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

All 25 Member States

Cut off date: 31 January 2006

Author: Malcolm Sargeant

Final version: June 2007

In partnership with Middlesex University Business School

Middlesex University

human european consultancy

Content

1. Introduction

Council Directive 2001/23/EC (OJ 82 of 22.3.2001, p.16) on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses is a consolidation of Council Directive 77/187/EEC (OJ L 61 of 5.3.77, p.26) as amended by Council Directive 98/50/EC (OJ L 201 of 17.7.1998, p.88).

According to the Preamble the 1977 Directive was intended 'to promote the harmonisation of the relevant national laws ensuring the safeguarding of the rights of employees and requiring transferors and transferees to inform and consult employees' representatives in good time'.

The amendments in 1998 were implemented 'in the light of the impact of the internal market, the legislative tendencies of the Member States with regard to the rescue of undertakings in economic difficulties, the case law of the Court of Justice of the European Communities, Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies and the legislation already in force in most Member States'.

In 1992 a report was published on the progress on implementation of the 1977 Directive in the 12 Member States – (SEC(92) 857). This was followed by a further report on the implementation of the Directive in Austria, Finland and Sweden.

In 1997 the Commission issued a Memorandum on acquired rights of workers in cases of transfers of undertakings (COM (97) 85 final of 4 March 1997). It was concerned with the application of Directive 77/187/EEC in the light of decisions of the European Court of Justice.

A further Commission Services' Working Document entitled Memorandum on rights of workers in cases of transfers of undertakings was published in November 2004 which was concerned with the amended Directive in the light of important judgments by the Court of Justice.

This report is written in the context of Contract reference VC/2005/0038, concerning *Studies on the Implementation of Labour Law Directives in the enlarged European Union*. This report is based upon the reports submitted by national experts[1] to the Commission.

The Directive, both in its original and amended form, has been the subject of much litigation, both in the national courts and in the European Court of Justice. The Commission Services' Working Document calculated that, as at October 30 2004, there had been a total of 37 judgements, mostly in connection with references for a preliminary ruling. There were also, at that time, six cases pending. In addition there had also been 5 judgements of the EFTA Court relating to the Directive.

[1] Bruno Blanpain (Belgium), Vit Zvánovec (Czech Republic), Lynn Roseberry (Denmark), Marlene Schmidt (Germany), Tatjana Evas (Estonia), Dimitrios Kyritsis (Greece), Jesus Lahera (Spain), Sylvaine Laulom (France), Gavin Barrett (Ireland), Riccardo Del Punto (Italy), Nicos Trimikliniotes (Cyprus), Irena Kalnina (Latvia), Linas Sesickas (Lithuania), Anne Morel (Luxembourg), Tamás Gyulavári (Hungary), Tonio Ellul (Malta), Anne Pieter van der Mei (Netherlands), Alexandra Knell (Austria), Barbara Godlewska-Bujok (Poland), José Leitão (Portugal), Meira Hot (Slovenia), Dagmar Zukalova (Slovakia), Ulla Lukkunen (Finland), Mia Ronmar (Sweden) and Malcolm Sargeant (UK).

2. Overview

Belgium

The Directive has been implemented in the private sector by Collective Bargaining Agreement (CBA) nr 32bis respecting the Maintenance of Workers' Rights in the Event of a Change of Employer because of the agreed Transfer of an Undertaking and governing the Rights of Workers Re-Employed where the Assets are taken over after a Bankruptcy. CBA nr 32bis has been extended by Royal Decree.

Of relevance also is the Statute of December 5, 1968 respecting Collective Bargaining Agreements and Joint Committees; CBA nr 9 as concluded in the National Labour Council on March 9, 1972; CBA nr 5 concluded in the National Labour Council on May 24 1971; the Statute of September 20 1948 respecting Works Councils.

Czech Republic

The Directive was implemented by an amendment of the Labour Code by Act No. 155/2000 Coll. amending Sections 249–251 of the Labour Code. Sec. 251b, 251c, and 251d were introduced by Act No. 220/2000 Coll., the Act Accompanying the Act on State Property. Sections 251a and 251b were already in force as a result of Act No. 74/1994 Coll. In the Act No. 155/2000 Coll. Section 251b was re-numbered as Section 249 para 1.

Act No. 262/2006 Coll. Introduces a new Labour Code which comes into force on the 1 January 2007. Sections 338 to 345 of the new Labour Code propose no changes in safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, although there are some changes in respect of worker representatives.

Denmark

The Act regarding Transfers of Undertakings (*Lov nr 111 af 21. marts 1979*) was amended by Law number 441 of 7 June 2001 (*lov nr 441 af 7.6.2001*) in order to bring it into conformity with the changes introduced by Directive 98/50/EC. The 1979 Act and the 2001 amendment were then combined into the Consolidated Act regarding Employees' Legal Position in Connection with Transfers of Undertakings of 20 August 2002 (*Bekendtgørelse af lov om løn modtageres retsstilling ved virksomhedsoverdragelse, LBK nr 710 af 20/08/2002*), Sections 1-6.

Germany

In 1972, the German legislature passed § 613a Civil Code (*Bürgerliches Gesetzbuch- BGB*), at that time consisting of only Para. 1 Sen. 1 (transfer of the rights and duties laid down in the individual employment contract), Paras. 2 and 3 (joint liability of old employer and transferee). Eight years later, § 613a BGB was amended in order to implement Directive 77/187/EWG.

The Labour Law EC Adaptation Act (Arbeitsrechtliches EG-Anpassungsgesetz, BGBl. I, 1308, in force since 21 Aug. 1980.) accommodated the transfer of rights and duties arising from collective agreements and works agreements in § 613a Para. 1 Sen. 2 - 4 BGB and the ban of dismissals on grounds of the transfer in § 613a Para. 4 BGB. In order to implement Directive 98/50/EC, the Works Constitution Act (*Betriebsverfassungsgesetz – BetrVG*) was amended: The Works Constitution Reform Act 2001 introduced § 21a BetrVG, and additionally, the

employees' right to be informed before the transfer was inserted in § 613a Para. 5 BGB by way of the Act Amending the Seaman's Act and Other Acts. At the same time, § 613a BGB was amended by Para. 6, codifying the employees' right to object the transfer of the employment relationship, as developed by the BAG.

Estonia

The Directive transposed into national law through provisions of the Employment Contracts Act 1992 (Eesti Vabariigi töölepingu seadus), the Trade Unions Act 2000 (Ametiühingute seadus) and the Collective Agreements Act 1993 (Kollektiivlepingu seadus).

Greece

Presidential Decree 178/2002 which transposed Directive 98/50/EEC and repealed the previous Presidential Decree 572/1988 is still in effect.

Spain

Spanish law for the protection of employees in the event of a transfer is mainly to be found in Article 44 of the Estatuto de los Trabajadores (RCL 1995, 997) and amended by Law 12/2001, de 9 de julio, de medidas urgentes de reforma del mercado de trabajo, para el incremento del empleo y la mejora de su calidad.

France

The main provision for the rules concerning employee protection in transfers are contained in Article L.122-12 of the Labour Code. Article 20 of Law Number 2005-843 du 26 juillet 2005 concerns employees' rights in transfer of undertaking between the private sector and the public sector.

Article 102-8 of the Maritime Labour Code dealing with the relationship between sailors and ship-owner reproduces the principles of Article L.122-12.

Ireland

The Directive was implemented by the European Communities (Protection Of Employees On Transfer Of Undertakings) Regulations 2003 (Statutory Instrument No. 131 of 2003). Section 21 of the Employees (Provision of Information and Consultation) Bill, 2005 adopts the exchange of information provisions in Article 3.2 of the Directive. This legislation was in its final stages of adoption at the time of writing.

Italy

The Directive is implemented by (i) Article 2112 of the Civil Code as amended by Article 47, paragraph 3, of Law n. 428 of 29 December 1990; by Article 1, paragraph 1, of d.lgs. (Legislative Decree) n.18 of 2 February 2001; by Article 32 of d.lgs. n.276 of 10 September 2003, then amended by Article 9, paragraph 1, of d.lgs. n.251 of 6 October 2004 and (ii) Article 47 of Law n. 428 of 29 December 1990 as amended by Article 2 of d.lgs. n.18 of 2 February 2001.

Art. 31 of the d.lgs. n.165 of 30 March 2001 refers specifically to the public sector.

Cyprus

The Cypriot law implementing the Directive is the 'Law on the safeguarding and securing the rights of employees in the event of transfers of undertakings, businesses, or part of businesses No. 104(I) of 2000', as amended by Law No. 39(I) of 2003.

Latvia

The main instrument for the implementation of the Directive are Articles 117-121 of Labour Law of Latvia [Darba likums], adopted in 6 July, 2001, in force since 1 June, 2002, as amended in 2002, 2004 and 2005. Also of relevance are Articles 3, 10(1) and 28(1).

Lithuania

A new Labour Code of the Republic of Lithuania (No IX-926 , of June 4, 2002, Official Gazette No.64) was adopted in 2003 and Articles 13(1), 15, 19(1), 63(3) 129(1), 129(5), 138 and 205 provide for the implementation of the Directive. Of relevance also are Article 20 of the Enterprise Bankruptcy Law, Article 209 of the Criminal Code, Article 63(1) of the Company Law, the Law on Labour Councils (No. IX-2500 of October 26, 2004, Official Gazette No.164), the Law on European Labour Councils (No. IX-2031 of February 19, 2004, Official Gazette No.39), and the Law on Trade Unions (No. I-2018 of November 21, 1991, Official Gazette No.34).

Luxembourg

Directive 98/50/EC was implemented into Luxembourg law by the Law of 19 December 2003. No further amendments were made as a result of the adoption of Directive 2001/23/EC.

Hungary

The main provisions transposing the Directive are contained in Act 20 of 2003 on the Amendment of the Labour Code (from July 2003). Other Acts of relevance are Act 33 of 1992 on the legal status of public employees(Kjt.) Section 25/A, 25/B and Ktv. (section 17/A-B).

Malta

Transposition of the Directive is contained in the Employment and Industrial Relations Act, 2002 (Act XXII of 2002) and Legal Notice 433 of 2002 [LN 433/02] entitled Transfer of Business (Protection of Employment) Regulations, 2002.

The Netherlands

The original Directive was transposed by the Law on Transfer of Undertakings (Law ToU 1981 Wet Overgang van Onderneming van 15 mei 1981, Staatsblad 1981, 400). This law inserted six Articles in the Civil Code (*Burgerlijk Wetboek* – BW), which are now contained in Articles 7:662-666 BW (Titel 10, Book 7 BW), Article 14a in the Law on the Collective Labour Agreement (*Wet op de Collectieve Arbeidsovereenkomst* - CAO*)* and Article 2a in the Law on the Statement of the Obligatory and Non-Obligatory Nature of Provisions of Collective Labour Agreements (*Wet op het Algemeen Verbindend en Onverbindend Verklaren van Collectieve Arbeidsovereenkomsten* – AVV).

The law was amended twice. The first amendment, which took effect on 1 April 1997, involved the introduction of a new Article 7:666 BW that excludes bankrupt undertakings from the ToU-rules (Vaststellingswet van 6 juni 1996, Staatsblad 1996, 406). The second amendment involved the Law on Transfer of Undertakings (Law ToU 2002 Wet Overgang van Onderneming van 18 april 2002, Staatsblad 2002, 215 en 245), which entered into force on 1 July 2002 and was adopted with a view to implementing Directive 98/50.

Austria

The Directive has been transposed into Austrian law by Section 3, paras 1, 2 and 5; Sections 3a, 4, 5, and 6 , paras 1 and 2 of the Employment Contract Law Adjustment Act (Arbeitsvertragsrechtsanpassungsgesetz, hereinafter referred to as the AVRAG. the Federal Law Gazette BGBl 1993/459 as amended by Federal Law Gazette BGBl I No. 103/2005) and also by Sections 8, para 2, 62ff, 108 and 109, paras 1, 1a and 3 of the Labour Relations Act (Arbeitsverfassungsgesetz, hereinafter referred to as ArbVG),

Poland

The implementation of the Directive is contained in Article 23 of the Labour Code, as amended (Ustawa z dnia 26 czerwca 1974 r. – Kodeks pracy (Dz. U. z 1998 r. Nr 21, poz. 94 z późn. zm.).

Portugal

The Directive is transposed in Portugal by Articles 318, 319, 320, 321 and 355 of the new Labour Code, adopted by Law 99/ 2003, of August 27.

Slovenia

The provisions on transfer of undertakings are contained in Articles 73 and 74 of the Employment Relationship Act (ERA Zakon o delovnih razmerjih, Ur.l. št. 42/02); of relevance also are the Workers Participation in Management Act (Zakon o sodelovanju delavcev pri upravljanju (Ur.l. RS, št. 42/1993, 61/2000 Odl.US: U-I-302/97, 56/2001, 26/2007) and the Pension and Invalidity Insurance Act (Zakon o pokojninskem in invalidskem zavarovanju (Ur.l. RS, št. 109/2006, UPB4)).

Slovakia

Transposition of the Directive is contained in the Labour Code (Act No. 311/2001 Coll. *Zakonnik prace* as amended) sections 27 to 31, named Transfer of Rights and Obligations arising from the Labour – Law Relations.

Finland

The rules on transfers of undertakings are contained in Sections 1.1, 1.10.1-3, 7.3, 7.5-6, 12.1-3, 13.4, 13.9.13.11-12 of the Employment Contracts Act (*Työsopimuslaki, 55/*2001). The rules on information and consultation are contained in Sections 2, 3.3, 6, 6a, 7, 7a, 8.4, 11.3-6, 15, 15a and 16 the Act on Co-operation within Undertakings (*Laki yhteistoiminnasta yrityksissä, 725/1978, ACU*). Also of relevance are Section 5 Collective Agreements Act, Section 5.3 of the Act on Personnel Representation in the Administration of Undertakings, the Seamens Act and the Pay Security Act.

Sweden

Sections 2(4), 6b and 7(3) of the Employment Protection Act (1982:80) (anställningsskyddslagen, LAS) and Sections 4(2), 13(2) and 28 of the Co-determination Act (1976:580) (medbestämmandelagen, MBL) are the main implementing measures in Swedish law.

United Kingdom

The Transfers of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) came into force on April 6 2006 amending previous Regulations and implementing the Directive. Where these Regulations go beyond the Directive, then powers under Section 38 Employment Relations Act 1999 are applied. The service provision changes are applied to Northern Ireland by the Transfers of Undertakings (Protection of Employment) Regulations (Northern Ireland) 2006 (SI 2006/1077).

3. Analysis of transposition measures

Scope and definitions

Article 1

1.
   a. This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.
   b. Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.
   c. This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive.

2. This Directive shall apply where and 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.
3. This Directive shall not apply to seagoing vessels.

It is clear that decisions of the European Court of Justice has been influential in the judicial application of the Directive in Member States. Member States do not always transpose the definition contained in Directive Article 1.1(b), but generally the national courts have followed the Court of Justice in this matter.

All Member States have transposed the Directive, although a number have not felt the need to change laws further in order to do so.

Belgium

The Collective Bargaining Agreement 32bis is applicable to all employers that fall under the scope of the Statute of December 5, 1968 respecting Collective Bargaining Agreements and Joint Committees. Article 2 §3 of this Statute states that it will not be applicable to the public sector and to the companies that are government owned or so called "public companies", with a limited number of exceptions. CBA 32bis is, therefore, not applicable to companies in the public sector.

Article 6 of CBA 32bis repeats the wording of the French and Dutch version of Articles 1.1(a) and 1.1(b) of Directive 2001/23.

Article 6 §1 of CBA 32bis uses Directive 2001/23's wording in Dutch and French stipulates that it is applicable to the *agreed* transfer of an undertaking. This wording which calls for the presence of an agreement is further strengthened because of the name of Chapter II of CBA 32bis, under which article 6 is mentioned. The said chapter is called "The Rights of Workers in the Event of a Change of Employer following the *Agreed* Transfer of an Undertaking". This

has the possibility of leading to confusion and the national author cites one case from the Labour Court of Appeals in Liege where the Court refused to apply CBA 32bis because the transfer as such had not been agreed.

There is the possibility of further confusion as the commentary of CBA 32bis, adopted by both social partners, defines part of an undertaking as a department (afdeling/division) in the sense of the Statute of June 28, 1966 regarding plant closings. While the Statute regarding plant closings does not define the concept of a department, it is applicable to undertakings or departments of undertakings that employ at least an average of 20 workers over the previous calendar year. As a consequence it has been argued that CBA 32bis is not applicable to a department that is employing less than 20 workers.

Article 1.2 - CBA 32bis is made generally binding by Royal Decree and can be enforced by fines and jail sentences. As a consequence CBA 32bis is only applicable to the Belgian territory and to the undertakings that are located in this jurisdiction.

Article 1.3 - article 5 of CBA 32bis states that there is no application to seagoing vessels.

Czech Republic

The Labour Code includes all undertakings or businesses, and all employers and their employees, including the non-commercial public sector.

The transfer itself is not defined in Czech law, but the lack of a precise definition is normal. All employers and employees, including the public sector, are included within the scope of the Directive. This is regardless of whether there is foreign involvement.

Article 1.1(c) – public sector re-organisations are included if there is a change in the employer.

Article 1.3 of the Directive has not been adopted.

Denmark

Section 1 paragraph 1 of the Consolidated Act provides that the law on transfers of undertakings applies to "transfer of an undertaking or a part thereof that is within the territorial scope of the Treaty establishing the European Economic Community." Danish law broadly applies to transfers in the private and public sectors, including outsourcing.

The Consolidated Act does not contain any definition of "transfer". Nevertheless, the preparatory works and the explanatory memorandum accompanying the draft for the 1979 Act, which implemented Directive 77/187/EEC, made it clear that the law applies only to transfers that are the result of an agreement.

The law applies in all instances where, as a result of an agreement, there is a change in the physical or legal person that is responsible for the undertaking's operation, including obligations towards the employees in the undertaking, provided that the undertaking has preserved its identity after the transfer. This interpretation of "transfer" excludes changes in ownership that do not result in a change of employer.

Seagoing vessels are excluded from the scope of the Consolidated Act.

Germany

Since 1997, following the ECJ's decision in *Ayse Süzen*, the German Court has adopted the ECJ's formula as regards a transfer of an undertaking. This includes contracting out and back in.

The wording of Section 613a BGB differs from the wording of the Directive's German version in so far as Section 613a BGB requires a "legal transaction" (*Rechtsgeschäft*) while the Directive uses the term "contractual transfer" (*vertragliche Übertragung*). In terms of German civil law, the term "*Rechtsgeschäft*" is wider than "*Vertrag.*

The term "legal transaction" is interpreted broadly. According to the BAG, the decisive point is whether or not the various legal transactions are aimed at transferring a functioning economic entity. Successive contracts following further competitive tendering are hence covered by the notion of a "transfer".

Section 613a BGB is applicable to any establishments of the private and the public sector; even military facilities may be regarded as an establishment in terms of §613a BGB. As a consequence, it also applies if a public undertaking or parts thereof are privatised, if a private undertaking is taken over by a public authority or if a transfer between to entities of public law takes place. It all depends whether or not an economic entity is transferred.

An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not regarded as a transfer within the meaning of the Directive.

The BetrVG as well as the staff representation acts apply to establishments situated within the borders of the Federal Republic of Germany.

Section 613a BGB is applicable to any employment relationships, i.e. also to those with employees working on seagoing vessels. According to §§ 114-116 BetrVG this act shall apply to maritime shipping undertakings and their establishments unless otherwise stipulated in sections 114-116 BetrVG.

Estonia

Estonian national law does not provide for an explicit definition of an undertaking within the meaning of the Employment Contracts Act. The legislation refers to employers rather than undertakings. Employer is defined in Article 3 of the ECA and includes: legal persons, a structural union of legal persons if it has been granted the rights of an employer and a natural person with active legal capacity.

The scope of application of the Directive in the national context is not limited to transfers of commercial undertakings. In applies to any private or public economic entity whether operating for gain or another purpose.

A definition of a 'transfer' is not provided in the ECA. However, Article 6 (1) ECA refers to, firstly, a merger, division or transformation of employers; secondly, to a change of employer (transfer) that takes place when the functions of a body administered by an administrative agency are fully or partially transferred to another person which continues the same or similar activities; thirdly to an economic entity or an organisationally independent part

thereof, operating for business or other purpose, is transferred from one person to another on any legal basis, if after the transfer the same or similar activities are continued.

The limitations in Articles 1.1(c) and 1.3 of the Directive are not covered nor is there any reference to territorial scope.

Greece

Articles 1.1, 1.2 and 1.3 of the Directive are transposed by Article 2 of Presidential Decree 178/2002.

The law is also applicable in cases involving transfers from the private to the public sector, but Article 2.1 of Presidential Decree 178/2002 leaves out of its scope "administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities".

In general the Greek courts have followed the jurisprudence of the Court of Justice, but it is not clear to what extent contracting out is to be regarded as coming within the scope of the legislation.

In its decision no. 647/2003 the Court of Cassation declined to include within the scope of protection a case, where the employer, a company, changed ownership by way of acquisition of share capital without any change in its legal form.

Spain

Article 44 of the Estatuto de los Trabajadores applies to all cases of transfers of undertakings or businesses. It is not relevant whether it is a public or a private enterprise. Article 44.2 reproduces the definition in Article 1.1(b) of the Directive. This includes the re-organisation of public services, although not internal administrative ones.

Art. 44 ET applies to any transfer taking place in Spain's territory, as this is the scope of Estatuto de los Trabajadores.

No exception is made for sea going vessels.

France

The definition given by the French courts of a transfer of undertaking is very similar to the wording of Directive Article 1.1.(b). Thus, Article L.122-12 can apply to initial contracting out, contracting back in and in successive contracts following further competitive tendering.

