

Report

on the Implementation in Austria, Finland and Sweden
of Directive 77/187/EEC Relating to the Safeguarding
of the Rights of Employees in the Event of the Transfer
of an Undertaking, Business or Part of a Business

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Abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch (Austria)
AD	Arbetsdomstolen (Labour Court, Sweden)
ArbVG	Arbeitsverfassungsgesetz
AVRAG	Arbeitsvertragsrechts-Anpassungsgesetz
ECJ	European Court of Justice
EEA	European Economic Area
KKO	Korkein oikeus (Finnish Supreme Court)
OGH	Oberster Gerichtshof (Austria)
SOU	Statens offentliga utredningar (Sweden)
Wbl	Wirtschaftsblätter

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1. Introduction

The present report contains an analysis of the implementation of Directive 77/187/EEC in the new Member States, Austria, Finland and Sweden. The provisions

on the safeguarding of the rights of employees in these countries are to be found in various labour statutes which needed to be modified in order to transpose the Directive into national law. As this report is attached to the Commission Report¹ on the implementation of Directive 77/187/EEC, only passing attention is given to the contents of the Directive itself.

The present report contains a separate chapter on each of the Member States Austria, Finland and Sweden. Each chapter begins with a presentation of the legal situation before the implementation of Directive 77/187/EEC followed by a description of the actions taken to implement the Directive into national law and an account of the controversial issues that arose during the implementation process. At the end of each chapter there is a conclusion.

2. Austria

2.1 The legal situation before the implementation of Directive 77/187/EEC

In Austria the regulation of the transfer of an undertaking, business or part of a business prior to the implementation of Directive 77/187/EEC was for the most part to be found in the Collective Employment Regulatory Act (Arbeitsverfassungsgesetz 1974, ArbVG). Although in general Austrian labour law acknowledged the need for the protection of employees, on major points the rules governing the transfer of an undertaking diverged from the objectives of Directive 77/187/EEC.

The character of the succession in Austrian labour law, i.e. singular succession (lease, purchase etc.) or universal succession (merger or succession to a deceased undertaking), was important for the status of an employment relationship in the event of a transfer of an undertaking. In cases of singular succession there were no provisions on the automatic transfer of an employment relationship. The general provision stated that employees remained with the transferor, including cases where the transferor no longer had a business and was unable to provide work. The employment relationship with the transferor did not change and an employee

continued to enjoy the same protection as before the transfer. A transfer as such did not constitute grounds for dismissal. In the case of universal succession, there were provisions on the transfer to the new owner of all rights and obligations, including employment relationships.

In the case of singular succession the employment relationship was transferred to the transferee only if all three parties, the transferor, the transferee and the employee, entered into a *three-party-agreement* in which the employee relationship and acquired rights were transferred to the transferee. The agreement could be compensated by *conclusive conduct*, e.g. where the work of the employee continued after the transfer and none of the parties objected to the transfer of the employment relationship. A transferred employee had the same right to protection against dismissal as before the transfer provided that the transferred unit met the provisions for the setting up of a works council¹. Failure to meet these provisions could occur especially if only a part of the establishment was transferred. According to rulings of the Austrian Supreme Court, in order to safeguard the effective representation of employees and if they did not object, the representatives of employees, e.g. members of the works councils, were to be automatically transferred to the transferee.²

Collective agreements have traditionally been very important in Austria. They have the same legal status as statutes and are directly binding. Collective agreements cover sectorally the majority of employees and employers and also cover employees who do not belong to the concluding party. In some cases a transferee may have been covered by a different collective agreement or, rarely, by no collective agreement. In such cases the transferred employees were covered by the collective agreement of the transferee. In cases where the new collective agreement was less favourable than the old one or in cases where there was no collective agreement, the relationship of the transferred employee was covered by the provisions in the old collective agreement until its expiry³.

¹ Pursuant to ArbVG a works council is to be set up when the permanent staff consists of at least 5 persons.

² See i.e. judgements OGH 16.12.1980, Arb. 9927, OGH 11.1.1983 DRdA 1984, 445.

³ ArbVG § 8.2.

