hereinafter the Court of Justice or the ECJ).

More than seven years have passed since the issuing of the said Memorandum. In the meantime Directive 77/187/EC has been amended by Directive 98/50/EC and both Directives have been consolidated by Directive 2001/23/EC. Moreover, a number of important judgments interpreting the Directive have been handed down. In these circumstances, and taking into account the enlargement of the EU, it is appropriate to update the 1997 Memorandum with the present document.

The reference to Articles in the present Memorandum is made to those as codified in Directive 2001/23/EC (hereinafter referred to as "the Directive", unless otherwise specified).

2. SCOPE

2.1. Which countries?

The Directive applies "where and insofar as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty" (Article 1(2)) or a member country of the European Economic Area (Norway, Iceland, Liechtenstein).

¹ OJ L 82 of 22.3.2001, p.16.

² OJ L 61 of 5.3.77, p.26.

³ OJ L 201 of 17.7.1998, p. 88.

⁴ COM (97) 85 final, 4 March 1997.

2.2. Which kind of undertakings?

The Directive applies to economic entities which constitute organised groupings of resources having the objective of pursuing an identifiable economic activity (Article 1(1)(b)).

According to Article 1(1)(c), the Directive applies to any type of undertakings whether they are public or private and whether or not they are operating for gain.

The essential element for the characterisation of an entity as undertaking or business is that this entity is engaged in economic activities, i.e. that it provides goods or services on a market. Activities involving the exercise of public authority do not fall within the scope of the directive. Also excluded from the scope of the directive is an administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities (Article 1(1)(c) last sentence).

Transfers involving sea-going vessels are explicitly excluded by the Directive (Article 1(3)).

2.3. Which employees?

The term 'employee' refers to any person who, in the Member State concerned, is protected as an employee under national employment law (Article 2(1)(d)).

All employees are protected. In this sense, according to Article 2(2), Member States shall not exclude from the scope of the Directive contracts of employment solely because

- (a) of the number of working hours performed; or
- (b) they are fixed-duration employment relationships within the meaning of Directive 91/838/EEC⁵; or
- (c) they are temporary employment relationships within the meaning of Directive 91/838/EEC⁶, and the undertaking, business or part of the undertaking or business transferred is, or is part of, the temporary employment business which is the employer.

The Directive does not apply, however, either to employees who have already left the undertaking on the date of the transfer⁷ or to employees engaged after the date of transfer⁸ or to employees employed by the transferor at the date of the transfer but who, on their own accord, decide not to continue the employment relationship with the new employer after the transfer⁹.

2.4. Which operations?

For a transfer to take place two conditions must be met: a) there must be a change of employer and b) the transferred entity must maintain its identity.

⁵ Article 1(1) of Council Directive 91/838/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship, OJ L/206, 29.7.1991, p. 19.

⁶ Article 1(2) of Council Directive 91/838/EEC.

⁷ Case 19/83, *Knud Wendelboe*.

⁸ Case 287/86 *Ny Mølle Kro*.

⁹ Case 105/84 *Danmols Inventar*.

2.4.1. *Change of employer*

There must be a change, in terms of contractual relations, in the legal or natural person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the entity¹⁰. Accordingly, the terms 'transferor' and 'transferee' have been defined in the Directive as meaning any natural or legal person who by reason of a transfer ceases to be (transferor) or becomes (transferee) the employer in respect of the undertaking, business or part of the undertaking or business. (Article 2(1) (a) and (b)).

The transfer of ownership of most of the shares in a company or a change in the majority shareholder does not constitute a transfer of the undertaking, as the employer's legal personality remains the same¹¹.

2.4.2. *Maintenance of the identity*

The maintenance of the 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 it¹². The assessment necessary in order to establish whether or not there is a transfer are a matter for the national courts, in view of the specific interpretation factors involved¹³:

- 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,
- the period, if any, for which those activities were suspended.

However, as recalled by the Court, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation.