There appears to be some doubt about the applicability to contracting out in the decisions of the courts. The Court of Cassation requires there to be a transfer of tangible or intangible assets. This can create a problem for outsourcing in the service sector and may lead to transfers just involving the movement of teams of people not coming within the scope of the legislation. This is particularly relevant to the successive transfers of tendered contracts, although in some important sectors collective agreements apply provisions to ensure that successive contracts are treated as relevant transfers.

There is also a further problem in the relationship between public and private law which may affect transfers between the public and the private sector, although Article 20 of Law Number 2005-843 recognises the existence of a transfer of undertaking when there is a transfer from the private to the public sector and defines the obligations for the new employer and the consequences for the worker.

There are no provisions in respect of Article 1(2), so the territorial scope is therefore governed by the general rules on the application of laws and they consequently apply to the whole of French territory.

French law does not reproduce the exception for seagoing vessels. Furthermore, Article 102-8 of the Maritime Labour Code dealing with relationship between sailors and ship-owner reproduce the principles of Article L.122-12.

Ireland

Article 1(1)(a) of the Directive has been implemented by Regulation 3(1) of the 2003 Regulations.

Article 1(1)(b) is reproduced almost verbatim by Regulation 3(2) of the Irish Regulations.

Article 1(1)(c) of the Directive has been implemented via virtual verbatim reproduction in the 2003 regulations, in Article 3(3) and 3(4).

No reference is made to Article 1(2). The Directive has not been understood as requiring that Irish law should be given some form of extra-territorial effect.

The requirements of Article 1(3) of the Directive has been implemented by Regulation 3(5) which state that the 2003 Regulations shall not apply to sea-going vessels.

Italy

Article 2112, paragraph 5 of the Civil provides for the implementation of Articles 1.1(a) and 1.1(b) of the Directive. Art. 1.1. (c) is implemented by Art. 2112 in the private sector and by Art. 31 of the d.lgs. n.165/2001 for the public sector.

The transfer of assets is not essential for the application of Article 2112. Of more importance is that the assets have been organised by the employer for the exercise of the activity of the undertaking.

Article 2112, paragraph 5, of the Civil Code, stating that the activity in question may or may not be operating for gain, has incorporated the intention of Article 1.1 (c.) of the Directive.

Case law has elaborated, on the whole, a wide concept of transfer, including mergers and outsourcing, including second generation transfers. The same principle has been held to apply in cases of assignment between the transferor and the transferee of an activity carried out by a private employer on the basis of a Public Administration contract (*concessione amministrativa*). There is some doubt, however, whether a transfer as a result of an act of the Public Administration is included, as there is contradictory case law on this subject. Excluded from the application of private law in this respect are judges, lawyers of the State, military personnel, the Police, diplomats and university professors and researchers.

There is no reference to territorial scope. Seagoing vessels are excluded. These are regulated by Article 347 of the Italian Code of Navigation. This provision states that, in the case of a change of ship ownership, the new owner will succeed the old one with respect to all the rights and obligations arising from the contracts of engagement of the crew members, but the latter may ask for a termination of their contract when the ship arrives in a national port.

Cyprus

The national law repeats the words of the Directive verbatim in Articles 1.1(a), 1.1(b), 1.1(c) with the exception of referring to shipping vessels rather than seagoing vessels in Article 1.3.

Article 1.2 has not been transposed. The Cypriot Law is silent as to its territorial application.

Latvia

Articles 1.1, 1.2 and 1.3 of the Directive are transposed by Article 117 of the Labour Law of Latvia, which deals with the transfer from one person to another, including in the public sector.

Article 117 refers to the transfer from one person to another, rather than to the transfer of a business or part of it, although this may not be significant;
Secondly, there is no definition of an economic entity, although Article 117 does state that a transfer of an undertaking means 'the transfer of an undertaking or its autonomous part to another person on the basis of an agreement, as well as a merger or division of commercial companies'.
thirdly, that it only mentions a contractual basis for a transfer, although this may not be as restrictive as the translation suggests.

Asset only transfers and share transfers are excluded.

The Labour law applies to public and private activities in accord with Article 1.1(c) of the Directive.

Article 117 (2) provides that the re-organisation of State administrative institutions or of local government administration, as well as transfer of administrative functions of one institution to another institution shall not be regarded as a transfer of an undertaking.

Article 117(3) provides for the exclusion of sea going vessels. There is no reference to the territorial scope.

Lithuania

Transfers of an undertaking, business, or part of undertaking or business, as defined in Article 1.1(a) of the Directive, could be carried out under national legislation through reorganisation of the company or sale of the company. Re-organisation of the company is defined by Company Law and the Civil Code as combining, contracting out, dividing and joining of an enterprise, establishment or organisation. Para 2 Article 2.95 of the Civil Code defines reorganisation as a closure of legal persons without a liquidation procedure. This, according to the national author, may be a restrictive interpretation.

The Labour Code prohibits the termination of an employment contract during the reorganisation of an enterprise by stating that changes of ownership under a wide variety of situations including the transfer of an establishment or organisation to another enterprise or a part, do not amount to a legitimate reason to terminate employment relations. These restrictions apply to all kinds of undertakings - public and private.

There is no reference to territorial scope or to the exclusion of sea going vessels.

Luxembourg

Article 1(1)(a), (b) and (c) of the Law of 2003 applies to any transfer of an undertaking, business, or part of an undertaking or business as a result of a contractual sale, merger, inheritance, scission and conversion of a business or incorporation of a company.

A transfer is a transfer of an economic entity which retains its identity. This means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

The Law applies to public and private undertakings engaged in economic activities whether or not they are operating for gain, but excludes any internal administrative reorganisation of public administrative authorities and the internal transfer of administrative functions between public administrative authorities. It therefore means that a transfer of undertaking from the public sector to the private sector would fall within the scope of the Law.

Article 1.2 of the Law is applicable to any transfer where an undertaking, business or part of an undertaking or business to be transferred is located on the national territory of the Grand-Duchy of Luxembourg.

The Law excludes sea going vessels.

Hungary

All employers with employees working in Hungary in a private employment relationship are under the scope of the Labour Code (Section 1). There are some exceptions from this rule including employers of posted workers. Thus, according to the general rule, Labour Code regulations on transfer only cover transfers affecting employers and employees under the scope of the Labour Code.

There are cases when the transferor (predecessor) and/or the transferee (successor) do not fall under the scope of the Labour Code. The legislation contains special rules in three separate Acts: the Labour Code, Act 33 of 1992 on the legal status of public employees (Kjt.) Section 25/A, 25/B Kjt. (section 25/A-B) and civil servants Ktv. (section 17/A-B).

Article 1.1(b) is implemented by section 85/A.1 of the Code. According to this section the following qualify as legal succession to the person of the employer: statutory legal succession; and when an independent unit (such as a strategic business unit, plant, shop, division, workplace, or any part of these) or the material and non-material assets of the employer are transferred by agreement to an organisation or person falling within the scope of this Act for further operation or for restarting operations if such transfer takes place within the framework of sale, barter, lease, leasehold or capital contribution for a business association. The only difference between Article 1.1.(b) of the Directive and Section 85/A par.

1. is that the Labour Code does not emphasise that the transferred economic activity may be "central or ancillary". However, the above list refers to this characteristic of the activity by providing a detailed list of the employer's tangible or intangible resources: business unit, plant, store, branch, workplace, or parts thereof. It can be assumed from this list, that the economic activity may also be ancillary, but it is not expressly stated by the definition of legal succession.

There is no reference to territorial scope or for the exclusion for sea going vessels.

Malta

Article 38 EIRA of the EIRA and the regulations under LN 433/02 transpose Articles 1.1, 1.2 and 1.3 of the Directive. They apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger; to any undertaking engaged in economic activities whether or not that activity is central or ancillary and whether or not it is operating for gain. LN 433/02 defines transfer as a transfer of an undertaking which retains its identity as an organised group of resources having the objective of pursuing an economic activity.

The legislation does not apply to an administrative reorganisation of public administrative authorities, or to the transfer of administrative functions between public administrative authorities.

It applies where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within a Member State of any international organisation to which Malta is a party or in Malta.

Sea going vessels are excluded by Regulation 3 of LN 433/02.

Regulation 4 provides that Article 38(2) of the EIRA only applies to undertakings that are being transferred and that employ more than twenty employees, including all full-time and part-time employees.

Netherlands

Article 7:662(2)a BW provides that a transfer takes place as a result of an agreement, a merger or a division, of an economic entity which retains its identity.

Article 7:662(2) BW is similar to the definition contained in the Directive and provides that the rules cover the entire private and public sector, including outsourcing, but not civil servants.

The territorial scope of the ToU-rules is determined by the general provisions of the Civil Code and limited to the territory of The Netherlands.

Sea going vessels are excluded.

Austria

The AVRAG defines the transfer of a business as when an undertaking, business or part of a business is transferred to another business holder ("Inhaber"). Whether a transfer of a business takes place depends upon whether an economic entity that retains its identity is transferred.

The intention of Section 3 Paragraph 1 of the AVRAG, is to cover as many forms of transfers as possible. In practice also the Austrian Supreme Court (OGH) has been influenced by the decisions of the Court of Justice and has held that the AVRAG covers as many types of transfers as possible without there being a need for a legal transaction. According to the OGH Section 3 Paragraph 1 of the AVRAG also refers to the transfer of a part of a business. In order for a part of a business to be covered it must pursue an independent purpose so that a functioning part of the business may be transferred.

Section 3 Paragraph 1 does not explicitly differentiate between a legal transfer or merger, nor is there a definition of the term "transfer of a business" as provided for by Article 1.1.b of the Directive.

Outsourcing, including transfers between contractors, has been interpreted by the Courts as being included within the scope of AVRAG, although there have been no decisions on the taking back in of outsourced work.

According to Section 1 Paragraph 2 Subparagraph 1 of the AVRAG, employment relationships with the provincial authorities, associations of local authorities and local authorities are exempt from the scope of the Act. Competence in this field lies with the provinces. The OGH has applied the Directive to provinces and local authorities even though it appears that they have failed to meet their obligations under the Directive.

There are no provisions with regard to exempting administrative re-organisations in accordance with Article 1.1(c).

There are no provisions with regard to Article 1.2.

There are no exemptions for sea going vessels as provided for in Article 1.3.

Poland

Article 23^1(1) of the Labour Code provides a broad definition of the changes resulting in a transfer and includes transfers, mergers, divisions, successions, transformations, and takeovers. It also covers all types of institutions including companies, co-operative enterprises and public institutions.

Article 1.1(b) of the Directive restricts the meaning of a transfer to situations where an entity retains its identity (meaning an organised grouping of resources). Under the Polish Labour Code there are no such restrictions.

Polish legal doctrine considers an undertaking as organisational and technical unit which is an employer. This means that the unit must be attributed with the ability to legally employ workers. This is understood as an organised unit which consists of particular assets, such as premises, land, equipment and machines and non-material elements such as the name,

brand, clients and business contacts, and its own structure of management (which covers staff). An employer may possess few undertakings which can be transferred, united and/or divided.

A part of an undertaking can also be considered as an independent employer.

There is no reference to territorial scope in the implementing legislation.

Article 1.3 has not been implemented. The employment relationships of employees on sea going vessels are provided for by the Act of 21 May 1991 on work on seagoing merchant ships (Journal of Laws No 258, item 61 as amended).

Portugal

Article 1.1 (a) has been transposed by the Labour Code Article 318 (1).

Article 1.1(b) of the Directive is transposed by Article 318(4) of the Labour Code. The provisions cover any legal transfer, which allows a broad interpretation as it includes all situations in which the identity of the owner of the undertaking changes, whatever the legal form in which this change is effected, except for a sale by shares only.

There are no provisions containing the words in Directive Article 1.1(c) but the labour law system ensures that public and private undertakings are included. Administrative re-organisations between public authorities are not.

The Labour Code applies to all undertakings, businesses, or parts of undertakings or businesses within Portugal (Articles 318-321).

There are special rules for sea going vessels, contained in Decree-Law 15/97 of 31 May 1997 which establishes the applicable rules to the individual contract of employment of maritime employees. Article 23 is concerned with transfers.

Slovenia

Directive Article 1.1(a) is provided for in Paragraph 1 of Article 73 of the Employment Relationship Act. A change of employer could be in the form of a legal transfer of the undertaking or a part of the undertaking, executed on the basis of a law, any other regulation, legal transaction, final court decision, merger or division.

The decisions of the Court of Justice have influenced the meaning of a transfer given in the ERA.

The ERA is applicable to both the private and the public sector unless the Act on Public Servants applies. Article 2 of ERA states that unless stipulated otherwise by a special act, the ERA also regulates employment relationships of workers employed by state bodies, local communities and institutions, other organisations and private persons carrying out a public service.

The Employment Relationship Act applies to employment relationships between employers established or residing in the Republic of Slovenia and the workers employed with them. The Act also applies to employment relationships between foreign employers and workers,

concluded on the basis of an employment contract in the territory of the Republic of Slovenia. In the case of workers posted to the Republic of Slovenia by a foreign employer on the basis of an employment contract pursuant to foreign law, the Act shall apply in accordance with the provisions regulating the position of workers posted to work in the Republic of Slovenia.

The ERA, does not explicitly exclude seagoing vessels from its scope, neither in Article 3 (which defines the applicability of the Act), or in Article 73,(which defines transfer of an undertaking). However as employment relationships for seafarers are defined in a separate section of the Act (Article 218) and therefore, by implication, are excluded. Relationships on seafarers are further detailed in the Maritime Code of the Republic of Slovenia

Slovakia

Article 28 Sec. 1 of the Labour Code provides that the rights and obligations of an employer transfer in a wide variety of situations. The definition of a transfer is not contained in the Labour Code. The Commercial Code, Article 218(a)–(g) contains the definitions necessary for Directive Article 1.1(b).

The Labour Code does not define economic entity. It uses the term 'part of an employer' which, according to Article 28(3) of the Labour Code, means 'each organisational unit which has the objective of pursuing an economic activity, whether or not that is central or ancillary'.

All transfers are treated as if the transferee undertakes all the obligations arising out of an employment relationship, regardless of whether the entity retains its identity or not.

The Labour Code does not refer to territoriality.

Sea going vessels are not excluded.

Finland

Article 1.1 of the Directive is transposed by Section 10.1, Chapter 1 of the ECA.

The transfer of the employer's business refers to the transfer of an enterprise, business, corporate body, foundation or a part to another employer, if the business or part to be transferred, disregarding whether it is a central or ancillary activity, remains the same or similar after the transfer.

Interpretation of this Section is given in the *travaux préparatoires*. Although the wording of the definition somewhat differs from that of the Directive, the definition is meant to correspond to the one in the Directive. The concept of the transfer of undertaking provided by Article 1 of Directive 2001/23/EC has been considered to correspond to the concept of transfers adopted into national Finnish labour law.

There is no reference to territorial scope.

Seamen are excluded by the Seamen's Act 1978.

Sweden

Section 6b of the (1982:80) Employment Protection Act, which was inserted into the Act in 1995 in order to implement the Directive, does not contain an express definition of a transfer of an undertaking, business or part of an undertaking or business. The legislative preparatory works provide that the concepts should be interpreted in light of the Directive and case law of the ECJ.

Section 6b expressly states that its rules on automatic transfer apply to public employees. The exclusions concerning the administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities in Article 1.1(c) do not apply.

There is no reference to territorial scope and sea going vessels are not excluded.

United Kingdom

The Transfer of Undertakings (Protection of Employment) Regulations 2006 apply to two distinct situations, which may overlap. Firstly they apply to transfers of undertakings (Regulations 3(1)(a) and 3(2)). The definition of a transfer adopts the precise wording of the Directive contained in Article 1(a) and 1(b).

In addition to this application, the Regulations also apply to "service provision changes" (Regulation 3(1)(b)). A service provision change is a situation when:

i). activities are contracted out to a contractor
ii). activities are subsequently transferred between contractors
iii). activities are brought back in house from a contractor.

The conditions for a service provision change are contained in Regulation 3(3).

Regulation 3(4)(a) of the 2006 Regulations uses the exact words from Article 1.1(c) in stating that they apply to public and private undertakings 'engaged in economic activities whether or not they are operating for gain'.

The exact words from Article 1.1(c) are also used to exclude transfers within and between administrative functions (Regulation 3(5)), although the application of the *Cabinet Statement of Practice on Staff Transfers in the Public Sector* and the subsequent code of practice ensure that the principles contained in the Transfer Regulations apply throughout the public sector and to transfers of administrative functions where there is no change in the public sector employer.

Regulation 3(1)(a) provides that the undertaking, business or part of business be situated immediately before the transfer in the United Kingdom.

There is no specific exclusion of seagoing vessels. Regulation 3(7) applies where, directly or indirectly as a result of a transfer, a ship ceases to be registered in the United Kingdom. This preserves the rights of seamen in this situation (right to be discharged) as in section 29 Merchant Shipping Act 1995.

Article 2

1. For the purposes of this Directive:

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

2. This Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship.
   However, Member States shall not exclude from the scope of this Directive contracts of employment or employment relationships solely because:

   a. of the number of working hours performed or to be performed,
   b. they are employment relationships governed by a fixed-duration contract of employment within the meaning of Article 1(1) of Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship(6), or
   c. they are temporary employment relationships within the meaning of Article 1(2) of Directive 91/383/EEC, and the undertaking, business or part of the undertaking or business transferred is, or is part of, the temporary employment business which is the employer

Not all Member States have specific definitions of the terms in Directive Article 2.1, although these exist in practice.

No Member State excludes any of the categories in Directive Article 2.2.

Belgium

Employees (travailleurs) are, under article Article 2.1 CBA 32bis, defined as those persons that perform work under a contract of employment or an apprenticeship. All employees, be they part-time or full time, with fixed term, temporary or indefinite duration contracts, fall within the scope of CBA 32bis.

The term contract of employment is not defined by the text of CBA 32bis itself. The commentary to Article 2 of the CBA states that the notion of an employment contract is to be interpreted as that used in the Statute of July 3, 1978 respecting contracts of employment. This does not include professional sports people.

Employer is defined in article 2 2° CBA 32bis as the natural person or legal entity employing employees.

The Dutch and the French wording of the definition of transferor and transferee in Directive 2001/23 is repeated in CBA 32bis.

The term' workers' representatives' is not explicitly defined by CBA 32bis. CBA 32bis only deals with information and consultation affecting employees, when no works council has been set up nor when a trade union delegation is established in the undertaking (see Information and Consultation below).

Czech Republic

Representatives of employees are defined in Section 18 of the Labour Code. There are four basic kinds of worker representatives: trade unions, works councils and representatives concerned with occupational health and safety, European works councils and employee representatives in SE, and employee representatives in supervisory boards.

Czech law does not provide a precise legal definition of a worker; an employee or transferor and transferee. Such notions are implicit in other measures: the meanings of the terms employer and employees follows from the wording of Sections 1 to 17 of the Labour Code; the meaning of transferor and transferee follow from the wording of Sections 249 to 251e of the Labour Code.

The Labour Code does not use the term enterprise or undertaking. It speaks about transfer of an employer or his or her part.

Section 5 of the Commercial Code has a definition of enterprise / undertaking (podnik), it does not have a definition of business (závod).

As the relevant Czech law covers all employees, the categories in Article 2.2 are included.

Denmark

There is no uniform definition of employee. Reference is made to the rights and obligations which the transferee takes over. These are those under collective agreements and other provisions concerning pay and working conditions.
There are no exceptions in relation to Directive Article 2.2.
Employee representatives include trade union representatives, safety representatives, members of workers' councils and employee members of boards of directors.

Germany

The German provisions transposing the Directive do not use the term transferor (*Veräußerer*). Instead, in § 613a BGB the term hitherto employer (*bisheriger Arbeitgeber*) is used. But the differing terminology has the same meaning. The same applies to the term *transferee*. § 613a BGB speaks of the new owner (*neuer Inhaber*) instead. A simple change of ownership - for example, a sale of shares – does not result in a new owner within the meaning of § 613a BGB.

In Germany, a well established system of employee representation takes a number of forms in the private and the public sector, giving employee representatives extensive rights to information and consultation.

A statutory definition of the term employee does not exist.. According to the established case law of the BAG, anybody 'who, on the basis of a contract under private law, is obliged, in service of another person and subject to his/her directives, to render work in personal dependency', is to be regarded as an employee. This includes the categories in Article 2.2 of the Directive.

Estonia

The terms 'transferor' and 'transferee' are not explicitly defined in national law. National provisions refer to the 'new employer' rather than transferee and 'former employer' to refer to transferor.

Legal persons in private law, according to Article 24 paragraph 2 of the General Principles of Civil Code Act, include general partnerships, limited partnerships, private limited companies, public limited companies, commercial associations, foundations and non-profit associations. Legal persons in public law are defined and regulated by Articles 24 and 25 of the General Provisions of Civil Code Act. Additionally, interpretation of Article 3 (definition of an employer) read together with Article 6 (1) 3) of the ECA suggests that a natural person may also be transferor or transferee within the meaning of the ECA.

According to Article 2 of the Employees Representatives Act a representative is an employee of an enterprise, agency or other organisation, who is elected by the members of a union of employees or by a general meeting of employees.

Article 2 defines employee as a natural person who has attained eighteen years of age and has active capacity or restrictive active legal capacity. All employees are covered by the ECA including part-time employees, employees with fixed-term contracts or temporary employment relationships.

Greece

Article 3 of Presidential Decree 178/2002 repeats the definitions contained in Article 2.1 and the limitations of Article 2.2 of the Directive.

Article 3 refers to Law 1767/1988 as amended provides that employees of undertakings employing at least 50 persons are entitled to elect workers' councils. For undertakings with less than 50 employees Article 3 of Presidential Decree 178/2002 provides that for the purposes of the Directive their employees are represented by a council of three members and that the rules concerning employee representation apply analogously in that case as well.