The Collective Employment Regulatory Act (ArbVG) contained provisions on information and on consultation on planned changes in the business. According to § 109 ArbVG the employer is to inform the works council of changes in the ownership of an establishment, i.e. the transfer of an undertaking. The works council has the right to prevent, eliminate or mitigate issues that disadvantage employees. If the undertaking normally employs at least 20 workers and if the changes substantially disadvantage a large number of the employees, the works council may prevent or mitigate a point of disagreement through a works agreement. Either party may call upon the assistance of a mediation board to settle a point of serious disagreement.

ArbVG § 91 provides the employees with a general right to information on all issues concerning the employees. The information is given at the request of the works council.

2.2 Implementation of Directive 77/187/EEC

Major changes in Austrian labour law resulted from the implementation of the Directive. Austria primarily implemented the Directive by enacting a completely new act - the *Employment Contract Law Adaption Act* (AVRAG, Arbeitsvertragsrechts-Anpassungsgesetz 459/1993). Amendments also were made to the Collective Employment Regulatory Act (ArbVG, Arbeitsverfassungsgesetz) and to the Rural Workers' Act (LAG, Landarbeitsgesetz 1948).

2.2.1 Employment Contract Law Adaption Act

The Employment Contract Law Adaption Act came into force in July 1993.⁴

The Act (§ 1) covers all employment relationships based on private law contracts with some exceptions such as the employment relationship of a civil servant, a rural worker and a domestic help, which are governed by special provisions.

⁴ Bundesgesetzblatt 9.7.1993, No. 459.

The provisions safeguarding the rights of employees are to be found in § 3 AVRAG. In the event of the transfer of an undertaking, business or part of a business, § 3 transfers existing employment contracts with all rights and obligations from the transferor to the transferee, e.g. the employment relationship of an employee working in the transferred business is automatically transferred to the transferee, except in cases involving the acquisition of a bankrupt's estate (§ 3.2). The provisions in the new Act apply to singular as well as universal successions.

The general provision states that the transfer of an undertaking does not alter the conditions of work (§ 3.3). If the transferred employee holds that the new collective agreement or working agreement results in a substantial deterioration in the working conditions, the employee may terminate the employment contract by giving a normal period of notice. An employee may appeal to the labour court to decide on questions of "substantial" changes in the working conditions (§ 3.6). Such a termination, contractual dismissal, is regarded as having been made by the transferee (§ 3.5).

Under § 3.4 the employee has one month to object to the transfer of his employment relationship if the transferee does not take over the collective agreement according to § 4 or does not take over the entitlements to old age benefits according to § 5. In such cases the employment relationship remains unchanged with the transferor.

The status of collective agreements in the event of the transfer of an undertaking is covered by the already existing provisions in ArbVG (§ 8.2). In the event that the transferee is not covered by a collective agreement, the transferee must observe the previous collective agreement of the transferred employee. The earlier existing provisions did not, however, protect the transferred employee against a deterioration in working conditions in cases where the transferee was bound by a different collective agreement. AVRAG § 4.1 also covers cases of several consecutive transfers. Insofar as the collective agreement of the new employer is less favourable to the employee or does not contain rules corresponding to the old collective agreement, the employee is covered by the old collective agreement in such a way that remuneration for the regular performance of work during normal working hours cannot be reduced and that notice of dismissal cannot be given.

According to Article 3 of the Directive the obligation, in the event of a transfer of an undertaking, to safeguard the old-age benefits of an employee that result from the employment relationship only concerns mandatory old-age benefits. The company pension in Austria may be based on a collective agreement or an employment contract. In such cases the pension is based on the general rules on collective agreements (§ 4) and works agreements (§ 3), and are usually transferred to the transferee. If the pension is based on an individual agreement laid down in the contract of employment, the pension right is transferred to the transferee only in cases of universal succession. In cases of singular succession the transferee may object to the transfer of the duties arising from an individual employment contract promising old-age benefits (AVRAG § 5.1). If the transferee refuses to take on such supplementary pension duties, the employee may object to the transfer and stay with the transferor (AVRAG § 3.4, see above).⁵

AVRAG § 6 prescribes joint liability by the transferor and the transferee, which is optional under Article 3(1) of the Directive. However, § 1409 ABGB⁶ restricts the liability of the transferee to the obligations connected with the undertaking which were or should have been known to the transferee. Whether this restriction complies with the Directive can be questioned.