Amongst the above elements, the type of activity carried on by the undertaking is an essential factor since it might determine the degree of importance to be given to the others. Indeed, as far as the provision of services is concerned, the Court has distinguished between activities based essentially on manpower, such as cleaning and surveillance, and activities based essentially on assets, such as public transport or catering. Therefore, in case of providers of services whose activities are based essentially on manpower, the taking over by the new employer of a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to the provision of the services in point can result in the maintenance of the identity of the entity¹⁴. Similarly, in case of providers of services whose activities are based essentially on assets, the taking over by a new operator of the assets indispensable for the provision of the services can result in the maintenance of the

¹⁰ Case 287/86 *Ny Mølle Kro*, Case 324/86 *Daddy's Dance Hall* and Case C-234/98 *Allen*.

¹¹ Case 24/85 *Spijkers*.

¹² Case C-13/95 *Süzen*.

¹³ Case 24/85 *Spijkers*.

¹⁴ Joint cases C-173/96 and C-247/96 *Sánchez Hidalgo*.

identity of the entity even when the essential part of the staff has not been taken over¹⁵. On the contrary, the identity is not maintained where the new operator does not take over the assets indispensable for the provision of the services¹⁶.

2.4.3. *The nature of the transaction at the origin of the transfer*

The means through which the change of employer takes place is not relevant. The Court has held that, in view of the differences between the various language versions of Article 1(1) of the Directive and the divergences between national legislation on the concept of legal transfer, its scope cannot be appraised solely on the basis of a textual interpretation¹⁷. Therefore, a transfer can result from a unilateral act, a judicial decision or a law. Similarly, there is no need that the transfer results from a direct contractual relationship between the transferee and the transferor.

The Court has held that the Directive is applicable to a transfer of undertaking which takes place in the following transactions:

- in the course of a procedure such as a 'surséance van betaling' (judicial leave to suspend payment of debts)¹⁸
- where the owner of a leased undertaking takes over its operation following a breach of the lease by the lessee¹⁹
- where, upon the termination of a non-transferable lease, the owner of an undertaking leases it to a new lessee²⁰;
- to the transfer of an undertaking pursuant to a lease-purchase agreement and to the retransfer of the undertaking upon the termination of the lease-purchase agreement by a judicial decision²¹;
- where, after giving notice bringing the lease to an end or upon termination thereof, the owner of an undertaking retakes possession of it and thereafter sells it to a third party²²;
- where, in accordance with a body of legislation such as that governing special administration for large undertakings in critical difficulties, it has been decided that the undertaking is to continue trading for as long as that decision remains in effect²³;
- to a situation in which a public authority decides to terminate the subsidy paid to a foundation, which is its only source of income, as a result of which its activities are fully and definitively terminated, and to transfer it to another foundation with a similar aim²⁴;
- to a situation in which one entrepreneur, by a contract, assigns to another entrepreneur responsibility for running a facility for staff, which was formerly managed directly²⁵;

¹⁵ Case C-340/01 *Able.r*

¹⁶ Case C-172-99 *Oy Liikenne*.

¹⁷ Case 135/83 *Abels*.

¹⁸ Case 135/83 *Abels*, Case 179/83 *FNV*, and Case 186/83 *Botzen*.

¹⁹ Case 287/86 *Ny Mølle Kro*.

²⁰ Case 324/86 *Daddy's Dance Hall*.

²¹ Joined Cases 144/87 and 145/87 *Berg*.

²² Case 101/87, *Bork International*.

²³ Case C-362/89 *D'Urso*.

²⁴ Case C-29/91 *Redmond Stichting*.

²⁵ Case C-209/91 *Watson Rask*.