Presidential Decree 178/2002 specifies that all natural persons who are connected with an undertaking by virtue of a 'relationship of dependent labour' fall under the concept of employee for the purposes of the Directive. It expressly includes fixed-duration and temporary employment relationships as defined in Council Directive 91/383/EEC and dictates that it applies to contracts of employment and employment relationships irrespective of the number of hours performed or to be performed.

In light of settled law the criterion of relationship of dependent labour employed by the Presidential Decree is broad. It is understood to encompass all those relationships where one party is under a duty to offer his work to another party and comply with the latter's instructions with regard to the place, time and nature of employment and the latter assumes the business risk.

Spain

Article 44 ET does not provide express definitions of the terms in Directive Article 2.

Article 1 ET in connection with Article 8 ET provides that a contract of employment is an agreement between employer and employee by means of which the latter undertakes to carry out particular services for an employer under his management, in exchange for a wage. Art. 44 ET applies to every employment contract, including the categories mentioned in Article 2.2 of the Directive.

Spanish Tribunals interpret the terms of transferor and transferee in the sense set down by the Directive.

Article 44 ET refers to 'representatives of employees'. There is a complex system of workers representatives, including works committees, trade unions and other representatives.

France

Article L.122-12 does not make any reference to 'transferor' and 'transferee'. This does not affect the application of the Directive as this Article broadly defines the concept of the transfer of undertaking.

There is no specific definition of employee. The French definition is broad. In the absence of a statutory definition, the generally accepted definition of the contract of employment is an agreement whereby an individual, the employee, puts his or her services at the disposal of another, the employer, subjecting themselves to the latter's authority, in exchange for the payment of remuneration. The main exclusions from this definition are public sector workers.

Representatives of employees are both works councils and staff delegates.

The transfer of contracts of employment applies to all contracts of employment without exception, including the categories in Article 2.2 of the Directive.

Ireland

Regulation 2(1) of the 2003 Regulations repeats verbatim the definition of transferor and transferee contained in the Directive.

Definitions of employee and employment relationship are contained in regulation 2(1) of the 2003 Regulations, with Regulation 2(1) providing a definition of 'contract of employment'. The definition of employee adopted for the purposes of the Irish regulations is a broad one. The categories in Article 2.2 are included.

Under Regulation 2(1) of the 2003 Regulations, 'employees' representatives' is defined as meaning a trade union, staff association or some other body; in the absence of such organisation, then some other person or persons chosen by the employees from among their number.

Italy

The law on the transfer of undertakings, with the exceptions already referred to concerning some categories of public employees and seagoing vessels, applies to all categories of dependent or subordinate employees, including the categories in Article 2.2 of the Directive.

Article 2112 provides definitions for transferor and transferee which correspond with the definitions in the Directive.

Representatives of employees are union representatives at plant level (*rappresentanze sindacali aziendali* : Article 19, Law 20 May 1970, n.300), and the unitary union representations (*rappresentanze sindacali unitarie*, provided for by a collective agreement dated 20 December 1993)..

Cyprus

The definitions contained in Article 2.1 of the Directive are repeated verbatim in Article 2 of the Cypriot Law. The term 'employee', is described as a person working for another person either under a contract of employment or apprenticeship or under such circumstances that the existence of an employment relationship may be inferred.

Representatives of employees are the trade union representatives.

The categories in Article 2.2 are included in this definition, although not explicitly mentioned.

Latvia

A transferor is any natural or legal person who, as a result of a transfer, loses the status of employer. A transferee is such a person who acquires this status as a result of a transfer.

An employer, according to Article 4 is a natural or legal person, or a partnership with legal capacity, that employs at least one employee. An employee, according to Article 3, is a natural person who on the basis of a contract of employment for agreed remuneration performs specific work under the guidance of an employer.

Representatives of employees are defined by Article 10 as trade unions or authorised employee representatives who have been elected in accordance with the Labour Law.

Lithuania

There are no specific definitions of transferor or transferee in national law, although the meaning in practice, according to the national author, is clear.

The definition of 'representatives of employees' is contained in a number of laws. In labour relations, according to Article 19, the rights and interests of employees may be represented and protected by trade unions or labour councils. The activities of labour councils and trade unions are governed by specials laws, i.e. the Law on Labour Councils, the Law on European Labour Councils and the Law on Trade Unions.

An employee is defined as a natural person possessing legal capacity in labour relations employed under employment contract for remuneration, Article 15. This included the categories in Article 2.2 of the Directive.

Luxembourg

Article 2(1) provides that the transferor is a natural or legal person who ceases to be the employer and the transferee as the natural or legal person who becomes the employer.

Representatives of employees are those appointed as members of employee delegations or as a member of a Joint Works Council.

There is no definition of employee in national law, but it has been construed by case law as a natural person performing a remunerated activity under the subordination of an employer (except for those that have the status of public employee). The categories in Article 2.2 of the Directive are included.

Hungary

There are no specific definitions for transferor, transferee, representatives of employees and employee in terms of a transfer. Therefore the general definitions and Section 85/A Subsection 1 apply.

Transferor and transferee may be any natural and legal person, who may be an employer. The transfer definition (Section 85/A) does not use the term transferor, but employer. Instead of transferor the definition talks about any person or organisation, which transfers the rights of the employer.

Employee may be any person with certain restrictions in terms of age and capacity (Section 72). The categories in Article 2.2 of the Directive are included.

Representative of employees may be a trade union, a workers' council or a committee formed from the representatives of non-union employees.

Malta

Regulation 2 of Legal Notice 433/02 repeats the definition of transferor and transferee found in Article 2.1(a) and (b) of the Directive.

Article 2 of EIRA provides that an employee is defined as any person who has entered into or works under a contract of service, or any person who has undertaken personally to execute any work or service for, and under the immediate direction and control of another person, including an outworker, but excluding work or service performed in a professional capacity or as a contractor for another person when such work or service is not regulated by a specific contract of service.

EIRA also defines an employee representative as meaning a recognised trade union representative. Where there is no recognised union, then the term means the representative of the union representing the employees, and in the case of non-unionised employees, the terms shall mean such representative duly elected from amongst the non-unionised employees.

Netherlands

There is no definition of transferor or transferee. In practice, however, these terms are used to refer to the natural or legal person that by reason of the transfer ceases to or becomes, respectively, the employer in respect to the undertaking in question.

The term 'representatives of employees' is not specifically defined. The term may refer to either works councils or trade unions.

An employee is any natural person that has an employment contract. Article 7:610 BW defines an employment contract as a contract by which an employee commits himself to perform for, and under the supervision of, the employer for a certain period of time, work in return for remuneration.

There are some workers who carry out personal work but who do not have a contract of employment. These can include home workers, seasonal workers and free lance journalists. Such persons are treated as employees by the Special Decree on Labour Relations (*Buitengewoon Besluit Arbeidsverhoudingen* - BBA), which, in part, makes dismissals by the employer conditional upon the authorisation of the Centre for Work and Income (CWI-*Centrum voor Werk en Inkomen*). Such persons would seem to be protected as employees under national employment law but are excluded from the protection of the Directive.

Civil servants are not covered, because they do not have an employment contract. According to the national author in the event of privatisation, personnel of public undertakings working on the basis of an employment contract can claim retention of their rights, but civil servants cannot. In the reverse situation of de-privatisation, both categories can benefit from the provisions.

The categories in Article 2.2 are not excluded provided they meet the criteria for being an employee.

Austria

The AVRAG does not contain any of the definitions in Article 2.1 of the Directive.

According to the OGH the concepts of 'transferor' and 'transferee' must be interpreted in a broad manner. Neither the transferor nor the transferee need to be the proprietors of the business, but only the legally secured and actual holder with the authority to manage the business.

The term 'representatives of employees' refers to works councils.

Deriving from Section 51 of the Labour and Social Court Act the term 'employee' covers all persons who, because of their personal and economic dependence, are in an employment relationship with an employer as well as apprentices who perform their work under a contract of employment.

The categories in Article 2.2 are not excluded provided they meet the criteria for being an employee.

Poland

Article 23 of the Labour Code describes the transferor as the previous employer. Article 3 of the Labour Code provides a definition of an employer covering all operators employing employees and a transferee as the new employer.

Representatives of employees are regulated under Article 26 of the Act of 23 May 1991 on trade unions.

Article 2 of the Labour Code defines an employee as 'a person employed based on an employment contract, appointment, election, nomination or co-operative employment contract'.

The categories in Article 2.2 of the Directive are included and protected by the non-discrimination provisions of the Labour Code.

Portugal

Portuguese law does not contain the definitions in Article 2.1 of the Directive. The terms are as used generally in labour law.

All contracts of employment or employment relationships, as defined in Articles 10, 12 and 13 of the Labour Code are covered by the law. The definition of a contract of employment is ' that for which a person assumes an obligation, in consideration of a payment, to render his/her activity to another person, under his/her authority and direction.' (Article 10 of the Labour Code).

Article 12 of the Labour Code establishes that there is a presumption of a labour contract when an employee is inserted in the organizing structure of another organisation.

The situations referred in 2.2 (a) (b) and (c) are protected in Portuguese law.

Slovenia

There are no definitions of a transferor or a transferee, but paragraph 2 Article 5 of the Employment Relationship Act provides that an employer is any legal or physical person or any other subject such as a state body, local community, branch office of a foreign company, diplomatic or consular representative which employs a worker on the basis of an employment contract. An employee is defined as is any physical person who is in an employment relationship on the basis of an employment contract.

Representatives of employees may be trades unions or Works Councils.

Slovakia

The Labour Code does not contain definitions of transferor or transferee.

Representatives of employees means trade unions, works councils or works trustees, trustees and representatives for occupational health and safety (Article 11a of the Labour Code). If there are no representatives, then the employer must consult with the employees directly.

An employee is someone who performs dependent work for the employer pursuant to instructions, for a wage or for remuneration.

The categories in Article 2.2 are included in the definition of employee.

Public and civil servants are not outside the scope of application of the Directive despite the fact that their employment relationships are governed by special laws.

Finland

There is no statutory definition of employer or employee. There is a definition of employment relationship in the ECA. Section 1 chapter 1 of this Act states that it applies to contracts of employment entered into by an employee, or jointly by several employees, agreeing personally to perform work for an employer under the direction and supervision of an employer in return for pay or some other remuneration.

Sweden

The definitions in Article 2.1 have not been explicitly implemented. The term employee has been defined through case law as meaning someone who, on the basis of a contract, personally works for someone else in return for remuneration. The terms transferor and transferee should be accorded the meaning in the Directive.

The categories of employees in Article 2.2 of the Directive are not excluded from the implementing legislation.

United Kingdom

Regulation 2 of the 2006 Regulations is concerned with definitions.

Employee is defined as someone who works under a contract of service or apprenticeship and excludes those working under a contract for services.

There are no special provisions with regard to the three categories in Article 2.2, as the Regulations apply to anyone employed immediately before the transfer, which would include all these groups.

Representatives of employees – these may be either the recognised trade union; where no such union exists, representative of employees will be elected or appointed by the affected employees.

Article 3

1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.
   Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.
2. Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under this Article, so far as those rights and obligations are or ought to have been known to the transferor at the time of the transfer. A failure by the transferor to notify the transferee of any such right or obligation shall not affect the transfer of that right or obligation and the rights of any employees against the transferee and/or transferor in respect of that right or obligation.
3. Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.
   Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year.
4.
   a. Unless Member States provide otherwise, paragraphs 1 and 3 shall not apply in relation to employees' rights to old-age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes outside the statutory social security schemes in Member States.
   b. (b) Even where they do not provide in accordance with subparagraph (a) that paragraphs 1 and 3 apply in relation to such rights, Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer in respect of rights conferring on them immediate or prospective entitlement to old age benefits, including survivors' benefits, under supplementary schemes referred to in subparagraph (a).

All Member States have provided for the transfer of rights and obligations relating to terms and conditions of employment when a transfer of an undertaking takes place. There are some exceptions to this requirement in Belgium and Hungary.

In terms of joint liability, some 16 Member States have provision for this, with another two, Cyprus and Lithuania, where it is possible on a voluntary basis.

Only five Member States, the Czech Republic, Latvia, Luxembourg, Hungary and the United Kingdom, have provisions that provide for the obligations under Article 3.2 of the Directive.

All Member States have provisions for the transfer of collective bargaining agreements, although in some Member States there are excluded categories of employees.

Belgium

Article 7 of CBA 32bis provides for the transfer of all rights and obligations, including those resulting from custom and practice.

The national author raises the possibility that works rules, which can include details of salary, employment conditions and working time, may not always be included in the contract of employment. Unless these work rules are explicitly referred to in the contract, then they may not transfer. This view is not shared by the Government agency concerned.

Article 8 of CBA 32bis provides that there is joint liability between the transferor and the transferee.

There are no measures concerning Article 3.2 of the Directive, but the national author reports on examples of this being adopted in sectoral collective agreements.

Article 20 of the Statute of December 5 1968 respecting Collective Bargaining Agreements and Joint Committees provides that the transferee employer must respect the collective bargaining agreement to which the transferor employer was bound. The terms and conditions established by the transferred collective bargaining agreement will have continued effect, as part of the contract of employment, even if the Agreement ceases through termination or through the passing of time. There appears to be contradictory judicial decisions as to whether this applies if the transfer results in a change of industry. This Statute is not applicable in the public sector.

There are no time limitations.

Article 4 CBA 32bis provides for the exclusion of rights and benefits contained in Article 3.4(a) of the Directive, although this can be amended by sectoral bargaining agreements.

The State provides certain guarantees to ex-employees, in accord with Directive 80/987/EEC, and these do not fall to the transferee.

Czech Republic

Article 249(2) of the Labour Code explicitly states that the employees' rights and obligations will transfer to the employer taking over the enterprise and that the transferor's obligations cease at this time. There is therefore no joint liability for debts.

Section 483 of the Commercial Code provides that the transferor and the transferee will sign a deed listing the rights and obligations; section 485 ensures that any items omitted from the deed will be listed separately. A transferee may deny an employee claim if it has not been included in the deed. The claim would then remain with the transferor. There would appear to be the possibility of denying automatic transfer of rights and obligations with this rule.

Collective agreements transfer in accord with Directive Article 3.3.

All pension and other benefits rest with the State, rather than with individual employers. Act 340/2006 Coll. on the Activities of Institutions for Occupational Retirement Provisions on the Territory of the Czech Republic came into force on 3 July 2006. This act allows employers who have their registered office in the Czech Republic to make contributions to institutions

for occupational retirement provision that are licensed in other Member States. As there are no Czech occupational pension schemes the implementation of Article 3.4(b) is not seen as an issue.

Denmark

Section 2(1) of the Consolidated Act of 2002 provides that the rights and obligations arising from collective agreements, provisions regarding pay and working conditions approved by public authorities and individual provisions regarding pay and working conditions transfer, with the exception of payments of pension and/or disability benefits.

The option of joint liability is not taken up, although there are some occasions, relating to avoidance of the law or obligations, when the transferor may be held liable for some debts.

There are no provisions for taking up the option in Article 3.2 of the Directive and the transferee will have liability for all those obligations existing at the date of transfer.

Section 2(1) of the Consolidated Act provides that the transferee assumes the rights and obligations under a collective agreement that applied at the time of the transfer.

Section 2(3) of the Act makes it clear that the law on transfers do not include any obligation to pay pension, disability, or survivors' benefits. Payment of pension benefits is covered by the Consolidated Act on Pension Funds nr 1017 of 24 October 2005. This rule applies to the payment of benefits and there has been debate as to whether pension contributions should be treated differently. It appears that pension contributions are to be treated as a continuing pay obligation that is transferred.

Article 3.4(b) of the Directive is not included in the Consolidated Act as the Consolidated Act on Pension Funds provides for the protection on employees who left the undertaking prior to the transfer.

Germany

Section 613a para 1 sen. 1 BGB implements Article 3.1 first para. Section 324 UmwG also applies the same principles in the event of mergers, spin offs or transfers of assets.

The principle of joint liability is adopted in section 613a para 2 BGB. The only exception is in certain cases where a corporate body or a commercial partnership cease to exist due to a transformation. In such cases the assets and the liabilities to employees transfers to the new employer.

The option of requiring information to be passed, contained in Article 3.2 of the Directive, is not explicitly implemented. The normal rules of contractual obligations apply, however, in the event of not providing information about third party rights outstanding.

The content of collective agreements and works agreements are protected for a period of up to one year from the date of transfer and may not be changed to the employee's disadvantage during that time. An important issue is the interpretation of the phrase 'terms and conditions'. It is clear that some collectively agreed provisions are treated as being outside the individually agreed terms and conditions in the employment contract.

Rights to old age, invalidity or survivors' benefits are transferred if they are contained in the individual contract of employment or the relevant collective agreement.

Rights of ex-employees no longer employed in the transferor's business at the time of the transfer, in cases of insolvency, are safeguarded by the Act on Occupational Pensions and the Pension Safeguarding Association (Pensionssicherungsverein). In this case the Association is required to fulfil the employer's obligations.

Estonia

Article 6.1 of the Employment Contracts Act provides that the rights and obligations arising from an employment contract transfer to the new employer.

Article 6^2(2) provides for a joint liability for rights and obligations in force at the time of the transfer and which fall due within one year of the change of employer. There is some uncertainty caused by the fact that rights and obligations which are in force and fall due at the time of the change of the employer remain the responsibility of the transferor according to Article 6^2(1). The national author states that it is likely that the national courts will prefer to apply Article 6.1, but there remains an ambiguity which creates uncertainty.

The option in Article 3.2 of the Directive is not taken advantage of.

Article 11(4) of the Collective Agreements Act obliges the transferee employer to continue to observe the terms and conditions of collective agreements. No time limits are referred to.

There are no provisions concerning Articles 3.4(a) or 3.4(b) of the Directive.

Greece

Article 4.1 of the Presidential Decree 178/2002, and judicial interpretation, have provided a broad application of Article 3.1 para 1 of the Directive.

Article 4.1 para 2 provides for joint liability. There is an unsettled debate about whether there are any limitations set for the liability of the transferee. There appears to be one view that this liability could not exceed the value of the transferred items. This is as a result of the application of Article 479 of the Civil Code which limits the liability of transferees in this way. There is also a view that this does not apply to liabilities arising from contracts of employment. There have been no judicial decisions on this subject.

The option in Article 3.2 of the Directive is not taken advantage of.

Article 4.2 provides for the transfer of collective agreements, but the new employer may, at any time after the transfer, negotiate a new collective agreement. Any new terms have immediate effect even if to the detriment of the employee. These do not result in changes to the terms and conditions of employment because of the Greek approach which is that collective agreements are not incorporated into individual contracts of employment but become a general norm to be applied. As a result it is not possible to state that there has been a unilateral change to the terms of the employment relationship. The Presidential Decree has not, however, affected the general rules regarding the validity and scope of collective agreements. Even in cases where the new employer decides to renegotiate the

collective agreement, he/she is bound by the terms of the old agreement for a period of six months after the termination (Article 9.4 of Law 1876/1990).

In addition, where the transferred entity is integrated into the transferee's undertaking, negotiations on this issue take place with the trade union recognised by the transferee.

Advantage is taken of the option in Directive Article 3.4(a) to exclude such benefits. The matter is left as a choice for the transferee employer. There are measures to protect employees' accrued benefits in the event that there is no take up by the transferee employer (Article 4.3 of the Presidential Decree) and there is explicit reference to the need not to compromise survivors' benefits in the transfer.

Spain

Article 44.1 ET provides for the transfer of rights and obligations, including the transfer of rights in relation to supplementary benefit schemes outside the statutory social security benefits. If an employee objects, then there only option is to resign.

Joint liability is established for a period of up to three years.

The option in Article 3.2 of the Directive is not taken advantage of.

Article 44.4 ET implements Directive Article 3.3. Transfers of collective agreements are until the expiry of the agreement or until the entering into force or application of another collective agreement, or unless something else is agreed between the transferee and the employee representatives. The date of expiry is automatically delayed until a new agreement takes effect, although there is a minimum of one year in which the terms must be maintained.

Art. 44.1 ET provides for the transfer of employees' rights in relation to benefits under supplementary pension schemes outside the statutory social security scheme.

Ex-employees are protected by RD 1588/1999 which implements Article 8 of Directive 80/987/EC.

France

Article L.122-12 of the Labour Code meets all the requirements of Directive Article 3.1 para1.

Joint liability is established except where there is no contractual relationship between the parties. In such situations the transferee and the transferor remain responsible for their own debts. This latter circumstance can result from insolvency proceedings, but may also result from transfers between contractors. This latter is an important issue but may relate to the fact that the traditional interpretation of the Directive in France, was that there needed to be a contractual relationship between the transferor and the transferee.

The option in Article 3.2 of the Directive is not taken advantage of.

According to Article L.132-8 para 7 of the Labour Code, collective agreements transfer, with a time limit of 15 months for applicability or until it is replaced by a new agreement negotiated between the transferee and the trade union. Such a new agreement will automatically replace the old one. If no agreement is reached within the 15 moths, then there is no obligation upon the transferee to be bound by it. Individual rights contained in the contract of employment are maintained as they have transferred.

Article L.911-3 of the Social Security code provides that collective agreements on supplementary pension schemes have the same legal regime as other collective agreements. Thus Article L.132-8 applies to these collective agreements. Article L.913-2 of the Social Security code adds that, in case of a transfer, any clause of an agreement on supplementary pensions which would undermine immediate or prospective entitlement to old age benefits, including survivors' benefits, of the employees and former employees shall be void. However this is not enough to protect employees' rights. Firstly, under Article L132-8 the survival of the collective agreement is temporary, and also because, except when employees have acquired a right when the transfer occurred, the advantages provided by a supplementary pension scheme can not be defined as an individual acquired right. Some others provisions on mandatory supplementary schemes on old age will apply and the two systems (AGIRC for the supervisory staff and ARRCO for the non supervisory staff) organise the safeguarding of employees' rights under supplementary pension schemes in case of fusion. Both schemes have been modified several times. Since the 1st July 2002, common rules apply now to both schemes.