2.2.2 Amendments to the Collective Employment Regulatory Act

The fact that Article 3(2) of the Directive is not restricted to the working conditions laid down in collective agreements made it necessary to amend the provisions of the ArbVG. Previously the new employer was obliged to observe the provisions of the works agreements of the former employer only if the identity of the business or part of the business⁷ was maintained in the transfer. As this did not comply with the objectives of the Directive, § 31 ArbVG was amended.

⁵ Konrad Grillberger discusses the complex of problems regarding collective agreements in the event of a transfer in Wbl 1993, 308-311.

⁶ Allgemeines Bürgerliches Gesetzbuch (General Civil Code).

⁷ Previously only a mere change of the owner did not affect the works agreements but re-organisations or transfer of only part of the establishment meant that the new employer was not bound by the old works agreement (ArbVG § 31.4).

According to the amended ArbVG § 31.5 the transfer of part of an business to an autonomous unit does not entail the loss of works agreements even in cases where the connection to the old business is terminated and the more favourable conditions of the works agreements applied by the transferor are observed by the transferee. ArbVG § 31.6 states that an employee of an undertaking or a part of an undertaking that is merged with another undertaking or part of another undertaking setting up a new undertaking is still covered by the previous works agreements.

The termination of works agreements are now regulated by a new provision (ArbVG § 32.3). According to ArbVG § 32.3, the unilateral termination of a works agreement does not mean that the agreement immediately ceases to apply. The workers covered by the current works agreement immediately prior to the termination notice are covered by a so-called “after-effect” until a new works agreement is agreed upon and enters into force. The works agreement transferred to the new employer cannot be amended within the first year from the day of transfer by an individual agreement that is detrimental to the employee.

Only a minor amendment was needed to comply with the provisions of the Directive on the protection of the representatives. This minor amendment repealed the former requirement that employment representatives were automatically transferred only when the part of an undertaking that had come into its own belonged to the *same group of companies as before*. The automatic transfer of representatives of employees is now laid down in § 62 ArbVG.

The existing rules on information and consultation (§ 91, 92 ArbVG) did already previously comply with the Directive. A new § 108 was added to assure that the owner (transferor) provides the works council of concerned employees with detailed information on planned transfers. This information is to be given in due time before the realisation of the transfer and must contain the reason for the transfer as well as the legal, economic and social impact on employees.

2.3 Controversial issues

The major changes in Austrian labour law resulting from the implementation of Directive 77/187 have resulted in a range of controversial and crucial questions.

According to Article 4 of the Directive, transfers as such do not constitute a ground for dismissal. Austrian legal scholars have interpreted the pre-existing rules prohibiting dismissal on the grounds of a transfer (§ 613a.4 BGB⁸) as complying with the provision of the Directive. A majority of the legal scholars are of the opinion that Austrian legislation does not sufficiently implement Article 4(1) of the Directive and that the prohibition should have been expressly included in AVRAG.⁹

The reference to § 1409 ABGB in § 6.2 AVRAG restricts the liability of the transferee to obligations established before the transfer in a way that is incompatible with Article 3(1) of the Directive. Moreover, the provision on liability in AVRAG only applies to transfers that includes transfer of property, i.e. a lease does not fall within its scope.¹⁰

The rules in AVRAG safeguarding the rights of an employee in the event of the transfer of an undertaking do not cover most federal and provincial level civil servants. Austrian civil servants can be divided into two categories:

Vertragsbedienstete, or contractual public servants such as cooks and cleaners, and *Beamte*. Individuals falling within the first category, *Vertragsbedienstete*, can be dismissed for organisational and other reasons.¹¹ Individuals falling within the second category, *Beamte*, cannot be dismissed even in cases where there is a lack of work. It is not out of question that individuals in the first category would be in need of the protection guaranteed by the Directive.

2.4 Conclusion

The implementation of Directive 77/187/EEC in Austria has been mainly effected through the provisions of the new AVRAG. The automatic transfer of employment

⁸ Under § 613a.4 BGB termination of employment contracts on grounds of transfer of undertaking is void.

⁹ See i.e. Andreas Tinhofer's article in Wbl 1994, 321-329.