- to a situation in which an undertaking entrusts by contract to another undertaking the responsibility for carrying out cleaning operations which it previously performed itself, even though, prior to the transfer, such work was carried out by a single employee²⁶;
- to the transfer of an undertaking which under Article 2(5)(c) of the Italian law 675 of 12 August 1977 has been declared to be in critical difficulties²⁷;
- to a situation in which an undertaking holding a dealership for a particular territory discontinues its activities and the dealership is then transferred to another undertaking which takes on part of the staff and is recommended to customers, without any transfer of assets²⁸;
- in the event of the transfer of an undertaking which is being wound up by the court if the undertaking continues to trade²⁹;
- where a company in voluntary liquidation transfers all or part of its assets to another company from which the worker then takes his orders which the company in liquidation states are to be carried out³⁰;
- where an undertaking which used to entrust the cleaning of its premises to another undertaking decides to terminate its contract with that other undertaking and in the future to carry out that cleaning work itself or trust that task to a third undertaking, if the new employer takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task³¹;
- to a situation in which a public body which had contracted out its home-help service for persons in need or awarded a contract for maintaining surveillance of some of its premises to a first undertaking decides, upon expiry of or after termination of the contract which it had with the first undertaking, to contract out that service or award that contract to a second undertaking, provided that the operation is accompanied by the transfer of an economic entity between the two undertakings³²;
- to a situation in which a company belonging to a group decides to subcontract to another company in the same group contracts in so far as the transaction involves the transfer of an economic entity between the two companies³³;
- to a situation in which an entity operating services for public use and managed by a public body within the State administration is, following decisions of the public authorities, the subject of an administrative concession, to a private-law company established by another public body which holds its entire capital³⁴;
- where a municipality, a legal person governed by public law operating within the framework of specific rules of administrative law, takes over activities relating to publicity and information concerning the services which it offers to the public, where

²⁶ Case C-392/92 *Schmidt*.

²⁷ Case C-472/93 *Spano*.

²⁸ Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys*.

²⁹ Case C-319/94 *Dethier Equipment*

³⁰ Case C-399/96 *Europièces*.

³¹ Joined cases C-127/96, C-229/96 and C-74/97 *Hernandez Vidal* and Case C-51/00 *Temco*.

³² Joined cases C-173/96 and C-247/96 *Sánchez Hidalgo*.

³³ Case C-234/98 *Allen*.

³⁴ Case C-343/98 *Collino*.

such activities were previously carried out, in the interests of that municipality, by a non-profit-making association which was a legal person governed by private law³⁵;

- to the taking over by an undertaking of non-maritime public transport activities - such as the operation of scheduled local bus routes - previously operated by another undertaking, following a procedure for the award of a public service contract under Directive 92/50³⁶;
- to a situation in which a contracting authority which had awarded the contract for the management of the catering services in a hospital to one contractor terminates that contract and concludes a contract for the supply of the same services with a second contractor, where the second contractor uses substantial parts of the tangible assets previously used by the first contractor and subsequently made available to it by the contracting authority, even where the second contractor has expressed the intention not to take on the employees of the first contractor³⁷.

3. CONSEQUENCES OF A TRANSFER

3.1. Transfer of rights and obligations to the transferee

In accordance with Article 3(1) of the Directive, the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer are, by reason of such transfer, transferred to the transferee. However, Member States may provide that after the date of transfer the transferor continues to be liable, side by side with the transferee, in respect of obligations arising from a contract of employment or an employment relationship existing on the date of the transfer.

In the Court's view, the Directive refers unreservedly to the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of transfer. It is the transferee who assumes, in the first instance, liability for bearing the burdens resulting from employees' rights existing at the time of transfer³⁸, without prejudice to the possibility for Member States to provide for joint liability of transferor and transferee in respect of obligations which arose before the date of transfer. The transfer of all contracts of employment or employment relationships existing on the date of the transfer of an undertaking between the transferor and the workers employed in the undertaking transferred takes place automatically by the mere fact of the transfer³⁹ and may not be made subject to the intention of the transferor or the transferee⁴⁰ or the agreement of the employees⁴¹, without prejudice, however, to the employee's right not to continue the employment relationship with the transferee⁴². Moreover, this transfer necessarily takes place on the date of the transfer of the undertaking and cannot be postponed to another date at the will of the transferor or transferee⁴³.

In calculating the rights of a financial nature attached, in the transferee's business, to employees' length of service, such as a termination payment or salary increases, the transferee must take into account the entire length of service of the employees transferred, both in his employment and that of the transferor, in so far as his obligation to do so derives

³⁵ Case C-175/99 *Mayeur*.

³⁶ C-172/99 *Oy Liikenne*.

³⁷ Case C-340/01 *Abler*.

³⁸ Case 135/83 *Abels*.

³⁹ Case C-362/89 *d'Urso*.

⁴⁰ Case C-305/94 *Rotsart de Hertaing*.

⁴¹ Joined cases 144 and 145/87 *Berg*.

⁴² Case C-132/91 *Katsikas*.