Ireland

Regulation 4(1) of the 2003 Regulations provides a broad interpretation of Article 3.1 of the Directive.

The option of joint liability is not taken advantage of.

The option to provide information as in Article 3.2 of the Directive was not initially taken advantage of. It is now (at the time of the national report) being implemented by section 21 of the Employers (Provision of Information and Consultation) Bill 2005.

Regulation 4(2) repeats verbatim Article 3(3) para 1 of the Directive. Recognition of trade unions is normally voluntary and collective agreements are normally not legally binding. This means that the effect of this Regulation is limited. The option of a time limit is not taken up.

Regulation 4(3) provides an exception for employees' rights to old-age, invalidity or survivors' benefits.

Regulations 4.4(a) and 4.4(b), refer to the Pensions Acts 1990 to 2003, concerning the interests of persons in respect of old-age benefits under supplementary company pension schemes which fall within the meaning of the Pensions Acts 1990 to 2003. Pensions may be frozen and not transferred. Thus accrued rights are preserved and protected, but there is no obligation upon the transferee employer to provide a new supplementary pension scheme.

Italy

Article 2112 para 1 of the Civil Code provides for the transposition of Directive Article 3.1 para 1. Case law has interpreted this provision very widely. Contracts transfer even if the employee objects. Excluded from this provision are unpaid statutory pension payments.

Article 2112 para 2 provides for joint and several liability. There is the possibility of the transferor reaching agreement with the employees, subject to an approved procedure, to exclude the transferor from this joint liability.

The option in Article 3.2 of the Directive is not taken advantage of.

Pre existing collective agreements continue to apply unless there is already one of the same level, in which case the latter applies. This may mean that the employee may have reductions in terms and conditions, although often there is a process of harmonisation between the old and new agreements arranged with the trade unions.

If the pre transfer agreement continues there is a limit of one year for observation by the employer.

There are no specific provisions relating to Directive Article 3.4(a) or 3.4(b). There is a general rule under Article 10 which allows the employee, when there is a breach of the rules, to move their pension fund to another provider or to cash it in.

Cyprus

Article 4.1 of the Cypriot Law copies verbatim the words of Directive Article 3.1 para 1.

The law also allows the transferor and transferee to agree joint and several liability.

The option in Article 3.2 of the Directive is not taken advantage of.

Article 4.2 provides that the transferee must observe the terms of the collective agreement for a minimum period of one year. If the transferee is bound by another collective agreement, then the one most beneficial to the employee will apply.

Article 4.3(a) excludes benefits connected with age, disability or survivors' benefits.

Article 4.3(b) provides that employees who have left maintain their right to these benefits. There is no enforcement mechanism for this.

Latvia

Article 118(1) of the Labour Law provides for continuity of rights and obligations arising from employment legal relationships at the time of the transfer.

There are no provisions as to joint liability.

Article 118(3) provides for the implementation of Directive Article 3.2 regarding a transferor's duty to inform the acquirer of the undertaking of all the rights and duties devolving on the acquirer of the undertaking, insofar as such rights and duties are known or should have been known to the transferor of the undertaking at the moment of transfer of the undertaking.

Article 118(4) introduces provisions on continuity of collective agreements until the end of the agreement period, or until the moment a new collective agreement is entered into, or until the application of the provisions of another collective agreement. There is a period of one year on the prohibition on derogating from a collective agreement. During this period the agreement may not be amended to the detriment of the employee.

There appear to be no provisions in relation to Directive Articles 3(4)(a) or 3(4)(b).

Lithuania

Article 138 of the Labour Code provides for the transfer of rights and obligations. If an employee objects he or she is entitled to terminate the contract of employment.

The possibility of joint liability has not been expressly adopted into national employment law. However, Article 6.279 of the Civil Code provides rules of joint liability stating that persons are jointly liable against a victim for their jointly inflicted damage. This article of the Civil Code can be applied to labour relations, so the possibility of joint liability is present in the national law.

The option in Article 3.2 of the Directive is not taken advantage of.

Article 63 para 3 provides for the transfer of the terms of the collective agreement. Article 53 para 3 provides that where several collective agreements apply to an enterprise, the provisions of the most favourable will apply.

There are no provisions with respect to Directive Articles 3.4(a) or 3.4(b).

Luxembourg

Article 3.1 of the Law of 2003 transposes Article 3.1 para of the Directive.

Article 3(1) para 3 of the Law of 2003 provides for joint liability. The transferor must reimburse the transferee for any amounts paid to the employees to ensure that 'the joint and several liability may not be an obstacle to a transfer of an undertaking'.

There is an obligation upon the transferor to notify the transferee of all rights and obligations to be transferred. A copy of this is sent to the Labour and Mines Inspectorate. If an employee objects to the transfer, then he or she will be considered as having resigned.

The transferee must observe the terms and conditions of a transferred collective agreement until the date of termination of that agreement or entry into force or application of another agreement. There is no provision for a time limit for observing the agreement.

The law provides for the transfer of supplementary pension schemes. According to Article 14 if, in the event of a transfer, part of the undertaking or business ceases to exist, then the acquired rights or rights being acquired of affiliated employees under a supplementary

pension scheme or the acquired rights of former affiliated employees are transferred to the transferee. If the undertaking, business or part of the undertaking or business continues to exist, the acquired rights or rights being acquired under a supplementary pension scheme of affiliated employees working for the transferee are transferred to the latter. Acquired rights of former affiliated employees remain with the transferor, except if the transferor and the transferee provide for otherwise. However, the transfer of acquired rights of former affiliated employees to an internal supplementary pension scheme is not allowed.

Hungary

Section 85/A para 2 provides for the transfer of rights and obligations.

There is an exception for public service workers and civil servants if the transferor is under the scope of the labour Code and the transferee is under the scope of the Ktv or the Kjt. In such a case the employees will have their contracts terminated at the time of the transfer and the transferor and the transferee will notify the employee no later than 30 days prior to the transfer as a public employee (Kjt) or a civil servant (Kyt). The employee then has 15 days to respond. Failure to do so will be deemed rejection.

If the employee is under the scope of Kjt (public employee) and the transferee is under the scope of the Ktv then the public employee status will be terminated (Section 25A subsection 4-6 of the Labour Code).

The transferor and transferee will be jointly and severally liable for obligations prior to the transfer. In addition the transferor may have surety liability for any claims arising from dismissals in connection with the employers' operation or from the ending of a fixed-term contract within one year of the transfer.

Section 85 subsection 3 provides for the information obligations of Directive Article 3.2.

Terms and conditions, except for work schedules, in collective agreements transfer and should be kept for up to one year or until the agreement terminates, or a new agreement is concluded. If the collective agreement of the transferee employer is more beneficial to the employee then that agreement may apply. If the predecessor collective agreement is more beneficial then the transferee will need to accept the more favourable collective agreement.

It is possible, however, for the transferor to end the collective agreement prior to the transfer.

There are no provisions concerning Directive Article 3.4(a), since these rights transfer as any other right. Protection in accordance with Directive Article 3.4(b) is provided in Article 165/A of the Labour Code and in Act 96 on Voluntary Mutual Insurance Funds. Employer's contribution may be granted to employees who are members of a voluntary pension fund, voluntary health fund, or voluntary mutual aid fund. The detailed regulations on the payment of employer's contributions (Act 96 of 1993 on Voluntary Mutual Insurance Funds) fully comply with the Directive.

Malta

Transfer of all rights and obligations are contained in Article 38(1) EIRA.

There are no provisions for joint liability.

The option in Article 3.2 of the Directive is not taken advantage of.

Directive Article 3.3 para 1 has been repeated verbatim in Article 38(3) EIRA. In the event of a transfer of part of an undertaking, the existing agreement will also transfer and remain until it expires or is terminated.

Regulation 5(1) of Legal Notice 433/02 provides for the inclusion of rights to old age, survivors and disability benefits under supplementary schemes outside the scope of the Social Security Act.

There are no provisions with respect to Article 3.4(b), as such schemes have very limited application.

Netherlands

Article 7:663 BW provides for the transfer of rights and obligations. This has been interpreted broadly by the courts. Employees have the right not to transfer but the result is the termination of their contract of employment at the time of the transfer.

Article 7:633 BW introduces joint liability, but limits this liability to one year after the transfer, under the condition that the obligations in the employment contract exist before the moment of the transfer.

The option in Article 3.2 of the Directive is not taken advantage of.

Article 3.3 of the Directive has been implemented by Article 14a of the Law on the Collective Labour Agreement (*Wet op de Collectieve Arbeidsovereenkomst* - CAO*)* and Article 2a of the Law on the Statement of the Obligatory and Non-Obligatory Nature of Provisions of Collective Labour Agreements (*Wet op het Algemeen Verbindend en Onverbindend Verklaren van Collectieve Arbeidsovereenkomsten* – AVV). These provide for the transfer of the rights and obligations related to collective agreements. Any deviation by the transferee will be void. The obligation ends when the agreement runs out or when it is replaced by another collective agreement. This may have complications for the employer, however, as the terms in the collective agreement will have become incorporated into the individual contracts of employment.

There are no time limitations as in Directive Article 3.3.

The Dutch legislator has made use of the option offered by Article 3(4)a of the Directive to extend the automatic transfer of rights and obligations arising from an employment contract or collective agreement to pension rights. The Law ToU 2002 has amended Article 7:664 BW, which initially wholly excluded pension rights from the transfer of rights and obligations as guaranteed by Article 7:663 BW. From the current Article 7:664 it follows that pension rights are among the rights that are transferred, unless: (a) the transferee decides to include transferred employees in the pension scheme that was already applicable to him and his

employees prior to the transfer; (b) the transferee is bound by law to participate in a company pension fund to which also the employees participate and (c) a collective labour agreement provides otherwise. Article 7:663 also applies to pension rights arising from collective employment agreements.

There are no measures reported concerning the implementation of Directive Article 3.4(b).

Austria

Section 3 para 1 of the AVRAG transposes Article 3.1 para 1 of the Directive.

Section 6 AVRAG provides for joint and several liability. Section 6 para 1, however, does limit the transferee's liability to an amount equivalent to the value of the assets transferred. The OGH has clarified the position on this and stated that the transferee, according to section 3 para 1, was fully liable for liabilities arising from the transferred employment relationships, whilst, according to section 6 para 1, the transferee had limited liability for debts which had not transferred. These concerned claims arising from already terminated relationships and company pensions.

The transferor is also liable for new debts relating to severance claims and pension benefits of transferred employees for a period of up to five years from the date of the transfer. There are limitations to this but the existence of a liability by both parties may have the effect of excluding claims to the insolvency fund.

The option in Article 3.2 of the Directive is not taken advantage of.

Section 4 AVRAG and section 8 ArbVG provide that the terms and conditions of a collective agreement will continue to be observed after the transfer until its expiration or the entry into force or application of another collective agreement. There is a limit of one year during which the terms and conditions must not be terminated nor limited to the detriment of employees. If the transferee does not have a collective agreement, the requirement to continue to observe the agreement for a period of one year or until a new agreement is reached. If both the transferor and the transferee have collective agreements, then this will lead to changes with some guarantees.

Work agreements remain valid when outsourced businesses and/or parts of a business are consolidated to form a new business. The businesses or parts of businesses involved cease to exist in their original form. If outsourced businesses or parts of businesses are absorbed by another (controlling) business, the works agreements of the absorbed business (which has ceased to exist) will only remain valid to the extent that they refer to matters not governed by the works agreements of the absorbing business.

Section 5 AVRAG, in implementing Directive Article 3.4(b), provides that a company pension commitment based on an individual agreement becomes part of the contract of employment entered into with the transferee, provided that the transferee is the universal successor. Part 5 AVRAG applies this to existing employees, whilst former employees are protected by Secton 6 AVRAG. If there is no universal succession then the transferee may be entitled to refuse to take over the company pension commitments. In such a case the employee may object to being transferred. There are separate rules concerning works agreements and collective agreements.

Poland

The transfer of transferor's rights and obligations to the transferee is provided in Article 23[1] paragraphs 1 and 2 of the Polish Labour Code. Paragraph 1 states that in the case of a transfer of an undertaking or its part to a transferee, the transferee becomes *ex lege* a party to the previous employment relationship.

Paragraph 2 provides the possibility of joint liability in cases of a transfer of any part of an undertaking. The transferor and the transferee may be liable jointly and severally where the transferee takes over a part of an entity. In the case of taking over the whole entity, as per Article 23[1](2) of the Polish Labour Code, a transferee is liable for obligations arising before the date of the transfer. The transferee has a right to examine the condition of an undertaking, its internal regulations that may prove any condition of an undertaking.

The option in Article 3.2 of the Directive is not taken advantage of.

According to Article 241 the transferee is obliged to observe the provisions set out in the collective agreements which were in force prior to the transfer, for up to one year. When the agreement terminates the terms and conditions become part of the contract of employment.

In Polish Law, supplementary company or inter-company pension schemes are regulated by the Act of 20 April 2004 on Workers' Pension Schemes. The basis for the functioning of the workers' pension scheme is a company's insurance agreement. Consequently, the employer establishes the worker's pension institution or decides on contributions to the outside investment fund or other forms. Workers' pension schemes cover those risks analogical to those determined in the Directive. This means that the transferee may accept the scheme, however it is not obligatory. This provision is related to provisions on measures adopted to protect the interests of employees and of persons no longer employed in the transferor's business at the time of transfer, covering transfer payments and payments from the scheme. Persons who are no longer employees of the employer maintaining the employees' pension scheme and who do not consent to a transfer to another person pension plan or individual pension account, will be paid their accumulated funds after reaching the age provided by the regulations.

Portugal

Article 318(1) provides for the transfer of rights and obligations as in Directive Article 3.1 para 1. This has been given a broad interpretation by the courts. An employee may refuse to transfer if it affects him or her seriously.

Article 318(2) provides for joint and several liability for up to one year from the date of transfer. However, it is possible for the transferor to put up a notice in the workplace informing them that they must claim the amounts due to them by the transferor within three months, failing which the liability for them will not be transferred to the transferee (Articles 319(3) and (4)). This appears to be in contrast to the requirements of the Directive.

The option in Article 3.2 of the Directive is not taken advantage of.

The transferee will continue to observe the terms and conditions of a transferred collective agreement until its expiry or the entry into force or the application of another agreement. This is so even if the transferee has another agreement in force. The time limit is not less than one year.

There are no statutory provisions with regard to Directive Article 3.4(a) but judicial interpretation suggests that such obligations are not transferred, although any terms that are part of the contract of employment, including pension credits, may be considered to transfer..

There are no measures with respect to Article 3.4(b).

Slovenia

Article 73 para 1 provides for the transfer of rights and obligations arising from the employment contract on the day of the transfer are transferred.

Para 4 provides for joint liability. This includes claims which occurred before the date of the transfer.

The option in Article 3.2 of the Directive is not taken advantage of.

Para 2 provides for the implementation of Directive Article 3.3 and that collective agreements transfer and are binding for a period of up to one year unless the agreement terminates or a new one is concluded within that time.

There are no provisions implementing Article 3.4 of the Directive, although the provisions of the Pension and Invalidity Insurance Act provide some protection of supplementary pension and invalidity rights through a defined contribution system

Slovakia

Article 28 sec 1 of the Labour Code provides for the transfer of rights and obligations in accord with Article 3.1 para 1 of the Directive.

There are no provisions for joint liability. The transferor is liable for claims for those who are not transferred.

The option in Article 3.2 of the Directive is not taken advantage of.

Article 31 sec 7 of the Code provides an obligation for the transferee to observe a collective agreement agreed by the transferor until the expiry date of the agreement. There is no time limit adopted.

There is a problem with agreements reached by employers and works councils or works trustees, as there appears no obligation to transfer these, in contrast to collective agreements reached with trade unions, as it is only competent trade unions that have the right to collective bargaining leading to collective agreements.

There are no provisions concerning Directive Articles 3.4(a) or 3.4(b).

Finland

Section 10.2 Chapter of the ECA provides for the transfer of rights and obligations.

If the employer needs to recruit new employees within nine months of any employees being terminated for the same or similar work, the employer must offer this work to the former employee. This is if the reasons for termination are connected with finance, production or re-organisation, have a right to be offered a position

There is joint liability for claims that have fallen due before the transfer, although the transferor is required to pay the transferee for any such claims.

The option in Article 3.2 of the Directive is not taken advantage of.

Following a transfer, the transferee must continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement (Section 5 of the Collective Agreements Act, *Työehtosopimuslaki 436/1946*). This is the case until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement. Thus, the transferee is bound to the collective agreement in a same manner as the transferor was bound.

The Act was amended in 2002 to ensure that supplementary pension schemes and pension obligations will be part of the transfer. A further Government Bill amending the Act on Pension Foundations (*Eläkesäätiölaki, 1774/1995*) was submitted to Parliament in 2005 to further clarify the position. This came into force in June 2006

Sweden

Section 6b of the Employment Protection Act provides for the transfer of rights and obligations. Subsection 4 allows the employee to refuse to transfer. In such a case he or she will continue to be employed by the transferor.

Section 6b also provides for joint liability for economic liabilities that arise before the date of transfer.

The option in Article 3.2 of the Directive is not taken advantage of.

Collective agreements constitute an important source of an employee's terms and conditions of employment. The agreement is legally binding for the contracting parties and the members and it is incorporated into the contract of employment. Section 28 of the Co-determination Act provides that when the transferor is bound by a collective agreement, then the transferee becomes legally bound by it, unless he or she is already bound by another collective agreement which can be applied to the transferred employees. If the original agreement remains in force, then it must be applied for at least one year after the date of transfer. This obligation expires when the original agreement is no longer in force or when a new agreement is applied.

Section 6b does not apply to the transfer of old age, invalidity or survivors' benefits.

The Act Safeguarding Old-Age Benefits was held by the Government to fulfil the obligations under Directive Article 3.4(b). The Act states that pension commitments to employees and survivors can be safeguarded by the employer by special accounting for pension liabilities or by the allocation of funds to a pension foundation. In addition, old-age, invalidity and survivor's benefits regulated by collective agreements are protected by section 28 of the (1976:580) Co-determination Act and rules on the safeguarding of the collective agreement in case of a transfer of an undertaking.

United Kingdom

Regulation 4(2) of the 2006 Regulations provides for the transfer of the transferor's rights, powers duties and liabilities in connection with the contract of employment, to the transferee.

There is no joint liability between transferor and transferee in respect of obligations and duties except for a failure of the transferor to carry out their obligations to inform and consult (Regulation 15(9) – see below under Article 7) and in respect of employers' liability insurance in relation to any claims arising from the employee's employment with the transferor in certain circumstances (Regulation 19).

Regulation 11 is concerned with the provision of 'employee liability information' and Regulation 12 deal with the penalties for failure to supply that information.

The obligation in Regulation 11(6) is upon the transferor to notify the transferee fourteen days before the relevant transfer or a soon as reasonably practicable thereafter.

Collective agreements are transferred by Regulation 5 and trade union recognition is transferred (Regulation 6) when the organised grouping of resources or employees maintains a distinct identity from the remainder of the transferee's undertaking.

Collective agreements do not normally have legal effect in the United Kingdom (Section 179 Trade Union and Labour Relations (Consolidation) Act 1992), unless they have become incorporated into the contract of employment. In this case they are likely to transfer with the contract.

Regulation 10 excludes occupational pension schemes from the scope of the Regulations. It further provides that this only includes benefits relating to old age, invalidity or survivors.

The *Transfer of Employment (Pensions Protection) Regulations* 2005 are concerned with applying Sections 257 and 258 of the *Pensions Act 2004*. These ensure that persons who had actual or contingent rights to pension scheme membership prior to the transfer have some rights to occupational pension scheme membership after the transfer or that the employer must make relevant matching contributions to a scheme for the transferred employee, of at least 6% of pensionable pay.

There are a number of measures affecting Article 3.4(b) which are also intended to implement Article 8 of Directive 80/987/EEC as amended. There is now an issue of whether the protection has been historically sufficient and a decision on this is waited from the Allied Wire and Steel case at the Court of Justice.

Article 4

1. The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.
   Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal.
2. If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.

In all Member States the principle contained in Article 4.1, that a transfer of an undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal, has been adopted. In most member States this is done by a positive statement to this effect. In some, such as the Czech Republic, Portugal, Slovenia and Slovakia, it is achieved by not making it a reason to justify a dismissal.

Regulation 4.2 has been incorporated into the law of many Member States, but there are a number of exceptions.

Belgium

Article 9 of CBA 32bis provides that a change of employer is not grounds for dismissal. Such employees may, however, be dismissed for serious cause or for an economic, technical or organisational reason resulting in changes in the area of employment. Article 35 of the Statute of July 3 1978 defines serious cause as a serious fault that destroys all trust in the employee and as a consequence makes the further execution of the employment contract immediately and definitely impossible.

The normal rules for sanctions on dismissals apply in the case of transfers.

No specific groups of employees covered by CBA 32bis are excluded.

Article 10 uses the same wording as the French and Dutch versions of Article 4.2 of the Directive. A unilateral change of an important condition of the employment contract might amount to termination of the contract.

Czech Republic

Section 46 of the Labour Code provides a list of specific reasons for termination of the employment contract by the employer. Transfers of undertakings are not included in this list. Sections 46(1)(a)-(c) refer to organisational reasons for dismissal.

The Labour Code des not regulate working conditions in transfer situations. These may be changed by the new employer subject to the rules on information and consultation.

All employees are protected from illegal dismissal and there are no special rules associated with Article 4.2 of the Directive.

Denmark

Section 3 of the Consolidated Act transposes Article 4 of the Directive.

There are no special sanctions applied except for the application of other laws on unfair dismissal. Unfair dismissal is generally defined as dismissal that cannot be justified on objective grounds.

Economic, technical or organisational reasons are usually invoked during workforce reductions or changes in needs for different employees.