¹⁰ Dr. Konrad Grillberger has discussed this problem in Wbl 1993, 315.

relationships and contracts with acquired rights has been effected without regard to the character of the transfer. The joint responsibility by both the transferee and the transferor has been effected so as to safeguard workers' claims arising from an employment relationship. However, the provisions are restricted in such a manner as raises doubts about their conformity with the provisions of the Directive.

AVRAG includes detailed provisions on the transfer of collective agreements and working conditions. Austrian legislation does not contain an explicit prohibition of the dismissal of employees exclusively on the grounds of a transfer. The scope of AVRAG is also subject to question. Problems of interpretation remain in spite of the legal implementation of the Directive.

3. Finland

3.1 The general legal situation before the implementation of Directive 77/187/EEC

In Finland the prior regulation of the transfer of an undertaking, business or part of a business largely corresponded with the objectives of Directive 77/187/EEC.

According to section 7 of the Contracts of Employment Act (Työsopimuslaki, 320/70) contracts of employment were automatically transferred to the transferee in the event of transfer of an undertaking. Prior to the implementation the transferee was not liable for remuneration that had fallen due before the transfer. The transferor and the transferee were jointly liable for claims that fell due after the transfer.¹²

Sections 7 and 40 of the Contracts of Employment Act stated that a transfer did not constitute legitimate grounds for either the transferor or the transferee to terminate a contract of employment. This was, and is, an established opinion in both Finnish

¹¹ See i.e. judgement of the Austrian Supreme Court OGH 1.7.1980, Arb. 9882.

¹² Judgements of the Finnish Supreme Court on this matter are i.e. KKO 1988:2, 1989:78, KKO 1990:61.

doctrine and case law¹³. Under certain conditions, "justified reasons due to the transfer"¹⁴, section 40 permitted the transferee to terminate employment within one month of the transfer.¹⁵ The Contracts of Employment Act did not cover certain groups of employers, i.e. small sized companies where a transfer as such constituted reason enough for the termination of a contract of employment.

Section 36 of the Contracts of Employment Act stated that a temporary contract of employment expired upon the agreed period of employment period and could not be prematurely terminated, e.g. an employee with a temporary contract was granted special protection. Section 40.2 did, however, entitle the transferee to terminate a temporary contract of employment if there were "justified reasons due to the transfer".

Section 37.5 stated that a contract of employment may not be terminated on the grounds of pregnancy, maternity, paternity or parental leave. The termination of workers in need of special protection was possible under the earlier version of section 40.2.¹⁶

Section 40.4 stated that the contract of employment of the representative of employees may be terminated under certain circumstances in the event of a transfer of an undertaking without respect to the conditions laid down in section 53.2. Section 53.2 required permission of the majority of the employees in order to terminate the employment contract of a workers' representative or that work entirely ceases and that no other work can be arranged that fits the professional skills of the representative of the employees.

The provisions on the right of employees to information and consultation previously were to be found in section 40.3 of the Contracts of Employment Act and the Co-determination in Undertakings Act (Laki yhteistoiminnasta yrityksissä, 725/1978). Section 11 of the Co-determination in Undertakings Act obliged the transferee to inform employees about changes in the ownership. Sections 7 and 8 of the Co-

¹³ See i.e. judgements KKO 1990:81 and KKO 1990:129.

¹⁴ See judgement KKO 1994:3.

¹⁵ These provisions do not apply to mergers, which are not considered to bring about any changes in the legal position of the employees.

determination in Undertakings Act thoroughly regulated the consultation procedures.

Section 5 of the Collective Employment Contract Law (Työehtosopimuslaki, 436/1946) provided already previously that the transferee after the transfer is to observe the rights and duties in any collective agreement applicable to the transferor. This provision is entirely in line with the objective of Article 3(2), as is also to be seen in the case law of the labour court in 1986.¹⁷

3.2 Implementation of Directive 77/187/EEC into Finnish law

Directive 77/187/EEC has been adapted by amendments to the Contracts of Employment Act¹⁸ and the Co-determination in Undertakings Act¹⁹. The amendments came into force at the beginning of 1993.

3.2.1 Amendments to the Contracts of Employment Act

The definition in the Directive of the *transfer of undertaking* largely corresponded with the conception of the transfer of an undertaking in the Finnish statutes and presented no difficulties in the implementation of the Directive.²⁰ Although the Finnish Contracts of Employment Act does not include mergers within the terms of the Directive, there was no need to amend the Finnish definition of the transfer of an undertaking.