⁴³ Case C-305/94 *Rotsart de Hertaing*.

from the employment relationship between those employees and the transferor, and in accordance with the terms agreed in that relationship. The Directive does not, however, preclude the transferee from altering the terms of the employment relationship where national law allows such an alteration in situations other than the transfer of an undertaking⁴⁴.

Article 3(1) relates to all the rights of employees mentioned therein which are not covered by the exceptions of Article 3(3)⁴⁵. Rights contingent upon dismissal or the grant of early retirement by agreement with the employer fall within the rights and obligations referred to in Article 3(1) of the Directive⁴⁶.

3.2. Transfer of undertaking and collective agreement applicable

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, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement⁴⁷. Member States may limit this period, provided it is not less than one year.

The above obligation is towards workers who were already employed by the undertaking at the time of transfer, thus excluding those who were recruited subsequent to that date⁴⁸.

3.3. Transfer of undertaking and changes in working conditions

If the contract of employment or the employment relationship is terminated because the transfer within the meaning of the Directive involves a substantial change in working conditions to the detriment of the employee, the employer is regarded as having been responsible for termination of the employment contract or employment relationship (Article 4(2)).

It is for the national court to determine whether the contract of employment proposed by the transferee involves a substantial change in working conditions to the detriment of the worker. If it does, Article 4(2) of the Directive requires Member States to provide that the employer is to be considered responsible for the termination⁴⁹.

According to the Court an obligation, prescribed by national law, to terminate contracts of employment governed by private law in the case of transfer of an activity to a legal person governed by public law, constitutes a substantial change in working conditions to the detriment of the employee resulting directly from the transfer, with the result that termination of such contracts of employment must, in such circumstances, be regarded as resulting from the action of the employer⁵⁰.

Employees' remuneration rights arising from their employment contract or employment relationship may not be changed even if the overall amount of their wages remains unchanged. However, in so far as national law makes it possible to amend an employment relationship in a way which is disadvantageous to employees, such changes are not ruled out merely because the undertaking has in the meantime been transferred. Thus, the rights and obligations may be

⁴⁴ Case C-343/98 *Collino*.

⁴⁵ Case C-164/00 *Beckmann*.

⁴⁶ Case C-4/01 *Serene Martin*.

⁴⁷ Case C-209/91 *Watson Rask*.

⁴⁸ Case 287/86 *Ny Mølle Kro*.

⁴⁹ Case C-399/96 *Europièces*.

⁵⁰ Case C-175/99 *Mayeur*.

changed vis-à-vis the transferee subject to the same restrictions as could have been applied to the transferor, assuming that the transfer in itself is not the reason for this change⁵¹.

3.4. Non-entitlement to waive the rights conferred by the Directive

The Court of Justice has held that the protection conferred by the mandatory provisions of the Directive is a matter of public policy. It has ruled very clearly that an employee cannot waive the rights conferred upon him by the Directive and that these rights cannot be restricted, even with his consent and even if the disadvantages resulting from his waiver are offset by such benefits that, taking the matter as a whole, he is not placed in a worse position⁵².

As the Court has specified, the Directive's rules apply to all, including the employees' representatives, who may not agree different arrangements in an agreement with the transferor or the transferee. According to the Court, it is not permissible to derogate from the rules in a manner unfavourable for the employees and hence the implementation of the rights conferred on employees may not be made subject to the consent of either the transferor or the transferee nor the consent of the employees' representatives or the employees themselves, with the sole reservation, as regards the workers themselves, that, following a decision freely taken by them, they are at liberty, after the transfer, not to continue the employment relationship with the new employer⁵³.

3.5. Employee's right not to continue the employment relationship with transferee

The objective of the Directive is to safeguard the rights of employees in the event of a change of employer by making it possible for them to continue to work for the transferee under the same conditions as those agreed with the transferor. Its purpose is not, however, to ensure that the contract with the transferor is continued where an employee does not wish to remain in the transferee's employ⁵⁴. In the event of the employee deciding of his own accord not to continue with the contract of employment or employment relationship with the transferee, it is for the Member States to determine what the fate of the contract of employment or employment relationship should be. The Member States may provide, in particular, that in such a case the contract of employment or employment relationship must be regarded as terminated either by the employee or by the employer. They may also provide that the contract or employment relationship should be maintained with the transferor⁵⁵.