There are no specific groups of employees excluded.

Section 3(2) of the Consolidated Act provides that an employee's ending of the contract of employment because of a substantial change in working conditions will amount to a dismissal.

Germany

The prohibition of dismissals on the grounds of a transfer has been implemented in § 613a Para. 4 BGB. Any termination of the employment relationship of an employee on the grounds of the transfer of an establishment or parts of an establishment is null and void, notwithstanding the employer's right to dismiss the employee due to other reasons. Dismissals due to economic, technical or organisational reasons entailing changes in the workforce are not prohibited.

According to the established case law of the BAG it all depends, whether or not there is, apart from the transfer, an objective reason justifying the dismissal; i. e. whether or not the transfer is only the occasion but not the reason for the dismissal. Hence, a dismissal is only regarded as contravening § 613a Para. 4 BGB, if the motive of the dismissal is conditional upon the transfer. If the transferee decides that he wants to continue with a new organisational concept and hence dismisses those who do not fit into this concept (*Kündigung nach Erwerberkonzept*), § 613a Para. 4 BGB does not apply.

The Act on Dismissal Protection (*Kündigungsschutzgesetz – KSchG*) is applicable only after 6 months of continuous employment in an establishment with more than 5 employees (if the employment relationship has been established before 31 December 2003) or in an establishment with more than 10 employees respectively (if the employment relationship has been established after 31 December 2003). Nevertheless § 613a Para. 4 BGB applies to every employment relationship in establishments of any size from the very first day.

There is no provision explicitly transposing Directive Article 4 Para. 2 into national law, partly because of the employee's right to object to the transfer. Nevertheless this reflects an inadequate implementation of this part of the Directive.

Estonia

Article 6 of the ECA provides that an employer may not dismiss an employee because of a transfer, but that this does preclude dismissal on some other ground allowed for by national law.

The dismissal reasons that are permitted are contained in Article 86 of the ECA. And Article 90 contains the requirement of compensation for employees with unlimited contracts for dismissals.

There are no specific groups of employees excluded.

Article 82(1) provides an employee with the right to terminate the contract for reasons which include 'material deterioration of the working conditions due to the change of employer'. In such cases compensation is payable in accordance with Article 82(2).

Greece

Article 5.1 of Presidential Decree 178/2002 repeats verbatim the provisions of Directive Article 4.1.

Generally, however, the employer does not need to specify a reason for dismissal. A dismissal is deemed to be valid and the onus is upon the employee to show that it is an abuse of rights under Article 281 of the Civil Code. Article 5.1 of the Presidential Decree gives employees grounds for showing this in transfer situations.

There is also freedom for employers to dismiss employees for economic, technical or organisational reasons.

There are no specific groups of employees excluded.

Article 7 of Law 2112/1920 provides that a substantial change in working conditions to the employee's detriment will be deemed to be a termination of the contract of employment and the employee will be entitled to compensation.

Spain

As a result of judicial interpretation Article 44.1 ET provides that a transfer does not constitute grounds for dismissal. There appears to be an exception for senior management and household employees to this rule, as they are a special case generally.

Individual or collective dismissal can be justified when an employer can show economic, technical or organisational reasons.

Directive Article 4.2 appears to pose some difficulties. The opportunity for employees to terminate the contract of employment because of a substantial change in conditions are limited. Any modification is considered to be a decision of the employer justified by economic, technical or organisational reasons. There is only a limited opportunity for the employer's actions to be challenged in the Social Court and compensation gained if successful.

France

There are no specific regulations corresponding to Article 4 of the Directive. The general rules on dismissal apply to situations concerned with transfers. Article L.122-12 of the Labour Code, interpreted by courts strongly influenced by the Court of Justice mean that a transfer cannot be grounds for a dismissal.

Dismissals for economic, technical or organisational reasons are possible. The Court of Cassation has held that an unfairly dismissed employee before the transfer has the choice of asking for re-employment by the transferee or bring an action against the transferee and ask for compensation.

Employees are automatically transferred, but can refuse to work for the transferee in line with *Katsikas*. The only way to express such a refusal is to resign employment.

All employees employed at the time of the transfer are covered and there are no specific exceptions.

There are no legal provisions corresponding to Directive Article 4.2. The employer is regarded as responsible for the dismissal if the cause of the termination is a substantial change in the working conditions.

Ireland

Regulation 5(1) of the 2003 Regulations implements Directive Article 4.1. Employees with a dismissal claim may bring proceedings either under the Transfer Regulations 2003 or under the Unfair Dismissals Acts 1977-2001.

Regulation 5(2) provides that dismissals can be made for economic, technical or organisational reasons. The precise meaning of these terms are not clear in Irish law. According to the national author the advice to transferor employers is not to rely on these grounds to avoid the danger of the dismissals being held to be on the grounds of the transfer. Rather the employees should be transferred and the transferee can then make decisions on redundancies.

There are no specific categories of employees excluded.

Directive Article 4.2 is repeated in the 2003 Regulations. Dismissals legislation already included termination by an employee of a contract of employment in circumstances in which, because of the conduct of the employer, the employee would have been entitled, or it would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of termination.

Italy

Article 2112 para 4 of the Civil Code provides that a transfer of an undertaking in itself does not constitute grounds for dismissal. Such a dismissal would be null and void with a greater sanction than for other unjustified dismissals.

Dismissals as a result of re-structuring are possible, subject to the normal limitations on the ability to dismiss.

There are no specific categories of employees excluded.

Employees whose working conditions suffer a substantial change in the three months following the transfer may hand in their notice under the provisions of Article 2119 of the Civil Code. This enables them to receive compensation. The term 'substantial change in working conditions' is given a broad interpretation and includes all substantial changes that are not acceptable to the employee.

Cyprus

Directive Article 4.1 para 1 is repeated verbatim in Article 5(1) of the Cypriot Law. Article 18(c) of the Termination of Employment Laws of 1967-2001 defines 'economic, technical or organisational reasons in specific terms as modernisation, mechanisation or any other change in the methods of production or organization which reduces the number of necessary employees; change in the products or in the methods of production or in the necessary specialisations of the employees; abolition of departments; difficulties in the placement of products in the market or credit difficulties; shortage of orders or of raw materials; rarity of means of production; reduction in the volume of the work or of the undertaking.

There are no specific categories of employees excluded.

Article 5(2) provides that if the transfer results in substantial changes in the terms of employment to the detriment of the employee, then the employer is deemed to be responsible for terminating the contract of employment. Article 3(1) of the Termination of Employment Act, however, states that employees must have 26 weeks continuous employment before being able to claim compensation for unfair dismissal.

Latvia

Article 118(5) of the Labour Law provides that a transfer of an undertaking of itself may not form the basis for a termination of the employment contract, although it does not expressly state that this prohibition applies to both the transferor and the transferee.

There is an exception in Article 118(5) for termination based upon the performance of economic, organisational, technological or similar measures in the undertaking. There is no definition given of this term.

There appears to be no provisions implementing Article 4.2 of the Directive.

There are no specific categories of employees excluded.

Lithuania

Article 138 of the Labour Code states that re-organisations, including transfers, are not a legitimate reason for dismissal. Judicial interpretation has held that this does not apply in liquidation proceedings.

It is possible to dismiss employees for economic, technological or organisational reasons. There are no specific definitions of these words, although judicial interpretation has suggested that technological change might result in modernization and the need for different skills and organisational change might require fewer employees. Such changes might provide a legitimate reason for dismissing employees.

There are no specific categories of employees excluded.

Luxembourg

The Law of 2003 provides that a transfer of an undertaking, business or part of an undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee.

There is no reference to economic, technical or organisational reasons being an exception to this, judicial decisions have made it clear that both the transferor and the transferee are entitled to terminate employment contracts on the basis of organisational measures. The grounds must refer to an economic context entailing the necessity of a reorganisation. A termination resulting from a reorganisation directly linked to the transfer may, however, be considered as abusive.

If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for the termination of the contract of employment or employment relationship.

There are no specific categories of employees excluded.

Hungary

Section 89.4 of the Labour Code provides that labour law succession shall not be grounds for ordinary termination of indefinite employment contracts. Section 89 specifies the reasons why an indefinite contract might be terminated. There are no specific references to economic, technical or organisational reasons. Transfers are not a legal ground for extraordinary dismissals either.
Ordinary dismissal is not possible in the case of fixed-term contracts. The employer may terminate a fixed-term employment relationship at any time at free will. Thus the fixed-term employees are not covered by the rules on ordinary dismissals.

Civil servants and public employees have their contracts terminated (see above).

Fundamental working conditions are basic wage, job profile and the place of employment and are part of the contract of employment. These can only be changed by mutual consent. Other working conditions are not protected by the Labour Code. There is the possibility for the employee to terminate the contract of employment by extraordinary dismissal if the employer has substantially changed working conditions. This approach, however, relies upon showing that the employer wilfully, or by gross negligence, committed a grave violation of any substantive obligations arising from the employment relationship or otherwise engaged in conduct rendering further existence of the employment relationship impossible. As a result of this, Article 4.2 is not fully implemented. The concept of constructive dismissal is entirely missing from Hungarian law.

Malta

Regulation 5(2) of L/N 433/02 provides the implementation of Directive Article 4.1.

There is no definition of the term economic, technical or organisational; nor is there any judicial interpretation.

No categories of employees in the private sector are excluded.

Regulation 5(3) fully implements Article 4.2 of the Directive.

Netherlands

Article 7:670(8) BW states that an employer may not terminate an employee because of a transfer.

Dismissal requires either the local court to dissolve a contract or the Centrum voor Werk en Inkomen to authorise the dismissal. Neither will happen if the transfer of an undertaking is the reason for the dismissal.

There are no specific provisions concerning economic, technical or organisational reasons. This is considered unnecessary in the light of the need for authorisation from the court or the Centre. There is difficulty, however, in distinguishing transfer based dismissals from ETO ones.

There are no specific categories of employees excluded.

Article 7.665 BW provides for the implementation of Directive Article 4.2. The law refers to working 'circumstances' rather than conditions and may be seen to have a wider scope than the Directive. It applies, however, only to dismissals authorised by the local court and not to those authorised by the Centre for Work and Income. This may be an issue as it will mean that some circumstances are not covered by the implementing measure.

Austria

Article 4.1 has not been transposed into Austrian law. The Courts have been influenced by decisions of the European Court of Justice, and proceed on the basis that termination for reasons connected with the transfer are prohibited.

Termination for economic, technical or organisational reasons are valid, but the onus is on the employer to show that the termination has not been just for a transfer reason.

It is possible for there to be a termination by mutual consent and subsequent re-employment by the transferee. This can only occur if the results, overall, are more favourable to the employee.

There are no specific categories of employees excluded.

Section 3 paras 5 and 6 of the AVRAG transpose Directive Article 4.2. The employee is entitled, within one month to terminate the employment relationship if the collective agreement or the works agreement to be applied after the transfer of the business involves a substantial deterioration of the working conditions.

Poland

The provisions contained in Article 23[1](1, 2) of the Polish Labour Code do not apply to any person who was dismissed or resigned before the transfer, unless the dismissal is related to the transfer. This provision also does not apply to employees employed in the part of the undertaking, which was not transferred.

Economic, technical or organisational reasons may be a reason for dismissal. A transferee may adjust the number of employees to suit their own needs through dismissal. If the transferee employs at least 20 employees, s/he will be obliged to pay severance, as mentioned in Article 8 of the Act of 13 March 2003 on the Specific Terms and Conditions for Terminating Employment Relationships with Employees for Reasons not Related to the Employees.

Article 23[1](6) of the Polish Labour Code provides that any transfer of undertaking may not be a legal ground for dismissal. It is interpreted that where a worker is dismissed before the transfer the dismissal must be treated as though it occurred during the transfer. In this case the person benefits from the protection of Article 23[1]. The Supreme Court in its judgment of 6 May 2003 decided that the practices of employers that modify the automatic guarantees of a worker's employment contract such as forcing the transferred workers to sign employment contracts for a trial period are unlawful. This means that the implicit obligatory nature of legal norms arising from Article 23[1] of the Polish Labour Code eliminates any form of modification of the norms of employment relationships, unless the explicit consent of both parties of the employment relationship have been given, thus upholding the protection standards of Article 23[1].

Portugal

The grounds for dismissal are comprehensively listed in the Labour Code. This list does not include transfers.

Economic, technical or organisational reasons entailing changes in the workforce are provided for by Articles 397 (despedimento colectivo – redundancy dismissal) and 402 (extinção de um posto de trabalho - extinction of a work post) of the Labour Code. Article 397(2) of the Labour Code, concerning redundancy dismissals, provides the following justifications: market reasons, structural reasons and technological reasons. Article 402 provides that the termination of an individual labour post is considered to be a justifiable dismissal when it is provoked by economic, market, structural or technological reasons.

All employees are protected from dismissal for reasons related to transfers.

Article 441(3)(b) of the Labour Code provides that an employee may justifiably end the contract when substantial and long-lasting changes in work conditions take place.

Slovenia

Article 88 of the Employment Relationships Act defines the reasons for an ordinary termination of employment. Although there is no definition of what constitutes economic, technical or organisational reasons entailing changes in the workforce, para 1 states that the reasons for an ordinary termination of the employment contract is also the cessation of the needs to carry out certain work due to economic, organisational, technological, structural or similar reasons on the employer's side (the business reasons).

There are no specific categories of employees excluded.

Article 73 provides that if the rights under the employment contract deteriorate for objective reasons and the worker therefore terminates the employment contract, the worker shall have the same rights as if the employment contract was terminated by the employer for business reasons. The meaning of deterioration due to objective reasons is, according to the national author, unclear and there has been little judicial consideration of it. In cases, when the worker refuses the transfer, because the working conditions with the employer have seriously deteriorated only termination on business reasons would appropriately apply (if these reasons exist with the transferor).

There are no specific categories of employees excluded.

If the worker refuses the transfer and the actual carrying out of work with the transferee, the transferor may extraordinarily terminate his employment contract.

Slovakia

The Labour Code specifies the reasons why a dismissal may take place and transfers is not one of the specified reasons.

Organisational changes by the employer are treated as a legal reason for dismissal. This is the case only 'if an employee becomes redundant by virtue of the employer or competent body issuing a written resolution on change in duties, technical equipment, reduction in the number of employees with the aim of increasing work efficiency, or on other organisational changes' (Article 63 Sec. 1 b) of the Labour Code).

Article 4.2 has not been implemented.

Finland

Section 5.1, Chapter 7 of the ECA provides that a transfer does not in itself constitute grounds for dismissal. This does not stop the employer terminating contracts of employment if the work to be offered has diminished substantially and permanently. If the work has diminished temporarily the employment contract may not be terminated.

Employees who do not wish to work for the transferee may terminate their employment contracts to end on the date of transfer under Section 5.2, Chapter 7 of the ECA.

There are no specific categories of employees excluded.

Section 6, Chapter 7 provides that the employer is deemed to be responsible for the termination of an employment relationship resulting from a substantial change in the employee's working terms to the detriment of the employee.

Sweden

Section 7 subsection 3 of the Employment Protection Act prohibits dismissals related to a transfer of an undertaking.

An employer may dismiss for economic, technical or organisational reasons. In practice this means that they may dismiss for redundancy, which has a wide meaning. A transferor may dismiss for this reason before a transfer is decided upon, but may not, in principle, do so afterwards. The transferor may not dismiss on behalf of the transferee. A transferee may dismiss after the transfer in accord with the normal rules of labour law.

There are no specific categories of employees excluded, apart from some groups who are generally excluded from the Act and its protection. These are employees in a high management position, the employer's family members, employees working in the employer's household and employees who are employed for work with special employment protection or in sheltered employment, (section 1 subsection 2 of the (1982:80) Employment Protection Act).

There has not been any specific implementation of Article 4.2. Existing case law principles include 'provoked dismissal', when the employer will be held responsible for the termination of the contract when his or her behaviour provokes the employee to resign, including when the employer has made significant changes to the employee's work duties.

United Kingdom

Regulation 4(1) of the 2006 Regulations ensures that, unless an objection is made, a relevant transfer shall not operate so as to terminate the contract of employment.

Regulation 7 provides that a person dismissed as a result of the transfer or for a reason connected with it will be automatically treated as unfairly dismissed in accordance with Part X of the Employment Rights Act 1996, unless the sole or principal reason is an economic, technical or organisational reason.

Exceptions to the application of Part X are employees with less than one year's continuous service and employees over normal or state retirement age of 65 years (this latter exception will change when the age aspects of Directive 2000/78/EC are implemented in the United Kingdom in October 2006).

When the employee informs the transferor or the transferee that he or she objects to being employed by the transferee, the objection serves to terminate the contract of employment with the transferor, but there is no issue as to dismissal (Regulation 4(7)).

If a transfer would involve a substantial change in working conditions to 'the material detriment of the employee', the employee may treat the contract as being terminated and shall be treated as if they were dismissed by the employer (Regulation 4(9)).

Generally Regulation 4(11) makes explicit the possibility of constructive dismissal resulting from the application of the Regulations.

Article 5

1. Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practioner authorised by a competent public authority).
2. Where Articles 3 and 4 apply to a transfer during insolvency proceedings which have been opened in relation to a transferor (whether or not those proceedings have been instituted with a view to the liquidation of the assets of the transferor) and provided that such proceedings are under the supervision of a competent public authority (which may be an insolvency practioner 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(7), and, or alternatively, that,
    b. (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.

3. A Member State may apply paragraph 20(b) to any transfers where the transferor is in a situation of serious economic crisis, as defined by national law, provided that the situation is declared by a competent public authority and open to judicial supervision, on condition that such provisions already existed in national law on 17 July 1998.
   The Commission shall present a report on the effects of this provision before 17 July 2003 and shall submit any appropriate proposals to the Council.
4. Member States shall take appropriate measures with a view to preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights provided for in this Directive.

Most Member States have special rules dealing with situations where the potential transferor is bankrupt. This usually involves exempting the transferee from liability for at least some of the pre-transfer claims of employees.

Member States who take advantage of the option in Directive Article 5.2(b) include Greece, Spain, France, Luxembourg, Portugal and the United Kingdom.

Belgium

Chapter III of CBA 32bis deals with the safeguarding of the rights of employees in the event of the bankruptcy of the employer. A transfer may still take place after the bankruptcy and Chapter III applies to those employed at the time of the bankruptcy or where the assets are transferred within a six month period of the bankruptcy. In such an event the collective agreement transfers unless the employer and the employee representatives agree otherwise. Article 12 provides that a transferee employer can in this situation select the employees which he or she wishes to hire.

A transfer may take place in cases of insolvency proceedings, under the supervision of the Commercial Court. Article 8 provides that debts may not transfer if the payment is guaranteed by the Plant Closing Fund (the ability to do this is to be adopted in 2006). In the event of a guarantee the employer and the employee representatives may amend employment conditions with a view to safeguarding employment and the continuity of the undertaking or part thereof.

When there is no such guarantee the normal rules in transfers of undertakings apply.

With respect to Directive Article 5.4 Chapter III of CBA 32bis deals with the safeguarding of the rights of employees in case of Bankruptcy. Article 11 determines that Chapter III will be applicable to all workers who were either employed at the moment in time on which the transferor was declared bankrupt or who were one month prior to such declaration dismissed and are as a consequence entitled to a termination indemnity and who did not receive payment. Article 14 provides that the employees that fall under the scope of Chapter III will retain their seniority or length of service acquired with the transferor for the purpose of the calculation of the notice period or the indemnity in lieu of notice. This length of service is to be increased with the time between the termination of the contract with the transfer or and the hiring by the transferee.

Czech Republic

In cases of judicial liquidation the liquidator may choose whether to sell the whole undertaking or business or just part of it. In such a situation the normal rules for transfers apply, with the exception that there is no transfer of claims for the pre liquidation period, including wages and salaries. The employees become claimants in the liquidation proceedings, albeit with super priority. There is no provision equivalent to Directive Article 5.2(a).

The other type of insolvency solving is a reorganisation (in Czech "vyrovnání"). Reorganisation means that the debtor's obligations are only reduced under the supervision of creditors, so, therefore, no transfer arises. In practice, reorganisation is rarely utilised.

There are no provisions for agreements to be reached between judicial liquidators and employee representatives.

There are measures in place to prevent the misuse of insolvency proceedings. For example, Sec. 5 of the Act No. 328/1991 Coll. stipulates an obligatory deposit must be made for the cost of bankruptcy proceedings of up to 50,000 crowns. If the costs exceed the obligatory deposit, the court is allowed to ask for another obligatory deposit of up to 50,000 crowns. The court may establish a preliminary judicial liquidator to inquire whether there is a bankruptcy or not. Fraudulent proposals for the commencement of insolvency proceedings have established a base for redress in damages of the alleged debtor.

In practice, it is possible to liquidate a company with debts and re-start under a new name.

Denmark

Section 1(3) of the Consolidated Act applies the normal rules for the protection of employees in transfer situations to a bankruptcy's sale of an undertaking or part of an undertaking.

If agreements regarding the transfer have been reached before the bankruptcy decree is issued, and the operation is continued during the bankruptcy, then the employees' claims for the period before the date of the decree transfer. If there is an agreement after the issue of the decree, then the transferee will only be liable for post decree claims. Thus debts payable before a transfer which occur after the bankruptcy decree are not transferred and the employees concerned are the subject matter of Danish legislation implementing Directive 80/987/EEC.

There are no provisions for the transferor or transferee employer to agree changes in pay or work conditions.

Germany

Section 613a BGB applies to insolvent enterprises in respect of the transfer of employment relationships and works councils, with the exception of claims arising from before the transfer.

If re-organisation is to take place requiring fewer employees, then dismissals for urgent operational reasons are permitted.

Sections 126 and 128 of the Insolvency Act dismissals by an Insolvency Practitioner are likely to be justified for urgent operational reasons, after agreement with the Works Council concerned.