The major change resulting from the implementation of the "Acquired Rights Directive" is the introduction of joint liability by the transferor and the transferee for workers' claims that have fallen due before the transfer day. According to section 7.3 the transferor shall after the transfer in addition to the transferee continue to be liable

¹⁶ KKO 1982 II 99.

¹⁷ Finnish Labour Court judgement TT 66/1986.

¹⁸ Amendment 235/1993, Statutes of Finland.

¹⁹ Amendment 236/1993, Statutes of Finland.

for obligations which arose from contracts of employment or employment relationships and which have fallen due before the transfer. Section 7 includes a discretionary provision stating that if there is no other agreement the transferor is liable to the transferee for the claims of workers that have fallen due before the transfer

The main rule on joint responsibility does not cover acquisition of a bankrupt's estate. When the transferor is a bankrupt's estate the transferee is not liable for claims that have fallen due before the transfer day. However under certain conditions, the transferee may be liable even after the transfer. Section 7.2 is designed to prevent an employer filing for bankruptcy to liquidate his debts while at the same time the employer or undertaking in which the former employer has authority continues the same business.

Article 4(1) of the Directive states that the transfer of an undertaking does not in general constitute legitimate grounds for dismissal by the transferor or the transferee. However it is stated that a contract of employment may with justified reason be terminated by the transferee within one month of the transfer where the reason is the result of the transfer. The Finnish Government has interpreted "justified reason" in the event of transfer as meaning economic, technical or organisational reasons that result in changes in the work force. To this point the pre-existing section 40.2 of the Contracts of Employment Act and also recent case law²¹ correspond to article 4(1) of the Directive. The amendment to section 40 introduced special protection against dismissal of certain categories of workers, e.g. pregnancy, maternity, paternity or parental leave did not constitute a legitimate reason for dismissal. This amendment was made by adding a reference in section 40 to section 37 subparagraph 5. The provisions in section 40 entitling termination of employees' representatives' (previous § 40.4) and temporary contracts of employment (previous § 40.2) were also repealed.

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²⁰ See i.e. Kairinen (1995), 232 and Tiitinen - Saloheimo - Bruun (1989), 188-189.

²¹ KKO 1994:3, 1994:35.

²² If a Finnish ship, or the undertaking of a shipowner, is transferred or leased to another Finnish employer, the employees can choose if they stick to the transferor or join the service of the transferee. The transferee has no special right to terminate the contracts of employment but he is on the other hand not responsible for the employee's claims that have fallen due before the transfer.

3.2.2 Amendments to the Co-determination in Undertakings Act

Article 6(4) of the Directive provides that Member States may restrict the obligation to inform and consult to only concern undertakings or businesses which fulfils the conditions for election of a collegiate body representing the employees. Since these provisions on information and consultation are included in the Co-determination in Undertakings Act, the provisions are restricted to the scope of the Act. The Co-determination in Undertakings Act is applicable to undertakings with a staff of at least 30 persons (under certain conditions 20 persons).²³

Article 6 of the Directive obliges both the transferee and the transferor to supply the representatives of the employees with certain information about the transfer.

According to the new provision § 11.2 in the Co-determination in Undertakings Act the transferor and the transferee shall inform concerned employees' representatives about the reason for the transfer as well as the legal, economic and social impact on employees. The information is to be given in writing.

Since also mergers are covered by the Directive, section 11 is supplemented by a regulation indicating that mergers correspond to transfers of undertakings.

3.3 Controversial issues

Although the Directive was implemented without major problems some issues gave rise to uncertainty and discussion.

The preparation of a new Civil Servant Act (Virkamieslaki, 750/1994) in 1994 brought up the question if also civil servants should be covered by the Directive. The public sector is not excluded from the scope of the Directive but neither explicitly included. The case law of the ECJ has, however, stated that employee is defined according to the definition in the national legislation of each Member State. The Court has added that employees that in one way or another have the position of an employee may not be excluded from the rights and protection granted by the Directive.

²³ Co-determination in Undertakings Act § 2.