3.6. Non-application of the Directive to benefits outside statutory social security schemes

Unless Member States provide otherwise, the transfer of rights and obligations arising from a contract of employment or an employment relationship does not cover employees' rights to old-age, invalidity or survivor's benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States (Article 3(4) (a)). Thus there is no transfer of the transferor's obligations based on non-statutory schemes. Since it is an exception to the general rule, Article 3(4)(a) must be interpreted strictly. That exception can therefore apply only to the benefits listed exhaustively in that provision and they must be construed in a narrow sense.⁵⁶

⁵¹ Case 209/91 *Watson Rask*.

⁵² Case 324/86 *Daddy's Dance Hall*.

⁵³ Case 362/89 *d'Urso*.

⁵⁴ Cases 144/87 and 154/87 *Berg*.

⁵⁵ Case 105/84 *Danmols Inventar*; Joined cases C-132/91, C-138/91 and C-139/91 *Katsikas*; Joined cases C-171/94 and C-172/94 *Merckx*; Case C-399/96 *Europieces*,

⁵⁶ Case C-164/00, *Beckmann*.

In order to avoid the adverse consequences for employees which could result from this exclusion, Member States must adopt the measures necessary to protect the interests of employees and persons no longer employed in the transferor's business at the time of transfer (Article 3(4)(b)).

3.7. Protection against dismissal

The transfer of an undertaking, business or part of a business does not in itself constitute grounds for dismissal by the transferor or the transferee (Article 4(1)), but this provision does not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.

Thus the Directive is limited to prohibiting dismissals where the only reason is the transfer.

The Directive's scope as far as dismissals are concerned may be curtailed by the right, recognised in the Member States, of withdrawing protection from "certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal" (Article 4(1), second indent).

The Court has held that the protection afforded by the Directive against dismissal applies to any situation in which employees affected by a transfer enjoy some, albeit limited, protection against dismissal under national law, with the result that such protection may not be taken away from them or curtailed solely because of the transfer⁵⁷.

Employees unlawfully dismissed by the transferor shortly before the undertaking is transferred and not taken on by the transferee may claim, as against the transferee, that their dismissal was unlawful⁵⁸.

3.8. Transfers effected in the context of insolvency proceedings

With a view to ensuring the survival of insolvent undertakings, some flexibility is allowed to Member States by virtue of article 5 of the Directive.

In principle, Articles 3 and 4 of the Directive do not apply to insolvency proceedings instituted with a view to the liquidation of the assets of the transferor under the supervision of a competent public authority. Where those two articles apply in insolvency proceedings which are under the supervision of a competent public authority, Member States may provide:

a) that certain debts of the transferor are not transferred to the transferee provided that such proceedings give rise to protection at least equivalent to that provided for in situations covered by Council Directive 80/987/EEC of 20 October 1980. In order to qualify for this exception, these debts

- must result from any contract of employment or employment relationships and
- must be payable before the transfer or before the opening of the insolvency proceedings;

and, or alternatively,

b) that alterations be made to the employees' terms and conditions of employment, provided that:

⁵⁷ Case 237/84 *Commission v Belgium*.

⁵⁸ Case C-319/94 *Dethier Équipement*.

- current law and practice permit them;
- they are designed to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or business; and
- they are agreed by 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.

3.9. Protection of the functions of the employees' representatives

Article 6 of the Directive aims to ensure continuity of the function of representation and protection of the persons concerned. As regards continuity of the function of representation (Article 6(1)), it should be borne in mind that if the business transferred preserves its autonomy, i.e. continues to exist as a separate operating unit rather than being absorbed by a more complex structure, the status and function of the representatives or representation of the employees affected by the transfer, as laid down by the national law of the Member States, must be preserved. However, this does not apply, if in accordance with national legislation the conditions necessary for the re-appointment of the employees' representatives are fulfilled.

The representatives of the employees affected by a transfer whose term of office expires as a result of the transfer "continue to enjoy the protection provided by the laws, regulations, administrative provisions or practice of the Member States" (Article 6(2)).

4. INFORMATION AND CONSULTATION

The transferor and transferee are required to inform the representatives of their respective employees affected by a transfer of the following (Article 7(1)):

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

The transferor must provide this information in good time before the transfer is carried out. The transferee must provide it in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment.