Claims arising before the transfer are protected by sections 183-189 of the Social Security Code III which implements Directive 80/987/EEC.

There are no further restrictions apart from those built into this process, including any measures under Directive Article 5.4.

Estonia

Article 6^2 (1) of the ECA provides that a former employer is liable for obligations arising from employment contracts which are in force and fall due by the time of change of employer, unless the employer is declared insolvent for the purposes of Article 19 of the Unemployment Insurance Act.

According to Article 181 of the Law of Obligations in bankruptcy proceeding provisions regulating transfers of undertakings do not apply. Article 97(2) provides that the trustee in bankruptcy has the right to terminate contracts of employment. The Unemployment Insurance Fund will provide compensation for employees. There are no special measures with regard to Directive Article 5.4, but it is felt that the laws protecting employees are adequate in such circumstances.

Greece

Presidential Decree 178/2002 excludes from its scope transfers where the transferor is the subject of bankruptcy and insolvency proceedings aimed at the liquidation of the transferor's assets and in accordance with procedures supervised by the competent authority (Article 6.1 PD 178/2002).

The insolvency practitioner may continue the contacts of employment if the operation of the undertaking is continued. In this situation all rights and obligations are transferred. If the practitioner ceases the operation, he or she will terminate the contracts of employment. There is the possibility of an agreement concerning a reduced claim for employees.

Claims arising from after the date of bankruptcy will be given priority over other creditors. Such employees will receive payments from the Guarantee Fund.

The implementing law does not establish any novel mechanism with regard to abuse. It states (Article 6.2) that the exclusion of transfers of undertakings, where the transferor is the subject of insolvency or bankruptcy proceedings, from the ambit of the Directive only takes effect after the competent judicial authority has issued a decision declaring the employer is bankrupt or ascertaining that the employer has stopped payments

Spain

Article 44 ET does not make any exceptions to the safeguarding of employee rights in the event of bankruptcies or any analogous insolvency proceedings, where there is a continuation of the economic entity.

The public authority supervising the insolvency proceedings may decide on a reduction of the debts owed to employees that are to be transferred to the transferee. It can be agreed that the transferee does not pay debts up to the amount guaranteed by the Guarantee Institution implementing Directive 80/987/EEC.

Article 149.2 Law Concursal provides that agreement can be reached between the transferee and the employee representatives to change collective work conditions with the aim of safeguarding the survival of the undertaking.

Article 44 ET does not make any direct reference to Directive Article 5.4, but there have been a number of judicial decisions affecting this, including the retention of joint liability in cases of fraudulent action by Companies.

France

Article 1122-12 of the Labour Code also applies during insolvency proceedings. During the first stage of these proceedings dismissals, under the authorisation of the insolvency judge and consultation with the works council, for economic reasons are possible. They are also possible as part of the recovery plan drawn up by the court. This is so even if there is a subsequent transfer of the entity or part.

There is no joint liability during insolvency proceedings, so the claims of the employees prior to the insolvency are not transferred, except in limited circumstances. The Wage Guarantee Insurance Fund provides compensation in accord with Directive 80/987/EEC.

The Law on Safeguarding Enterprises of 2005 has introduced a new safeguarding procedure, where the guarantee is partially excluded. This is so even though the transferee does not take responsibility for the debts of the transferor. This is a potential loophole in the application of the Directive, but it has not been the subject of judicial debate. If the situation worsens it may lead to the introduction of compulsory administration proceedings when the guarantee will apply.

Article L.122-12 of the Labour code does apply to a transfer of undertaking occurring during insolvency proceedings. Thus such proceedings could not really be used to deprive employees of the rights provided for in the Directive. Economic dismissal could be decided during insolvency proceedings before the transfer, but they need to be authorised by the Court. Thus the Court controls that the dismissals are needed for the safeguard of the undertaking. Here again, the insolvency proceedings could not be used to deprive employees of their rights.

Ireland

The provision of Article 5(1) of the Directive is given effect to by Regulation 6(1) of the 2003 Regulations. No provision has been made in Irish law for the implementation of the optional provisions concerning the non-transfer of debts and/or the possibility of agreement to changing the employees' terms and conditions.

The requirements of Article 5(4) of the Directive is reflected by the provision of Regulation 6(3) of the 2003 Regulations.

Italy

The provision which has taken into consideration Articles 5.1 and 5.3 of the Directive, is Article 47, paragraph 5, of Law n.428 of 29 December 1990, which states that 'whenever the transfer concerns undertakings or productive units of which the CIPI has ascertained a status of company crisis under Article 2, paragraph 5c), of Law n.675, 12 August 1977 or companies which have been declared bankrupt, or there is a court approval of a preventive scheme of bankruptcy arrangement consisting in the sale of goods, or the issue of a compulsory winding up order or an extraordinary administration order, in the event that the continuation of the activity has not been ordered, nor has it been transferred and, in the consultation of the previous paragraphs (see below), an agreement has been reached on maintaining, even on a part-time basis, the employees whose employment relationship will continue with the purchaser, then Article 2112 of the civil code will not apply, unless more favourable conditions arise out of the agreement.

The said agreement may also provide that the transfer does not concern stand-by employees and that these will continue to stay, all or a part of them, in the employment of the vendor'.

The cases of "derogation" determined by this provision concerns an undertaking that has been declared (by a Committee under the Ministry for Employment) in an economic crisis (Law n. 675 of 12 August 1977). The declaration of economic crisis does not presuppose a condition of insolvency and triggers (provided that the undertaking has more than 15 employees in the industrial sector or more than 50 in the commercial one) the "*cassa integrazione guadagni straordinaria*" (a public body responsible for unemployment benefits/company crisis), aimed at making the recovery of the undertaking possible. Therefore, it is possible for the undertakings, with the previous agreement of the trade unions and (if existent) the employees' representatives, to provide that the employees pass over to the employment of the transferee without the seniority that they had acquired with the transferor; provide that the obligations arising from the preceding employment periods are not taken on by the transferee, unless such obligations are entered into the company accounts under the general rules of Article 2560 of the Civil Code; modify the working conditions of the transferred employees to their detriment; provide that all of the employees or some of them should remain under the employment of the transferor and not be transferred.

A further problem is that there is no application of minimum guarantees equal to those provided in Directive 80/987/EEC in Italian law.

There have not been any measures to implement Article 5.4.

Cyprus

The provisions of Directive Article 5.1 are transposed by Article 6 of the Cypriot Law which, apart from the reference to the public authority supervising the liquidation, repeats verbatim the words of the Directive.

Directive Article 5.2 has not been transposed into the Cypriot Law. The Cypriot Law is silent on the issue of transfer of debts and on the possibility of an agreement between employees, transferees and transferors to change the terms of employment.

Article 9(1) of the Cypriot Law provides that any employer who deliberately resorts to insolvency proceedings in order to deprive employees of their rights under the Cypriot Law, is guilty of an offence and liable to a penalty not exceeding CYP1,000 (approximate Euro equivalent: 1,724). The national author is of the view that this is inadequate. The employee will be entitled to compensation under the Termination of Employment Laws.

Latvia

Article 119 of the Labour Law excludes the application of Article 118 paras 1,3 and 4 of the Labour Law to transfers of undertakings that take place in situations of bankruptcy proceedings. There do not appear to be any measures that deal with insolvency proceedings not leading to liquidation.

Abuse of insolvency proceedings of a transferor of an undertaking for the purpose of restricting or depriving the rights of employees provided for by Chapter 28 "Transfer of an Undertaking to Another Person" of the LL is not permitted. For violation of this prohibition there are administrative and penal sanctions.

Lithuania

The transfer of an undertaking shall be suspended if and when bankruptcy proceedings are instituted against the undertaking in a transfer situation. Articles 3 and 4 of the Directive are excluded in such situations. The transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings is permitted only when

i). the transfer is effected as a result of a composition concluded with the creditors;
ii). a bankruptcy case is discontinued,
iii). an undertaking or business or part of an undertaking or business in bankruptcy or bankrupt is sold pursuant to the requirements of the Enterprise and Bankruptcy Law.

There is no difference of treatment between those organisations that are going to be liquidated and those insolvent organisations that may be rescued.

The Law on Restructuring of Enterprises creates the conditions for companies having temporary financial difficulties without interruption of economic or commercial activities to secure and develop their activities, to pay debts, restore solvency and avoid bankruptcy.

Pursuant to Article 3 of the Law on Restructuring Enterprises Restructuring of an enterprise may commence where

1. an enterprise fails to settle with a creditor/creditors for more than three months after the deadline prescribed by laws, other legal acts, also by agreements between a creditor and an enterprise on the discharge of the enterprise's liabilities, or for a term of the same length after a written claim of a creditor/creditors for the discharge of obligations, if the deadline has not been specified in the agreements;
2. an enterprise has not discontinued its economic and commercial activities;
3. no bankruptcy proceedings have been initiated against the enterprise or no extrajudicial bankruptcy process has been commenced. The sale of the enterprise or a part thereof, might be part of the enterprise restructuring plan. There are no provisions in the national legislation exempting application of Articles 3 and 4 in these situations.

There is no reference to the minimum guarantee equivalent to that of the guarantee institution.

There are no explicit references to the ability of employers and employee representatives to vary the contracts of employment, but it may be possible if there is consent of all employees expressed in writing in order to ensure survival of the undertaking, business or part of the undertaking or business.

The Enterprise Bankruptcy Law provides that if the court investigating the enterprise bankruptcy case establishes a fraudulent bankruptcy, the administrator is obliged to review all contracts concluded in the previous five years, which may lead to action for the

invalidation of contracts not deemed to be in the interests of the enterprise. Misuse of insolvency proceedings is a criminal act with sanctions including imprisonment.

Luxembourg

Article 30 of the Law of 24 May 1989 provided that bankruptcy proceedings relating to employment contracts resulted in an automatic termination of employment contracts in the event of bankruptcy proceedings instituted on the employer's assets. Article 5.1 of the Law now states that it shall also apply where the transferor is subject to bankruptcy proceedings or any similar insolvency proceedings, which have been instituted with a view to liquidating the assets of the transferor.

The recovery of the activities by the transferee must take place within three months of the cessation of activities by the transferor to entail a transfer of the employment contracts.

The new provisions of Article 30 operate an automatic renewal of the employment contracts as soon as the transferee starts his or her activities. It means that the employment contracts automatically terminate when the bankruptcy proceedings or any analogous proceedings start and are automatically continued in the sole event of a transfer within the meaning of the Law.

Article 5.2 of the Law provides the possibility of agreement with employee representatives to change the employees' working conditions, insofar as current law or practice permits at a national level, to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or of the business.

There are no measures specifically implementing Directive Article 5.4.

Hungary

The procedure in case of insolvency of the employer is covered by Act 49 of 1991 on Bankruptcy. The Act on bankruptcy includes three different procedures: bankruptcy insolvency proceeding where the debtor requests relief from its financial obligations in an attempt to seek composition agreement; liquidation where the proceedings are for the benefit of the creditors; and voluntary dissolution where the proceedings are initiated by an enterprise that is not insolvent but wishes to satisfy its creditors upon its winding up.

In the first of these, when parts of the insolvent company are sold and taken over by a successor employer, the normal transfer rules are to be applied. However, the liquidation process (both involuntary and voluntary) terminates the economic organisation (the employer) without successor and therefore employment relationships terminate automatically on the day of the termination of the existence of the employer.

In case of voluntary dissolution and liquidation procedures the receiver or the liquidator may not terminate the employment contracts or collective agreements (Bankruptcy Act Section 47). Consequently the employment contracts and the collective agreement must remain unchanged from the time of commencing the given procedure and after the labour law succession as well. Consequently all provisions on labour law succession must be applied to all procedures under the Bankruptcy Act.

There are, therefore, no insolvency situations where the application of Articles 3 and 4 excluded.

Malta

Article 38(4) of the EIRA implements Article 5.1 of the Directive and provides that sub-articles (1) and (3) of Article 38 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or in a winding up by the Court in accordance with the provisions of the Companies Act or other insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a court appointed liquidator.

The Companies Act states that references in other laws, other than Part III of the Commercial Code, to a bankrupt shall be interpreted as including references to a company being wound up in circumstances of insolvency and references to bankrupt shall be construed accordingly.

Although sub-article (5) of Article 38 of the EIRA provides that the Minister responsible for employment may make regulations prescribing the categories or classes of employment or undertakings that are exempted from the effects of this article and any other matter that is related or ancillary thereto, thereby introducing exceptions to the insolvency proceedings mentioned previously, to date no such regulations have been issued. Consequently, Maltese law does not contain any provisions which implement the provisions of Articles 5.2, 5.3 and 5.4 of the Directive.

Netherlands

Article 7:666 BW states that the rules do not apply to undertakings that have been declared to be in a state of bankruptcy; but they do apply to undertakings where there is a temporary suspension of payments (surséance van betaling).

As a result, in the event of a transfer of a bankrupt undertaking or part thereof, the transferee is not bound by any of the rules concerning transfers and may select employees and set different pay rates and so on.

There are no provisions implementing Article 5.2 of the Directive. There is currently a review of the bankruptcy laws and this may lead to further decisions in this respect.

A bankruptcy can be annulled on the grounds of misuse of procedures such as requesting a bankruptcy in order to avoid employment protection of workers.

Austria

Section 3 Paragraph 1 of the AVRAG does not apply in the case of bankruptcy of the transferors. This is provided for in Section 3 Paragraph 2.

There has been uncertainty about whether the exemption is to be narrowly defined in terms of bankruptcy proceedings where the undertaking is liquidated and/or what is to apply in the case of sales of undertakings in bankruptcy. The OGH has stated, regarding Section 3 Paragraph 2 of the AVRAG, that the acquisition of a business from a bankrupt's estate does not, in general, result in the transferee entering into the existing employment relationships.

Neither does Section 3 Paragraph 2 of the AVRAG apply if a transfer of a business takes place prior to but with a view to an imminent bankruptcy. This may be an issue of some concern as it appears to provide the opportunity for the transfer out of profitable parts of the undertaking or business and the using the opportunities provided by Directive Article 5.

There are no measures implementing Articles 5.2, 5.3 or 5.4 of the Directive.

Poland

The general provisions on the termination of an employment agreement with regard to liquidation or bankruptcy are provided in Article 41[1] of the Polish Labour Code. It reads that in the case of an announcement of liquidation or bankruptcy, any other provisions on protection of employees against unlawful termination of employment agreement need not be applied.

Liquidation proceedings are to be seen as a process. Thus, if during the liquidation procedure any action takes place which could be grounds for a transfer, Article 23[1] will apply. In this case employees are transferred to the transferee and Article 41[1] need not apply. Article 23[1] may not apply to employees, who were dismissed on the basis of bankruptcy and insolvency provisions and to whom Article 41[1] applies. Until the moment of the transfer, the transferor may act in accord with Article 41[1] and dismiss employees as per the Act, on specific terms and conditions for terminating employment relationships with employees for reasons not related to the employees mentioned before. In Polish legislation there are no provisions excluding transfers where an undertaking is transferred during the procedure of bankruptcy.

Portugal

Portuguese legislation provides for the safeguarding of employees' rights in cases where the transferor is the subject of insolvency or bankruptcy proceedings. Insolvency situations are not excluded from the application of Articles 3 and 4 of the Directive. According to Article 391 of the Labour Code, as long as the undertaking is not closed down the contracts of employment remain in force.

National legislation does permit the non transfer of debts and/or the possibility of agreement to changing the employees' terms and conditions in these situations.

According to Article 193 (3), Code of Insolvency and Rescue of Undertakings (Código da Insolvência e da Recuperação de Empresas) the administrator of the insolvency must prepare a proposal for a plan on insolvency payments. This must be done in co-operation with the creditors and the workers commission or the representatives' of employees and the insolvent employer. This plan may include a reduction or the ending of any debts. Employees' claims may be changed by agreement (Article 197).

There are a number of measures adopted to prevent abuse include: Article 40 of the Code of Insolvency and Rescue of Undertakings and Article 227 of the Criminal Code punishes deceitful insolvency (insolvência dolosa) with imprisonment up to five years or a fine. Under Article 228 of the same Code negligent insolvency is punished with imprisonment up to one year or a fine.

Slovenia

Article 103 of the ERA provides for the rights and obligations of the employer and employees in bankruptcy or in liquidation proceedings executed by the court. According to this Article, the receiver in bankruptcy or in liquidation may with a 15-day period of notice, terminate the employment contracts to employed workers whose work has become redundant due to the introduction of bankruptcy proceedings or liquidation with the employer. If in the bankruptcy proceedings the debtor is sold as a legal person, the workers whose employment contracts were terminated in the bankruptcy proceedings have the preferential right to employment with the employer if they fulfil the conditions for carrying out the work.

According to Article 106, in the case of a confirmed compulsory composition, the receiver in the compulsory composition may with a 30-day period of notice terminate the employment contracts to no more than such a number of workers as stipulated by the programme for the termination of employment relationships due to financial reorganisation.

Article 5.2 of the Directive is not transposed.

Article 5.4 of the Directive is not transposed.

Slovakia

According to the Act on Bankruptcy and Restructuring No 7/2004 Coll. effective as of July 2005 an employer is being bankrupted in case that it has been declared insolvent or has become indebted. Article 92 Sec. 2 of this Act says that 'a bankruptcy administrator may transfer to a purchaser only those obligations of the seller concerning to the transferred enterprise or its part which have arisen after the day when the bankruptcy was declared as well as non-monetary obligations of the seller arising from employment relations stipulated in a contract. A sale contract concerning transfer of the enterprise or its part shall be governed by provisions of the Commercial Code on sale of business accordingly'. Based on this, Slovakia has implemented Article 5 of the Directive in the meaning that Articles 3 and 4 shall not apply in cases of employers´ bankruptcy, including opened insolvency or indebtedness proceedings (which are aimed at the liquidation of the employer).

The option in Directive Article 5.2(a) is taken advantage of in that the transferor's debts arising from the employment relationship and payable before the transfer or before the opening of the bankruptcy proceeding shall not be transferred to the transferee because all monetary claims of employees are covered within the process of settlement of the seller's debts as soon as the financial sources from the sale of the enterprise or its part are collected by the administrator

Employees of the insolvent employer are entitled to receive compensation money from the Guarantee Fund which is funded by employers Employees will receive from the Guarantee Fund salaries and other compensations, such as redundancy payments, compensation for the unused holidays, state holidays and overtime premiums.

There are no special measures taken with respect to Directive Article 5.4.

Finland

Section 10.3, Chapter 1 of the ECA provides that when an undertaking is transferred by a bankrupt's estate, the transferee is not liable for the employee's pay or other claims deriving from the employment relationships that have fallen due before the transfer.

The transferee is liable, however, if the control in the bankrupt undertaking and the transferee's undertaking is exercised by the same person.

The Pay Security Act (*Palkkaturvalaki, 866/1998*) ensures payment of employees' claims rising from an employment relationship in the event of the employer's insolvency. The definition of insolvency is included in Section 6 of the Pay Security Act. The condition for receiving pay security is that the employer is insolvent. The employer is considered insolvent:

1. if the employer has been declared bankrupt;
2. if it is established by distraint that the employer is unable to pay his debts;
3. if the employer has neglected to remit the statutory withholding taxes or employer contributions on time;
4. if the employer cannot be contacted or has terminated his operations and sufficient funds cannot be found for payment of the claim; or
5. if, in cases comparable to those mentioned above, the employer's insolvency can be established by the pay security authorities clearly and beyond dispute.

Sweden

Section 6b of the (1982:80) Employment Protection Act does not apply to transfers where the transferor is the subject of bankruptcy proceedings. Section 6b may apply, however, when the transferor is the subject of other insolvency proceedings.

When the transferor is the subject of bankruptcy proceedings the employees are, however, given a priority right of re-employment (section 25 subsection 3 of the (1982:80) Employment Protection Act).

There is no explicit implementation of Articles 5.2, 5.3 and 5.4.

United Kingdom

Regulation 8(7) of the 2006 Regulations uses the same words as Article 5.1 to exclude Regulations 4 and 7 when the transferor is subject to such proceedings under the supervision of an insolvency practitioner.

Regulation 8 is concerned with a situation when the transferor is subject to relevant insolvency proceedings and takes advantage of the option in Directive Article 5.2(a). Thus the employees of an insolvent employer whose contracts are transferred to the transferee and all those who may have been dismissed unfairly by the transferor, as a result of a reason connected to the transfer or a non ETO reason, are entitled to such payments from the Secretary of State that they would be entitled to if their employer was insolvent and they were not in a transfer situation, thus meeting the obligations to provide payments at least equivalent to those required under Directive 80/987/EEC as amended.

Regulation 9 seeks to take advantage of Article 5.2(b). If the transferor is subject to relevant insolvency proceedings, then the transferor or the transferee or an insolvency practitioner may agree 'permitted variations' with 'appropriate representatives' of assigned employees.

A 'permitted variation' is a variation to the contract of employment of an assigned employee where the reason for it is a transfer or a reason connected to a transfer (not an ETO reason) and is 'designed to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or business', using the same words as the Directive (Regulation 9(8)).

The Insolvency Act 1986, as amended by the Insolvency Act 2000, contains a number of measures designed to prevent abuses from occurring during the course of insolvency proceedings. One of these is that the proceedings need to be under the control of an authorised insolvency practitioner. There are also provisions (also in the Company Directors' Disqualification Act 1986) to enable investigations and prosecutions to take place following reports of suspected malpractice. All identified cases of malpractice are followed up with particular emphasis on those who operate 'phoenix' companies. There are restrictions on the re-use of a failed company's name and means to recover assets and money that have been deliberately put beyond the reach of creditors.

Article 6

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

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

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

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

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

Most Member States provide for the continuation of representation in the event of a transfer of an undertaking or business. Exceptions are Lithuania and Italy.