There is no clear ruling on how the Directive is to be applied to the public sector. The objective of the Directive is to protect employees without regard to how their employment relation is considered by national legislation. The state can further be considered as a legal person in the meaning of Article 2 of the Directive. In the public sector transfer of undertaking comes primarily into question by transfer of part of the state's business to an undertaking (private or state-owned).

No provisions on transfer of part of the state's business are included in the new Civil Servant Act. The Civil Servant Act covers a large range of public service relationships, e.g. relationships where the state is the employer and the civil servant the employee. A situation where the provisions of the Directive may be applicable also to the public sector is where the employer subject is transposed from public to an independent legal person, e.g. "privatisation" of public business regardless of the new undertaking is public or private.

Neither the new Act safeguarding the employment relationship of civil servants in the municipalities (Laki kunnallisen viranhaltijan palvelusuhdeturvasta, 483/1996) does include any provisions corresponding to the Directive. It is not out of question that at least some groups of civil servants of the municipalities are to be considered as such employees that should be protected by Directive 77/187/EEC in cases when the municipality privatise part of its business.

No express measures to protect the rights of former employees to supplementary old-age benefits are adapted in Finnish law. This may become crucial in a situation where the employees (pensions rights included) are transferred to the transferee but the pension funds remain by the transferor. In that case the pension obligations might not be transferred from the transferor to the transferee. In such cases the state ought according to Article 3(3) of the Directive to protect the employee. Such protective provisions are lacking in Finnish law. Section 9 point 9 of the Finnish Pension Funds Act (Eläkesäätiölaki, 1774/1995) does not sufficiently implement the Directive to this part since it only prescribes that rules of pension funds must provide if and to what extent old-age and other benefits are maintained if the insurance relationship comes to

an end before payment of the benefits.

There is no express rule stating that the employer is responsible for the termination of the employment contract after the transfer due to substantial change in working conditions to the detriment of the employee, although, it can be claimed that the law ought to be interpreted in that way.

Section 14 in the Co-determination in Undertakings Act allows derogation by means of collective agreement from certain rules in the Act, also to the detriment of employees, included the obligation on consultations in the event of transfer of undertakings. This freedom of contract does not comply with Directive 77/187/EEC as it entitles deprivation of employees' rights to consultations. At the moment this possibility to derogate from the Co-determination in Undertakings Act is not included in any valid collective agreement but the theoretical conflict with the Directive remains.

3.4 Conclusion

Directive 77/187/EEC was implemented in Finnish law by amendments to the Contracts of Employment Act and the Co-determination in Undertakings Act. The major change was introduction of joint liability for workers' claims that have fallen due before the transfer by both the transferor and the transferee (section 7 as amended).

The prohibition to dismiss employees on grounds of transfer of undertaking as such was extended to cover also employees on pregnancy, maternity, paternity or parental leave, employees with temporary contracts and representatives of employees (section 40 of the Contracts of Employment Act).

The rules of the Co-determination in Undertakings Act were supplemented with provisions providing both the transferee and the transferor to inform the employees on a planned transfer (section 6). The employees are entitled to detailed information on the transfer (section 11).

It is still controversial whether the provisions of the Directive safeguarding employees rights shall be applied also to civil servants. It is further questionable whether the provision of the Co-determination in Undertakings Act allowing derogation from the Act by means of collective agreements, complies with the Directive. Furthermore there is no protection of transferred employees' rights to supplementary old age benefits.

4. Sweden

As the Bill²⁴ on the European Economic Area (EEA) Agreement was submitted to the Swedish Parliament in 1992 Swedish statutes governing safeguarding of employees' rights in the event of transfer of undertaking were considered to comply with Directive 77/187/EEC. This conclusion turned, however, soon up to be rash and major differences between the Swedish statutes and the provisions of the Directive were pointed out.

4.1 The legal situation before the implementation of Directive 77/187/EEC

The Swedish labour statutes contained no general rule on transfer of employment relationships in the event of transfer of an undertaking. Termination of employment contracts by the transferor in the event of transfer was considered to be occasioned by a "reasonable ground" since after the transfer the transferor had no business anymore and, consequently, no work to offer. Section 7 of the Swedish Employment Protection Act (Anställningsskyddslagen 1982:80) held lack of work as such as a "reasonable ground" for dismissal. The transferee was free to take over the employment contracts if he wished and he was basically not bound by any previous terms and conditions of work other than those laid down in his own collective agreement in force.²⁵ Section 25 of the Employment Protection Act was one of the few provisions in favour of the employees and it provided that transferred employees were entitled to recall the

²⁴ Bill 1991/92:170, app. 9 at 25.