Whereas the obligation to provide information is general, the consultation obligation is limited. This obligation exists when the transferor or transferee envisages measures in relation to his employees (Article 7(2)), e.g. a reduction in the size of the workforce. Consultation takes place "with a view to seeking agreement". The Court of Justice has interpreted a similar provision in Directive 75/129/EEC (collective redundancies) as not creating an obligation with regard to results⁵⁹. This consultation must be made "in good time" with the employees' representatives.

According to the Court, the Directive was not intended to bring about global harmonisation of the national systems of employee representation in the firm. However, the limited nature

⁵⁹ Case 284/83, *Dansk Metalarbejderforbund*.

of such harmonisation should not frustrate the purpose of Article 7 of the Directive. Notably, it should not absolve Member States from their obligation to take all the necessary measures to ensure that the employees' representatives may be designated with a view to the information and consultation provided for in the Article in question. This being the case the Directive leaves it to the Member States to determine the arrangements for designating the employees' representatives⁶⁰.

The information and consultation obligations laid down in Article 7 shall 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 obligations referred to above to undertakings or businesses which, in terms of respect of the number of employees, fulfil the conditions for the election or nomination of a collegial body representing the employees (Article 7(5)).

They shall also provide that, where there are no representatives of the employees in an undertaking or business, the employees concerned must be informed in advance (Article 7(6)).

It must be emphasised that national law must provide for effective, proportionate and dissuasive sanctions in the event of the employer's failure to inform and consult the employee representatives⁶¹.

5. THE ISSUE OF CROSS BORDER TRANSFERS

The Directive leaves to national law some of the notions it uses: for instance, according to Article 2.1.(d) "*employee' shall mean any person who, in the member State concerned, is protected as an employee under national employment law*". Similarly, Article 2.2 refers to national law as regards the definition of contract of employment or employment relationship. Moreover, Member States can exercise some options when transposing the Directive into national law.

The Court has also referred to Member States' legislation in order to rule certain aspects related to transfers of undertakings. For instance, it is the national law that determines transferor's obligations to be maintained after the transfer whether they arise under a contract of employment, an employment relationship or a collective agreement as well as the possibility to change them vis-à-vis the transferee⁶². Similarly, in the event of the employee deciding of his own accord not to continue with the contract of employment or employment relationship with the transferee, it is for the Member States to determine what the fate of the contract of employment or employment relationship should be⁶³.

In these circumstances, when the transferor and the transferee are governed by the laws of different States conflicts of law may arise for which the Directive does not provide a solution even if by virtue of article 1(2) the operation is within the scope of the Directive.

The Rome Convention⁶⁴ could provide an answer as far as the law applicable to the employment contract is concerned. However, this is not the case as to the continuation of collective agreements and information and consultation obligations.

⁶⁰ Case 382/92 *Commission v. UK*.

⁶¹ Case 382/92 *Commission v. UK*.

⁶² Case 209/91 *Watson Rask*.

⁶³ Case C-399/96 *Europieces*,

⁶⁴ Convention applicable to contractual obligations opened for signature in Rome on 19 June 1980.

Taking into account that with the growing integration of the Member States economies, the number of cross border transfers is likely to increase, the Commission intends to carry out an in depth analysis of the issue with a view to clarifying it.

6. CONCLUSION

The Directive has formed the basis for a large number of cases brought before the Court of Justice of the European Communities. A total of 37 judgments have been rendered, most of them in connection with references for preliminary rulings (see Annex I). The EFTA Court has also handed down 5 judgements related to the Directive (see Annex II). At the moment there are several cases pending before the Court (see Annex III).

The Commission will analyse the effects of the Directive and, under the obligation provided for by Article 10, shall report to the Council before 17 July 2006. On the basis of this report, it shall propose any amendment which may seem necessary.