There are particular problems in some Member States concerning when the undertaking or business does not retain its autonomy

Belgium

Article 21 section 10 of the Statute of September 20 1948 on Works Councils provides rules for the continuation of representation in situations where there is a transfer of an undertaking as a legal entity; a transfer of part of an undertaking; and where the transferred undertaking is split into several legal entities.

Article 20b of the CBA no 5 concluded on May 24 1971 provides that trade union delegates will continue until the end of their term if the undertaking retains its autonomy; if it does not then the trade union delegation will be reconstituted within 6 months, although existing delegates will continue until this occurs.

In cases of bankruptcy or insolvency trade unions who presented candidates in the previous social elections will be able to appoint representatives after the transfer, in proportion to the number of employees transferred, until the next social elections.

Czech Republic

There can be no works council when a trade union operates within an employer. When there are more employees' representatives' (trade unions locals), such a situation is handled by Act No. 120/1990 Coll., Which Regulates Some Relationships among Trade Unions and Employers. Non-unionised employees (those who are not members of any trade union) are represented by a trade union local with most employer's employees as its members—Sec. 3 Para 2 of the Act No. 120/1990 Coll. Every such a non-unionised employee may decide otherwise.

Problems with trade unionists do not occur as Sec. 3 Para 1 of this Act stipulates that every trade union represents its own members and the representation of employees will remain. A problem does arise when a branch ("odštěpný závod"), or other organisational component of an enterprise / undertaking is created without legal subjectivity. Only the employer as a whole is acknowledged for a social partnership by Czech labour law. The non-unionised employee who wishes to be represented by his or her original trade union which ceased to be his or her trade union (with most employer's employees as its members—Sec. 3 Para 2 of the Act No. 120/1990 Coll.) has to express his or her will. This constitutes a contradiction of Article 6.1 of the Directive where no such expression of will is required.

All these contradictions of Article 6.1 are acknowledged by the government as the New Labour Code amends this in Sec. 281 Para 5 and provides the following explanation: 'Czech law does not stipulate the transfer as a condition for the reappointment of the representatives of the employees or for the reconstitution of the representation of the

employees. No special provision was taken to ensure that the transferred employees are properly represented until the new election or designation of representatives of the employees in case of bankruptcy proceedings or any analogous insolvency proceedings. Therefore either term of office of the representatives of the employees affected by the transfer does not expire as a result of the transfer.'

If the undertaking, business or part of an undertaking or business does not preserve its autonomy, supra written provisions will apply since only the employer as a whole is acknowledged for a social partnership by Czech labour law. This is not a contradiction of Article 6.1 of the Directive, since it stipulates that employees only shall be "properly represented" (*a contrario* "preserved on the same terms and subject to the same conditions as existed before the date of the transfer"). This is observed.

There are no provisions with regard to Directive Article 6.1 paras 2 or 3..

A transfer does not affect the term of office of employee representatives.

Denmark

Section 4 of the Consolidated Act provides that employee representatives in transferred undertakings keep their legal status and function after the transfer.

Section 4 para 2 provides that if the basis for employee representation no longer exists after the transfer, which would occur if an insufficient number of employees were transferred with the employee representatives, the employee representatives are still protected by the relevant rules on protection of employee representatives. However, this protection applies only for the period of time that corresponds to the applicable notice periods for employee representatives that have been agreed either by individual contract or collective agreement.

In the event of bankruptcy the rules regarding the transferee's assumption of rights and obligations existing after the entry of the bankruptcy decree apply. Section 4 of the law provides protection of union representatives and safety representatives from dismissal in connection with the transfer even in the event of bankruptcy.

There are no measures implementing Directive Article 6.1 para 4. The focus of the legislation appears to be on protecting the representatives rather than protecting the rights of workers to representation.

Germany

According to the case law of the BAG, a transfer does not affect the legal status of a works council as long as the identity of the establishment continues after the transfer.

Section 21a BetrVG provides that, where an establishment is divided up (and hence changes its identity), its works council shall remain in office and run the business for the sections of the establishment that had previously been allocated to it. The interim mandate ends as soon as a new works council is elected in the appropriate sections of the establishment, but not later than six months after the division takes effect. A collective agreement or works agreement may stipulate that the interim mandate will be extended for another six months.

An interim mandate has only been introduced into the BetrVG, but not into the SprAuG or the staff representation acts. In this respect German law is hence not in line with the Directive.

In situations of insolvency the works council simply continues to exist as long as the establishment keeps its identity.

Section 21b BetrVG provides that where an establishment ceases to exist due to closure, spin-off or merger, its works council shall remain in office as long as necessary in order to safeguard participation and co-determination rights.

Section 15 Para. 1 KSchG provides that any dismissal of a member of a works council is null and void, unless the employer is entitled to dismiss the works council member due to serious reasons without any notice and the works council has given its consent or the works council's consent has been replaced by the labour court. If the term of office has expired, any works council member enjoys the same dismissal protection for another year. Since § 15 Para. 1 KSchG does not ask for the reasons of the termination of office, the provision is also applicable to works council members whose term of office expires as a consequence of a transfer.

Estonia

Article 23 of the Trade Unions Act is titled 'protection of the rights of trade unions and their elected members upon merger, division and transformation of agencies, organisations and companies, or upon transfer of enterprises or parts thereof' and provides that the rights and obligations of trade unions and their elected representatives do not change upon transfer of the rights and obligations of the employers.

Article 23 is the only provision of national law regulating representation of employees in case of transfer of an undertaking. National law does not provide for further regulation or limitations to the right of representation of employees in case of transfer.

Thus, national law, Article 23 of the Trade Unions Act does not provide for detailed regulation of different situations catered for by Article 6.1 and 6.2 of the Directive, but rather provides for a general rule that rights of representatives of employees and trade unions do not change upon transfer

Greece

Article 7 of Presidential Decree 178/2002 provides that if the undertaking preserves its autonomy the elected works council continues until its term of office expires, unless any re-organisation of the undertaking by the transferee changes the conditions for a reconstitution of the works council (change in numbers for example). If the undertaking loses its autonomy, then the exiting works council will continue until a new one is elected. Rules on protection against dismissal assume that this protection will continue until one year after the end of the original term of office.

National law does not take advantage of the option granted under Article 6 to institute special measures ensuring the representation of employees in cases where the transferor is the subject of bankruptcy proceedings. This means that the general provisions regarding employee representation apply in this case.

Spain

Article 44.5 ET establishes that when the undertaking, business or part of an undertaking or business preserves its autonomy, the fact of the transfer itself does not produce the termination of a representative's office.

Article. 67.1 para 5 ET establishes, as a general rule, that when as a result of changes in workforce the number of employees becomes greater, the number of employees representatives can be increased. When the workforce decreases the reconstitution of employees´ representation can take place by an agreement between employer and employees representatives.

Due to the collective representation system in Spanish Labour Law, the employees transferred will automatically be represented by the employees' representatives in the transferee's undertaking or business. If the transferred undertaking does not preserve its autonomy and the transferee does not have employee representatives, then representation could be lost.

There are no special provisions in relation to bankruptcy.

There are no special rules on the protection of employee representatives in transfer situations. The normal levels of protection apply.

France

Article L.412-16 of the Labour Code for union representatives and Article L.423-16 for staff delegates provides that in the event of a transfer, as defined by Article L122-12, the terms of workers' representatives are transferred when the entity retains its legal autonomy. This has been broadly interpreted by the Court of Cassation to mean that retention of autonomy is needed.

Because of the particular meaning given to the word 'establishment' in French law, If an entity does not retain its identity and is not a separate establishment after the transfer, then the conditions necessary for the appointment of the employee representatives may not be fulfilled (see national report). There are no legal provisions to ensure that employees transferred who were represented prior to the transfer continue to do so during the period necessary for the reconstitution or re-appointment of employee representatives.

When the entity remains autonomous the terms of office of staff delegates and works council members will continue until the end of their term. The length of term and the structure of representation could be altered by collective agreement.

Representatives of employees receive special protection for a period for between six months, for the staff delegates and members of works councils, and one year for union representatives, after the end of their term of office.

Ireland

Regulation 7 of the 2003 Regulations implements Directive Article 6(1).

Regulation 7(2) provides that where an undertaking, business or part of an undertaking or business does not preserve its autonomy, the transferee shall arrange for the employees transferred who were represented before the transfer to choose a person or persons from among their number to represent them (including by means of an election), during the period necessary for the reappointment of the representatives of the employees' or the reconstitution of their representation.

Regulation 7(3) provides that if the term of office of the representatives of the employees affected by the transfer expires as a result of the transfer, the former representatives of the employees continue to be protected under the relevant parts of the Unfair Dismissals Act 1977 and any other relevant enactments.

Italy

Italian law has not specifically implemented any part of Article 6.

Apart from the case in which (Art. 6.1, paragraph 2) the conditions for the constitution of a new employee's representation are fulfilled (union representation or unitary union representation), there are no measures to preserve the status and the functions of the representatives or the representations of the employees. The result which Article 6.1 paragraph 1 addresses, can also be assured in the same way, based upon existing law, whenever the undertaking or the part of the undertaking involved in the transfer had its own autonomy even from the point of view of union representation and it maintains this autonomy after the transfer. In such a case the representations will remain appointed even after the said transfer.

On the other hand, in the case of a transfer of a part of an undertaking, if the transferred representatives form part of a representative body established in relation to the whole undertaking, they will lose their appointment. In such a case, these have the possibility to establish new union representation or to elect a unitary union representation according to the usual regulations. However, whenever the numerical conditions no longer exist (at least 16 employees) to constitute a union representation in the new undertaking, such representation falls away if it had survived and cannot be constituted anew if it had fallen away due to the transfer of the undertaking.

Cyprus

Article 7(1)(a) of the Cypriot Law Implements Article 6.1 of the Directive. This does not apply when the conditions for a fresh appointment or re-appointment of representatives exists.

Article 7(1)(c) provides that, If the undertaking does not preserve its autonomy, the transferor and the transferee must take measures to ensure that the employees who were represented before the transfer will continue to be represented during the period necessary for the reconstitution or reappointment of the representation of employees in accordance with the law or the practice.

In effect, the law transfers the obligation of the member state to take measures to safeguard the rights of the employees onto the transferor and the transferee and does not specify what these measures will be, nor does it introduce an enforcement mechanism.

Article 7(2) of the Cypriot Law copies verbatim the wording of Directive Article 6.2.

Latvia

Article 121 of the Labour Law provides for the transfer of the status and functions of employee representatives affected by the transfer of an undertaking or part that retains its independence.

Such provisions will not apply if the preconditions required for the re-election of employee representatives have been satisfied.

Para 3 and 4 of Directive Article 6.1 have not been adopted.

There are only general provisions for the protection of representatives of employees as in Directive Article 6.2.

Lithuania

Employee representation can be either through trades unions or labour councils. The applicable laws are the Law on Labour Councils, the Law on European Labour Councils and the Law on Trade Unions.

The subject of the protection of members of administrative, governing or supervisory boards of companies who represent employees on such bodies are not covered in national legislation.

Article 6 has not been transposed.

Luxembourg

Article 7 of the Law amending the law dated 18 May 1979 regulating staff delegations and Article 8 of the Law amending the law dated 6 May 1974 regulating joint works councils makes a distinction depending on whether or not the transferred undertaking, business or part of the undertaking or business preserves its autonomy after the transfer. If it preserves its autonomy, the status and function of the staff delegation or the works council are preserved. If it does not preserve its autonomy, members of the staff delegation or works council will automatically become part of the transferee's staff delegation or works council, until the next election.

If the transferee does not have a staff delegation or works council, the staff delegation or works council in place within the transferor will then act as a common staff delegation or works council within the transferee.

There are no further measures with regard to Directive Article 6.2.

Hungary

Section 55 subsection 1 of the Labour Code provides that the workers' council shall be dissolved if the employer is dissolved without legal successor or if the division is wound up; its term expires; it is dismissed; its membership, for any reason, decreases by more than one-third; the number of employees drops below fifty or by at least one-third; merger of several employers or divisions would require more than one works council at the employer, and the employer or the operational facility is demerged,

There are special rules (section 86/A) in cases where the workers' council is dissolved by virtue of labour law succession due to the last two categories on this list. These provide for the appointment of a temporary workers' council.

Section 56/A regulates the situation if the workers' council or representative of the organisational unit affected by the labour law succession dissolves. The transferred employees will participate in the successor's works council. If a central workers' council is operating at the successor employee the delegated member shall participate in the central works council.

If the number of employees affected by the labour law succession reaches at least twenty percent of the successor employer's employees at the time of the succession, the workers' council or representative shall operate for a maximum of one year from labour law succession in accordance with the above rules. If a new workers' council or representative is not elected within one year from labour law succession, the workers' council or representative ceases (section 56/B subsection 1-6).

Section 28 of the Labour Code also protects elected trade union officials. This protection is valid for the term of the official's appointment, respectively for one year from the termination thereof, provided that her appointment lasts at least six months.

Malta

Regulations 5(4) and 5(5) of LN 433/02 reproduce paragraph 1 of Article 6.1 and Article 6.2 of the Directive

No measures have been taken to implement para 3 of Directive Article 6.1. Nor have there been any measures concerning para 4. As a result the status and function of the employees' representatives of the employees affected by the transfer would not be preserved on the same terms and subject to the same conditions as existed before the date of the transfer.

Netherlands

Directive Article 6 has not been implemented.

According to the national author, in the Dutch legislator's view, the 1971 Law on Works Councils (*Wet op de Ondernemingsraden* – WOR) provides all the rights and guarantees prescribed by Article 6 of the Directive.

The WOR confers upon undertakings with 50 or more employees the duty to take the initiative to install a works council. Undertakings with less than 50 employees are under no such obligation but if a works council has been established voluntarily or in furtherance of a

collective labour agreement all relevant rules of the WOR are applicable. Undertakings with less than 50 employees can also choose to establish a personnel representation. If at least 10 employees request a personnel representation, such a body must be established.

The WOR, according to the national author, does not provide rules to ensure that the transferor's works council should continue to exist on the same terms and conditions after the transfer, if autonomy is retained. Nor does it provide rules that ensure, in situations where autonomy is not preserved, that transferred workers should continue to be represented after the transfer. Finally, there are no solutions for situations where there is no works council in the transferee's undertaking.

Austria

Directive Article 6 has been transposed into Austrian law by Sections 62 120 of the ArbVG.

If the undertaking or business continues as an autonomous entity the competence of the former works council will continue.

If parts of a business become legally independent, the works council remains competent until the election of a new works council, although there is a maximum period of 4 months for this to happen.

If businesses or parts of the businesses do not become legally independent, but instead are amalgamated into a new business, the two or more works councils will form a joint works council until a new works council is constituted, although there is a maximum period of one year.

The situation where a business or a part of a business is absorbed by another business has not been explicitly regulated. If the transferred part of the business has lost its identity, the term of office of the works council members of the transferred business expires and representation is provided by the works council of the other business.

Article 6 para 2 of the Directive has been implemented by Section 3 Paragraph 1 of the AVRAG and by Section 120 Paragraph 3 of the ArbVG, according to which the employment relationships of members of the works council must not be terminated within three months of having lost their works council functions.

Poland

Representation of employees is carried out by trade unions. If the undertaking is transferred as a whole, then the position of the trade union is unchanged. Where an undertaking continues to be independent, the company trade unions organisation retains its status and functions. Employees are represented in the same way as before the date of the transfer

Where only a part of an undertaking is transferred then the company trade unions organisation may lose its status. It is suggested that where the transfer is effective only for a part of the undertaking, the mandate of members of the company trade union organisation expires.

If the undertaking loses its autonomy there appears to be no clear provision about sorting out the relationship between the incoming and the current trade union.

Portugal

Article 321(1) (2) (3) (4) of the Labour Code concerning the representation of the employees after the transfer is applicable. According to this Article, if the economic unit that has been transferred keeps its autonomy, the employees' representatives' situation remains unaffected.

If the undertaking is merged into an undertaking of the transferee and where a commission representing the employees does not exist, the former representatives will continue in those functions for a period of two months or until a new commission takes over their functions. In the meantime the former representatives of employees keep all their rights. If there is already a commission representing the workers then that will take over the function of the incoming commission, so that there is only one commission for each unit.

Employees' representatives, in general, are protected until the date it is supposed that they will terminate their contract. Representatives for safety and health continue to be protected until the date that is supposed to be the term of their mandates. The same is applicable to Members of administrative, governing or supervisory bodies of companies who represent the employees.

Slovenia

Article 209 of the Employment Relationship Act provides that in the case of a transfer, a trade union representative will keep his or her status providing the conditions for his or her designation are fulfilled in accord with the collective agreement. There are no provisions in this respect in the situation of a loss of autonomy.

Para 3 of Article 209 provides protection in accordance with Article 210 ERA to a trade union representative, whose term of office expires due to a transfer for another year after the termination of office of the representative.

Mergers do not constitute termination of a company but are viewed as a type of a change of the employer, where Article 67 of the Workers Participation in Management Act (Zakon o sodelovanju delavcev pri upravljanju) applies; it states that if due to the legal transfer of the undertaking or a part of the undertaking, executed on the basis of a law, any other regulation, legal transaction, final court decision, merger or division, the employer is changed, the member of the Workers Council shall keep his status provided that with the transferee employer the conditions for his designation are fulfilled in accordance with the law.

Slovakia

Article 31 Sec. 8 of the Labour Code states that 'once the rights and obligations arising from the employment relations are transferred from the transferor to the transferee, the legal status and position of employee's representatives shall remain unchanged until the regular end of their term of office, unless agreed otherwise'.

Article 31 Sec. 8 of the Labour Code guarantees that employees of an undertaking that does not preserve its autonomy, are properly represented by the current employees´ representatives until the expiry of their term in the office, unless agreed otherwise.

The transferee keeps the terms and conditions of the employee's representatives already existing within the transferee before the transfer as well as those who have been transferred to the transferee.

It is guaranteed under Article 31 Sec. 8 of the Labour Code that the status and function of representatives shall be preserved, unless the conditions necessary for the reappointment are fulfilled (i.e. an expiry of the term of office), unless agreed otherwise. In this way, Article 6.2 concerning protection during the term of office of representatives has been implemented.

Finland

The protection of shop stewards is provided by collective agreements and legislation. The ECA contains specific provisions on the status of employees' representatives in the event of the transfer. Section 3, Chapter 13 of the ECA contains rules on elected representative duties and scope of competence of such an elected representative are determined in the manner laid down separately in the ECA and elsewhere in the labour legislation.

Representatives in administrative, supervisory and management bodies are governed by Section 5.3 of the Act on Personnel Representation in the Administration of Undertakings (725/1990). Unless otherwise agreed, personnel representation shall be implemented within one year after the conditions laid down in Section 2 of the Act have been met and representation has been demanded. When an undertaking that has implemented personnel representation alters its administrative structure, the representation has to be altered to correspond to the new structure. If the change comes about as a result of a transfer of business, or a merger or demerger of companies, personnel representation may be altered later, but not beyond one year after the alteration of personnel representation has been demanded

The employees may further take majority decisions to authorize the elected representative to represent them in matters of employment relationships and working conditions specified in the authorization. Employees who do not have a shop steward referred to in a collective agreement applicable to the employer under the Collective Agreements Act may elect a representative from among themselves. If an elected representative's term comes to an end as a result of the transfer, the representative has the protection against termination for six months from the end of his or her term. The protection against termination on individual and collective grounds governs both shop stewards and elected representatives (Sections 10.1 and 10.2, Chapter 7 of the ECA).

The protection of shop stewards is provided by collective agreements and legislation.

Sweden

Article 6 has not been explicitly implemented in Swedish law. Existing rules in the (1974:358) Act on Trade Union Representatives (lag (1974:358) (om facklig förtroendemans ställning på arbetsplatsen) were found to fulfil the requirements of the Directive.

According to this Act, and Swedish law and practice, a representative of the employees is a representative of a trade union which is bound by a collective agreement with the employer (or the federation of employers), a so-called *established trade union* (see below *Article 7*).

Generally the autonomy, status, function and protection of these representatives of the employees are safeguarded in the event of a transfer of an undertaking, either as a result of the application and safeguarding of the collective agreement (cf. *inter alia* section 28 of the (1976:580) Co-determination Act) or as a result of the transfer of individual employment contracts.

The Swedish implementation of Article 6 has been criticized for not designating, and thus protecting, representatives of employees according to the (1974:358) Act on Trade Union Representatives in situations where all employees are members of a trade union which is *not* bound by a collective agreement with the employer (or the federation of employers) or non-union members.

United Kingdom

Regulation 5 of the 2006 Regulations deals with the effect of a relevant transfer on collective agreements made between trade unions and the transferor. It ensures that these are transferred, subject, of course, to sections 170 and 180 of the Trade Union and Labour Relations (Consolidation) Act 1992, which presumes that such agreements are normally binding in honour only and not legally enforceable.

Regulation 6 provides for the transfer of trade union recognition where the organised grouping of resources or employees 'maintains an identity distinct from the remainder of the transferee's undertaking'. Regulation 6(2)(b) states that any agreement for recognition may be varied or rescinded.

The problem in the United Kingdom is the voluntary nature of most trade union recognition. It is this that is dealt with by the Regulations. Of concern is the position of trade unions that have gained recognition via the statutory recognition procedures introduced by the 1999 Employment Relations Act. These require agreement on the bargaining unit which is the subject of the recognition claim and also requires the majority of workers to be in favour of the trade union being recognised for collective bargaining purposes.

It is not clear what the position would be in the event of a transfer of such a bargaining unit or part of such a unit. The transfer of a part might result in the numbers of workers in support of the trade union being changed. The Government has promised future Regulation, but, in the meantime, there is the possibility of this statutory trade union recognition being transferred and becoming voluntary recognition thus enabling the transferee employer to de-recognise the union. It might also have effects on the transferor's position and mean that bargaining units change and there is the possibility of a lessening of protection.