²⁵ See i.e. Labour Court judgements 1978 no. 68 and 161.

*preferential hiring right*²⁶ if the transferee planned to employ new staff to carry on the acquired business within one year after the transfer.

As regards Swedish collective agreements the general rule was, and is still today, that they are binding only upon those employees who are members of the contracting trade union (section 26 of Joint Regulation Act, Medbestämmandelagen, 1976:580).

Transfer of undertaking did not make any exemption and there was, consequently, no extensive application upon non-union members. This could result in the stern fact that transferred employees were deprived of their legal rights stipulated in the collective agreements of the transferor. The employer may enter into an agreement with non-union members on application of the collective agreement also to them. Generally such an agreement is entered into²⁷.

The previous section 28.1 of the Joint Regulation Act stated that the transferee was legally bound by the transferor's collective agreement in connection with a transfer of a business or part thereof, only if the transferee was not bound by any other collective agreement which was applicable to the acquired business. If the transferee was bound by such another collective agreement the employees might have had to accept other (deteriorated) terms and conditions. If the transferor and transferee were part of the same collective agreement this was naturally binding upon the transferee after the transfer. Section 28 also included a provision entitling the transferor to, 60 days before the transfer, give notice of termination of the collective agreements in order to relieve the transferee from the agreement. The employees could object to the transfer of their employment relationships no later than 30 days before the transfer day.

Information and consultation duties were previously mainly based on collective agreement relationships. Transfer of a business constituted such a major change in business that provided consultation in accordance with section 11 of the Joint Regulation Act.²⁸ The employer had to negotiate with representatives of the employees about the planned transfer to give the union a chance to make their views

²⁶ The preferential hiring model lays down certain rules regarding the turn in which employees may be dismissed. See *Eklund* (1983) for details.

²⁷ See i.e. Labour Court judgement AD 1977 no. 49.

²⁸ See i.e. Labour Court judgements AD 1978 no. 156 and AD 1980 no. 49.

known before the final decision was made. This duty was based on a collective agreement relationship between the local trade union and the employer. This duty was therefore not applicable to unions that had not established such a collective agreement relationship. The employer was obliged to negotiate with non-union members only on issues "especially concerning the members" (section 13). Transfer of undertaking was, surprisingly, not regarded to be an issue concerning non-union members.²⁹ Non-member organisations were, however, entitled to ask for negotiations pursuant to section 10.

4.2 Implementation of Directive 77/187/EEC

In 1994 amendments to the Employment Protection Act and the Joint Regulation Act were proposed in order to bring the Swedish law in conformity with the requirements of the Directive.³⁰ The Swedish legislator did in the end implement an even higher level of protection of the employees in the event of transfers. The amendments came into force on 1 January 1995.

4.2.1 Amendments of the Employment Protection Act

The application of the provisions of the Directive to the public sector is quite clear in Sweden.³¹ Since the Swedish labour statutes apply to all employees equally regardless of the employer, the Swedish Employment Protection Act applies to the private as well as the public sector. The new section 6b.2 of the Employment Regulation Act applies expressly to all employees in the public sector, e.g. there is no need to make a distinction between those engaged in the exercise of public power and those engaged in matters of economic or administrative nature.³²

The concept of legal transfer does not interfere with the concept of the Directive and the ECJ. In the doctrine there is, however, a discussion whether the Swedish Labour

²⁹ See i.e. Labour Court judgement AD 1983 no. 65.

³⁰ Bill 1994/95:102.

³¹ See i.e. the discussion in the 1994 Commission Report.

³² See also Bill 1994/95:102, 49.