ANNEX I

JUDGMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES RELATING TO TRANSFERS OF UNDERTAKINGS (Situation as of 30.10.2004)

Case 135/83. Judgment of the Court of 7 February 1985. *Abels*. ECR 1985 Page 0469

Case 19/83. Judgment of the Court of 7 February 1985. *Knud Wendelboe*. ECR 1985 Page 0457

Case 179/83. Judgment of the Court of 7 February 1985. *FNV*. ECR 1985 page 0511

Case 186/83. Judgment of the Court of 7 February 1985. *Botzen*. ECR 1985 Page 0519

Case 105/84. Judgment of the Court (Fifth Chamber) of 11 July 1985. *Danmols Inventar*. ECR 1985 page 2639.

Case 24/85. Judgment of the Court (Fifth Chamber) of 18 March 1986. *Spijkers*. ECR 1986 Page 1119.

Case 237/84. Judgment of the Court of 15 April 1986. *Commission vs. Belgium*. ECR 1986 page 01247

Case 235/84. Judgment of the Court of 10 July 1986. *Commission vs. Italy*. ECR 1986 page 2291

Case 287/86. Judgment of the Court (Third Chamber) of 17 December 1987. *Ny Mølle Kro*. ECR 1987 page 05465

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Case 101/87. Judgment of the Court (Third Chamber) of 15 June 1988. *Bork International* ECR 1988 page 3057.

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Case C-382/92. Judgment of the Court of 8 June 1994. *Commission vs. United Kingdom*. ECR 1994 Page I-2435

Case C-48/94. Judgment of the Court of 19 September 1995. *Rygaard*. ECR 1995 page I-2745.

Case C-472/93. Judgment of the Court (Fifth Chamber) of 7 December 1995. *Spano*. ECR 1995 page I-4321

Joined cases C-171/94 and C-172/94. Judgment of the Court (Sixth Chamber) of 7 March 1996. *Merckx*. ECR 1996 page I-1253.

Case C-298/94. Judgment of the Court of 15 October 1996. *Henke*. ECR 1996 page I-4989

Case C-305/94. Judgment of the Court (Second Chamber) of 14 November 1996. *Rotsart de Hertaing*. ECR 1996 page I-5927.

Case C-13/95. Judgment of the Court of 11 March 1997. *Süzen*. ECR 1997 Page I-1259.

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Case C-319/94. Judgment of the Court (Sixth Chamber) of 12 March 1998. *Dethier Équipement*. ECR 1998 page I-1061.

Case C-399/96. Judgment of the Court (Second Chamber) of 12 November 1998. *Europièces*. ECR 1998 page I-696.

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Case C-343/98. Judgment of the Court (Sixth Chamber) of 14 September 2000. *Collino* ECR 2000 Page I-6659.

Case C-175/99. Judgment of the Court of 26 September 2000. *Mayeur*. ECR 2000 Page I-7755.

Case C-172/99. Judgment of the Court (Sixth Chamber) of 25 January 2001. *Oy Liikenne*. ECR 2001 Page I-0745.

Case C-51/00. Judgment of the Court (Sixth Chamber) of 24 January 2002. *Temco*. ECR 2002 Page I-00969.

Case C-164/00. Judgment of the Court of 4 June 2002. *Beckmann*. ECR 2002 Page I-04893.

Case C-4/01. Judgment of the Court of 6 November 2003. *Serene Martin*.

Case C-340/01. Judgment of the Court (Sixth Chamber) of 20 November 2003. *Abler*.

ANNEX II

JUDGMENTS OF THE EFTA COURT RELATING TO TRANSFERS OF UNDERTAKINGS (Situation as of 30.10.2004)

Case E -2/95. Advisory opinion of the EFTA Court of 25 September 1996

Case E -3/95. Advisory opinion of the EFTA Court of 25 September 1996

Case E – 2/96 Advisory opinion of the EFTA Court of 19 December 1996

Case E – 3/96 Advisory opinion of the EFTA Court of 14 March 1997

Case E-3/2001 Judgment of the EFTA Court of 22 March 2002

ANNEX III

**CASES PENDING BEFORE THE COURT OF JUSTICE OF THE EUROPEAN
COMMUNITIES OR THE EFTA COURT RELATING TO TRANSFERS OF
UNDERTAKINGS**

(Situation as of 30.10.2004)

Case C-425/02 Delahaye

Case C- 297/03 Sozialhilfverband Rohrbach

Case C -478/03 Celtec Ltd

Case C-232/04 Güney-Görres

Case C-233/04 Demir

Case E-2/04 Rasmussen