Court's interpretation of the concept entirely complies with the Directive.³³

The provisions of Directive 77/187/EEC were implemented in the Swedish Employment Protection Act by a new section; 6b. This section provides that rights and duties relating to existing employment relationships are automatically transferred from the transferor to the transferee. This provision does not apply to transfer of a bankrupt's estate. The section states further that employees may object to a transfer. Since the Directive only sets minimum standards it is acceptable to deviate from the law by means of collective agreement if this does not entail less favourable terms and conditions for transferred employees. The provision on automatic transfer also concerns representatives of employees in most cases.³⁴

Section 6b introduces joint liability by the transferor and transferee for workers' claims that have fallen due before the transfer. The liability concerns economic claims arising from the employment relationship. Old-age, invalidity and survivor's benefits are excluded from the section. Transfer of liability for acquired old-age benefits are governed in sections 23-24 of the Act safeguarding old-age benefits (1976).

The amended section 7.2 of the Employment Protection Act implements Article 4(1) of the Directive and, consequently, prohibits dismissal of employment contracts on grounds of transfer *per se*, e.g. reasonable grounds like economic, technical or organisational grounds affecting the staff are required. This also prohibits the transferor to dismiss employees before the transfer in order to please the transferee.

4.2.2 Amendments of the Joint Regulation Act

According to section 26 of the Swedish Joint Regulation Act collective agreements are binding only upon those employees who are members of the contracting union.

Section 28 of the Joint Regulation Act provides that the transferee is legally bound by the transferor's collective agreement in the event of transfer of an undertaking. This does, however, not apply if the transferee is bound by another collective agreement. In

³³ See i.e. judgements AD 1994 no. 92 and AD 1995 no. 96.

³⁴ Bill 1994/95:102, 63, 81.

order to comply with Article 3(2) of the Directive a new third paragraph was added to section 28. This amendment introduced the obligation for the transferee to apply terms and conditions of the transferor's collective agreement to the transferred employee on the same terms as were applicable to him during one year after the transfer day, provided that the original collective agreement is still in force and not substituted by a new one. In practise this a major change in Swedish industrial life; an employer may now in connection with a transfer be obliged to observe terms and conditions of a collective agreement by which he is not party.

Section 13 as amended obliges the employer (both transferor and transferee) to negotiate with all concerned organisations of employees even if the employer is not bound by any collective agreement. Section 15 of the Joint Regulation Act states that the information shall contain the reason for the transfer, the legal, economic and social implications of the transfer for the employees.

The co-determination provisions in the Joint Regulation Act are in the same way as in Finland quasi-mandatory, e.g. they may be deviated from by means of collective agreements. The minimum standard set by Article 6 of the Directive does, however, seem to be met by an amendment to section 4.2 of the Joint Regulation Act which provides that a collective agreement may not deviate from the law in a way that entails less favourable provisions for the employees than those of the Directive.³⁵

4.3 Controversial issues

Article 4(2) of the Directive governs situations where the transferor deteriorates from the employees' working conditions in order to provoke the employees to terminate the employment contracts themselves. This shall be regarded as termination by the transferor ("contractual dismissal"). This provision is not explicitly implemented in Swedish law.

The Directive provides that the employer shall negotiate with the concerned employees' representatives with the "view of seeking agreement". This is not expressly

³⁵ See SOU 1994:83, p. 135-136.

stated in the Joint Regulation Act although this is interpreted to be the objective also of the provisions of the Swedish Act. Also the question whether the Swedish concept of transfer is in conformity with Directive 77/187/EEC has been debated in Sweden.

There has been some doubt whether the provision of the Directive on safeguarding the rights of the representatives of the employees has been sufficiently implemented in Sweden. The Act on Union Representatives at the Workplace (Förtroendemannalagen 1974:358) protect the representatives sufficiently provided that the successor is bound by a collective agreement, which usually is the case. If there, however, is no organised worker at a workplace there seems to be no mechanism for nominating workers' representatives.

4.4 Conclusion

The implementation of Directive 77/187/EEC resulted in introduction of joint liability by both the transferor and the transferee for worker's claims that have fallen due before the transfer day. The new section 6b of the Employment Protection Act introduced automatic transfer of the employees' employment relationships and acquired rights to the transferee. It was also expressly laid down that transfer of an undertaking *per se* does not constitute a ground for termination of a contract of employment, but certain "justified reasons" are to be fulfilled. Even though Sweden at least introduced a higher level of protection of employees in the event of transfer of an undertaking some minor issues referred to above in chapter 4.3 remain controversial.

^{1.} EN/05/96/08730000.P00(ES) alf/alf