Article 7

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

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

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

2. Where the transferor or the transferee envisages measures in relation to his employees, he shall consult the representatives of his employees in good time on such measures with a view to reaching an agreement.
3. Member States whose laws, regulations or administrative provisions provide that representatives of the employees may have recourse to an arbitration board to obtain a decision on the measures to be taken in relation to employees may limit the obligations laid down in paragraphs 1 and 2 to cases where the transfer carried out gives rise to a change in the business likely to entail serious disadvantages for a considerable number of the employees.
The information and consultations shall cover at least the measures envisaged in relation to the employees.
The information must be provided and consultations take place in good time before the change in the business as referred to in the first subparagraph is effected.
4. The obligations laid down in this Article shall apply irrespective of whether the decision resulting in the transfer is taken by the employer or an undertaking controlling the employer.
In considering alleged breaches of the information and consultation requirements laid down by this Directive, the argument that such a breach occurred because the information was not provided by an undertaking controlling the employer shall not be accepted as an excuse.
5. Member States may limit the obligations laid down in paragraphs 1, 2 and 3 to undertakings or businesses which, in terms of the number of employees, meet the conditions for the election or nomination of a collegiate body representing the employees.
6. Member States shall provide that, where there are no representatives of the employees in an undertaking or business through no fault of their own, the employees concerned must be informed in advance of:

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

All Member States, except Lithuania, have provisions for information and consultation either with works councils or trade union representatives in respect of the Directive. Most also have arrangements for information and consultation when no such formal organisation exists. Lithuania has no specific provisions implementing this Article.

Belgium

Where a works council has been established Article 11 of CBA nr 8 of March 9 1972 provides that consultation must take place regarding the 'consequences and the projections of the level of employment, the organisation of work and employment policy in general'. It is not clear whether this information is sufficient to meet the requirements of Directive Article 7.1.

Article 3 states that the information must be provided before any formal decision is made. Consultation must take place before any actual decision is made.

The rules apply to the transferor and the transferee.

Article 24 of CBA nr 5 of May 24 1971 states that if no works council exists, then the trade union delegation must be informed and consulted. This has not been declared binding by Royal Decree, so employers with no works council but who have a trade union delegation have no information and consultation requirements.

Article 15bis of CBA nr 32bis provides for situations where there are no works councils or trade unions in conformity with Directive Article 7.6..

No advantage is taken of Articles 7.3 or 7.5.

Czech Republic

Sec. 18b Para 2(b) and Para 3(h) of the Labour Code provide that trade unions are informed and consulted and Sec. 24 Para 2 provides for information and consultation with works councils.

Trade unions are informed and consulted according to Sec. 18b Para 2(b) and Para 3(h) of the Labour Code. Works councils are informed and consulted according to Sec. 24 Para 2 of the Labour Code. Czech labour law stipulates that it is the obligation of an employer to inform and consult employees directly (Article 7.6) Sec. 18 Para 1, Para 2(b), and Para 3(a) of the Labour Code. Matters to be informed and consulted on are contained in Article 250(1), which are the fact of the transfer; the date of the transfer, the grounds for its legal, economic and social consequences and the envisaged measures relating to employees. This must take place before the transfer. Sec. 18 Para 1 i. f. of the Labour Code stipulates consultation shall be held with a view to reaching an agreement. From this follows information for consultation shall be provided in good time.

There is no implementation of Directive Articles 7.3 and 7.4, although there is no evidence that the excuse that the decision was made elsewhere would be accepted. The new Labour Code sets the minimum number as 10 employees for the purposes of Directive Article 7.5.

Article 250(2) provides that if there is no works council or trade union organisation, then the transferor and the transferee employers must directly inform the affected employees of the information required in Article 250(1).

Denmark

Section 5 of the Consolidated Act requires the transferor and the transferee to inform employee representatives or, if there are none, the affected employees of all the matters listed in Directive Article 7.1. This must be done in a reasonable amount of time before the transfer.

Section 6 obliges the transferor and the transferee to negotiate with either the employee representatives or directly with the employees about any arrangements affecting the employees that are being considered.

The Consolidated Act does not include any provisions that take advantage of the limitations in Article 7(3) or 7(5) of the Directive.

Germany

Germany has taken advantage of the option in Directive Article 7.3. The measure implementing this is Section 111 ff BetrVG. It applies to undertakings normally employing more than 20 persons where the employer must promptly and fully inform the works council of planned changes to the establishment which may have serious disadvantages for the workforce or a considerable proportion of the workforce. 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.

If ultimately the employer and the works council cannot reach an agreement then the arbitration board (Einigungsstelle) will rule on drawing up a social plan which has the same effect as a works agreement.

There are situations where the relevant part of the BetrVG are not applicable and where those concerned do not have recourse to the arbitration board. The national author highlights the position in this regard of executive committees for executive staff and staff councils. Where recourse is possible, the decision is not binding, thus giving a lower level of protection than accorded under Directive Articles 7.1 and 2.
Section 111 par 4 sub para 1 implements Directive Article 7.4.

Section 613a par 5 BGB provides for direct information to employees in accord with Directive Article 7.6.

Estonia

Article 6^3 (1) of the ECA implements the provisions of Directive Articles 7.1 and 7.6. The information requirements are the same as that contained in Directive Article 7.1.

The information must be given to employee representatives or directly to employees if there are no such representatives.

The information must be given in good time, but no later than one month prior to the transfer. Article 6^3(3) provides that representatives of employees have the right to meet the employers and submit their own written proposals within a period of at least 15 days of the receipt of the information. Employers are required to give reasons for refusal to consider the proposals.

Article 6^3(2) implements Directive Article 7.2.

Article 7.3, 7.4 and 7.5 are not implemented.

Greece

Article 8 of Presidential Decree 178/2002 transposes Directive Article 7. It specifies the same topics covered by the duty of information; it provides that the transferor ought to give this information to the representatives of the employees in good time before the transfer and

that the transferee ought to discharge his or her duty of information observing the time limitations set out in Directive Article 7.1.

The duty of consultation in Directive Article 7.2 is implemented by article 8.2 of the Presidential Decree 178/2002). The duty of consultation it envisages applies only to measures that "change the employees' status". This is a slightly different formulation from the one employed by the Directive, which talks about "measures envisaged in relation to the employees". It has been suggested in theory that this difference is not without legal consequences. More specifically, it has been submitted that in Article 8.2 [duty of consultation] the Presidential Decree refers solely to measures that pertain to the legal status of the employees and that it doesn't apply to changes related to the regime of the undertaking. The Presidential Decree itself has used the Directive's formulation in determining the content of the duty of information. In Article 8.1, indent (d), it specifies that the employer must inform employees of "any measures envisaged in relation to the employees".

There is no transposition of Directive Articles 7.3 or 7.5 and the Presidential Decree makes special provision for information and consultation for undertakings that are not big enough to be entitled to a works council.

Article 8.5 of the Presidential Decree provides for the implementation of Directive Article 7.6.

Spain

Article 44.6 ET reproduces the terms used in Directive Article 7.1 para 1 and Article 44.8 reproduces the requirements of paras 2 and 3.

Article 44.9 ET implements Directive Article 7. In particular it requires there to be negotiations acting in good faith with a view to reaching agreement. When substantial modification of work conditions or a geographic change of workplace are envisaged, then there are additional rules setting a minimum consultation period and restricting the employer's discretion by only allowing mutual agreement to change the collective agreement on working time, remuneration or production systems.

Directive Article 7.3 is not taken advantage of.

Directive Article 7.4 is reproduced in Article 44.10 ET and the direct information requirements of Directive Article 7.6 are provided for in Article 44.7 ET.

France

According to Article L.432-1 of the Labour Code the works council must be informed and consulted if the economic organization or legal status of the undertaking is changed, particularly in the event of a merger, sale, or transfer.

The general competences of works councils are broadly defined by the law and cover the issues of the Directive. The consultation process also involves information and, as required by the Directive, the employer must give the reasons for the changes planned and consult the work council about the measures to be taken with respect to the employees if they are affected by the changes.

The works council should be informed and consulted with prior to the transfer being carried out. These requirements have been interpreted strictly by the judiciary. Directive Article 7.4 has not been implemented but in practice the employer must inform and consult the works councils even if the decision is taken by the employer or an undertaking controlling the employer

There is no specific requirement for consultation with a view to reaching agreement. This is partly because of the fragmented nature of consultation and negotiation, but is unlikely to be an issue in practice.

Works councils are elected by the employees in undertakings with fifty or more personnel. If there is a lack of candidates and no works councils could be elected, staff delegates enjoy the works council's rights. Thus, there is no obligation to inform and consult on the transfer in an undertaking employing less than 50 employees, except in the case of collective redundancies.

There are no provisions implementing Directive Article 7.6.

Ireland

Directive Article 7 is implemented by Regulation 8 of the 2003 Regulations, with the transferor required to give the relevant information to the employees' representatives, where reasonably practicable, not later than 30 days before the transfer is carried out and, in any event, in good time before the transfer is carried out. There are similar requirements for the transferee.

Regulation 8(4) requires that the representatives of the employees be consulted, where reasonably practicable, not later than 30 days before the transfer is carried out and, in any event, in good time before the transfer is carried out, in relation to any such measures with a view to reaching an agreement.

The provisions of Articles 7(3) and 7(5) of the Directive have not been taken advantage of.

Regulation 8 (5) provides that, where there are no employees' representatives in the undertaking or business of the transferor or of the transferee, the transferor or the transferee is required to put in place a procedure whereby the employees may choose from among their number a person or persons to represent them (including by means of an election. Where, notwithstanding this, there are still no representatives of the employees in an undertaking or business concerned (through no fault of the employees), each of the employees concerned is required to be informed in writing, where reasonably practicable, not later than 30 days before the transfer and, in any event, in good time before the transfer, of the date or proposed date of the transfer; the reasons for the transfer; the legal implications of the transfer for the employee and a summary of any relevant economic and social implications for that employee; and any measures envisaged in relation to the employees.

The requirements of Directive Article 7(4) are implemented by Regulation 8(7).

Italy

Article 47 para 1 of Law n. 428/1990 provides for the implementation of Directive Article 7.1. It repeats the list of requirements from the Directive.

Article 47 para 2 requires a written request from the trade union within 7 days of the receipt of the notification from the employer. It also provides that the consultation will be over if no agreement has been reached within 10 days.

Directive Article 7.3 has no application in Italy.

Article 47 para 4 provides that the obligation to inform and consult remains even when the decision relating to the transfer has been taken by a controlling undertaking.

Article 47 para 1 limits the obligation to those concerning undertakings with more than 15 employees. Article 35 of Law n.300, 20 May 1970, limits the possibility of constituting a representation of employees to productive units that employ more than 15 employees in the area of a municipal territory if it involves an industrial undertaking; or 5 employees if it involves an agricultural undertaking. Thus there are wider rules for the information and consultation provisions.

Directive Article 7.6 is not implemented and there are no provisions for giving the information to employees directly.

Article 47 para 3 provides that a lack of respect for the obligation to inform and consult is a breach of Article 28 of Law n.300 of 20 May 1970 (Workers Statute) and may constitute anti-union behaviour.

Cyprus

Article 8(1)(a) of the Law on the safeguarding and securing the rights of employees in the event of transfers of undertakings, businesses, or part of businesses transposes Directive Article 7.1 and requires both the transferee and the transferor to inform either the representatives of the employees or the employees themselves.

Articles 8(1)(b) and (c) provide that this information must be communicated promptly before the transfer takes place and definitely before his employees' working conditions are affected directly by the transfer.

Article 8(3) repeats almost verbatim the text of Directive Article 7.2. There is a difference in the wording between the Directive and the Cypriot Law in that the Cyprus Law, as in the previous sections, creates an obligation to inform or consult either the employees' representatives or the employees themselves.

Article 8(4) provides that information and consultation must cover at least the measures affecting the employees and must take place 'promptly" before the transfer occurs.

Article 8(1)(d) repeats verbatim the provisions of the first paragraph of Directive Article 7.4, whilst Article 8(2) repeats verbatim the provisions of the second paragraph of Directive Article 7.4.

Article 8(5) provides that where there are no representatives of the employees for reasons outside their power, then the information set out in Article 8(1) must be communicated to the employees 'promptly'.

Latvia

Article 120 of the Labour Law provides that the transferor and the transferee must inform employee representatives of the matters contained in Directive Article 7.1. This information must be provided by the transferor not later than one month before the transfer and by the transferee not later than one month before the transfer starts to directly affect the working conditions and employment provisions of his or her own employees.

The Labour Law precisely follows the Directive with Articles 120 (2), (3) and (4) following Directive Articles 7.2-7.6.

Lithuania

Although there is a statutory based system of works councils and trade union representation, Article 7 of the Directive is not specifically implemented. It may be that works councils and trade unions where they exist are entitled to the information in Directive Article 7.1, but there are no provisions with regard to Directive Article 7.6 to inform employees directly. There are no provisions relating to Directive Articles 7.1, paras 2 and 3, 7.2, 7.3, 7.4 or 7.5.

Luxembourg

The transferor and the transferee shall be required to inform the representatives of employees affected by the transfer of the matters listed in Directive Article 7.1.

Where there is no staff delegation in an undertaking or business, the employees concerned must be informed in advance.

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

Where the transferor or the transferee contemplates measures in relation to his or her employees, he or she shall consult the representatives of the employees in good time on such measures with the view to reaching an agreement. The information and consultation shall cover at least the measures envisaged in relation to the employees. The information must be provided and consultations taken place in good time before change in the business affected by the transfer. Such obligations shall apply irrespective of whether the decision resulting in the transfer is taken by the employer or an undertaking controlling the employer of an undertaking, business, or part of an undertaking or of a business.

Hungary

Section 85/B of the Labour Code provides that, in the event of labour law succession, the predecessor and the successor employer – no later than fifteen days preceding the succession – shall notify the trade union represented at the employer, in the absence of such the workers' council, in the absence of a workers' council the committee of the representatives of non-organised employees on

a. the date or planned date,
b. the grounds,
c. the legal, economic, social consequences pertaining to employees of the succession.

They shall also initiate consultation on further planned actions affecting the employees (section 85/B subsection 1). The consultation shall cover the principles of the actions, ways and means to avoid detrimental consequences, and the means to mitigate such consequences (section 85/B subsection 2). The predecessor and the successor employee shall also be bound by their notification and consultation obligation in the event that the decision on the transfer has been passed by the person or organisation controlling the predecessor employer (section 85/B subsection 3).

If the transferor is covered by the Labour Code and the transferee is covered by the Ktv. or the Kjt. than the transferor and the transferee – no later than thirty days preceding the transfer – shall notify the employee, the trade union represented at the employer, and the works council (works representative) of the same matters as well as initiating consultation.

Prior to adopting its decision, the employer shall submit to the trade union the drafts of decisions affecting a considerable number of employees, in particular proposals for the employer's reorganisation, transformation, conversion, privatisation and modernisation of an organisational unit into an independent organization (section 21 subsection 2 of the Labour Code). Prior to adopting its decision, the employer shall submit to the works council the same material (section 65 subsection 3 of the Labour Code).

The Labour Code ensures that the predecessor and the successor employee shall also be bound by their notification and consultation obligation in the event that the decision on the transfer has been taken by the person or organisation controlling the predecessor employer.

Hungary does not apply Article 7.3 of the Directive.

In the absence of a workers' council or trade union, the committee of the representatives of non-organised employees shall be notified by the predecessor and the successor employer on

a. the date or planned date,
b. the grounds,
c. the legal, economic, social consequences pertaining to employees of the succession.

Malta

Article 38(2) EIRA provides for the implementation of Directive Article 7.1 and contains the same list of matters. Employee representatives are recognised trade union representatives. In their absence the employer must hold a secret ballot to elect employee representatives.

The information must be in writing and delivered at least 15 working days before the transfer takes effect or affects directly the employees as regards their working conditions and employment, whichever is earlier. Failure to do this will result in a fine of not less than 500Lm for each affected employee. Consultation must commence within 7 working days where the transfer includes measures affecting conditions of employment.

Regulations 6(3) and 6(4) implement Directive Article 7.4.

There are no provisions implementing Articles 7.3, 7.5 and 7.6.

Netherlands

Works Councils have the right to be informed and consulted in accord with Directive Articles 7.1 and 7.2. There is a more limited right for those with personnel representation (10-50 employees). In 1981 the Dutch legislator did not adopt specific measures aimed at implementing the provision on the information and consultation of employee representatives. The basic assumption was that the WOR already guaranteed the rights and duties prescribed by the Directive. In 2002 the response was essentially the same, although a specific clause was inserted in the Civil Code to implement Article 7(6) of the current Directive 2001/23.

Works councils possess a number of rights among which the right to be consulted on economic, organisational and financial affairs (Article 25 WOR) and a right of approval as regards a number of issues concerning the 'internal social policy' of the undertaking (Article 27 WOR).

The works council must be consulted on proposed decisions that will alter the size, structure and organisation of the undertaking among which are decisions to transfer the undertaking. This duty rests on both the transferor and the transferee in relation to their 'own' works council. Generally, a personnel representation is less powerful than a works council, but, in undertakings with 10-50 employees, it must be consulted as regards proposed decisions that might lead to a loss of jobs or a significant change in the working circumstances of at least 75% of the employees. No such right exists for a personnel representation of an undertaking of less than 10 employees.

In the event of a transfer of an undertaking also the trade unions must be involved. Article 4 of the Decree of the Social-Economic Council on the Code of Conduct relating to Mergers 2000[2] provides that prior to reaching agreement on a merger, the parties involved must inform trade unions. The parties must provide in writing the unions an exposition of their motives of the planned merger, the envisaged policy objectives of the undertaking, the social, economic and legal consequences of the merger and the measures envisaged. Parties must give the unions the opportunity to express the employees' point of view on the planned merger, and the implications for employees in particular, in such a way and at such a time that this view may have a decisive influence on the completion or non-completion of the merger. In addition, parties must inform works councils of their intentions so as to enable them to give their advice in accordance with Article 25 WOR. The above duties apply to mergers involving at least one undertaking established in The Netherlands and employing more than 50 employees

[2] *Supra* note 25.

Directive Article 7.4 has not been implemented.

From the above it follows that the Netherlands has made use of the possibility provided by Article 7(5) to limit the obligations laid down in paragraphs 1,2 and 3 of Article 7 to undertakings, which, in terms of the number of employees, meet the conditions for the election or nomination of a collegiate body representing the employees.

Article 7.665a provides that where no works council or personnel representation exists then the employer shall inform his own employees about the matters contained in Directive Article 7.1. It appears that the establishment of this procedure is voluntary.

Austria

Section 108 Para 1 of the ArbVG provides that the works council must be informed about various measures; at its request the works council is to be consulted on such information.

Section 108 Para 3 of the ArbVG provides that these information and consultation requirements apply in cases of transfers, legal independence, concentration or absorption of businesses or parts of businesses. The information must be provided in good time and in advance and will include the reasons for the measure; the legal, economic and social consequences for the employees; and the measures envisaged with respect to the employees. There is no requirement for any information concerning the date of the transfer. In the view taken by the Vienna Chamber of Labour, according to the national author, the requirement to inform does exist.

Section 109 Paragraph 1 of the ArbVG provides that the works council must be informed about all planned changes in the business as soon as possible and in such a timely manner that a consultation on the measures can still be carried out.

Section 109 Paragraph 3 of the ArbVG provides that if the change to a business with at least 20 employees results in serious disadvantages for all or for a considerable part of the employees, measures for the prevention, elimination or mitigation of such consequences may be provided for in works agreements). If the business holder and the works council fail to reach an agreement on such a works agreement, the arbitration board will decide upon application. These information and consultation requirements also apply if the planned measure was initiated by a controlling company.

Section 109 Paragraph 2 of the ArbVG provides that the works council is entitled to submit proposals for the prevention, elimination or mitigation of the adverse consequences.

Article 7 Paragraph 6 of the Directive has been literally transposed by Section 3a of the AVRAG.

Poland

Article 23^1 of the Labour Code provides for trade unions to be informed about a transfer. If at there is not a trade union organisation in existence, the transferor must apply Article $23^1(3)$ and inform every employee of the transfer. Article $23^1(3)$ obliges parties to the transfer, where a trade union does not exist, to inform employees in writing before the transfer of the implications for them.

The provision provides that information must be forwarded to all employees by both the transferor and the transferee. This information should consist of the planned date of the transfer, the reasons justifying the decision, and the social results of the transfer, including any plans for the employment terms and conditions and qualifications of employees needed. Any guarantees for employment, the organisation and structure of future employment, any changes to technologies of production and any necessary re-training of employees and other information on the impact of the transfer should be indicated by the transferor and the transferee. This information should be provided at least 30 days before the planned date of the transfer.

Article 26[1] of the Act on Trade Unions provides that the transferor and transferee are obliged to inform in writing the company trade union functioning in their undertakings of the planned date of the transfer, its reasons, its legal, economic and social consequences for employees, as well as of planned changes concerning the terms and conditions of employment, remuneration and re-training. This information should be forwarded at least 30 days before the planned date of the transfer.

If a transferor or a transferee intends to change the terms and conditions of employment, they are obliged to commence negotiations with the trade unions to conclude an agreement. Where the agreement is not achieved within 30 days as a result of not being able to agree on particular issues, the employer may take decisions on the terms and conditions of the employment, taking into consideration any matters agreed with the trade union during the process of negotiating the agreement.

Portugal

Article 320 (1) (2) (3) (4) of the Labour Code) provides that the transferor and the transferee are required to inform the employee representatives, or where there are no representatives, the employees concerned must be informed, in advance of the date or proposed date of the transfer, the reason for the transfer, the legal and social implications of the transfer for the employees and on any measures envisaged in relation to the employees. This information must be provided in writing in good time before the transfer is carried out and at least 10 days before the consultation commences.

The transferor and transferee shall consult the representatives of their employees in view to reaching an agreement on the measures they envisage in relation to this as a consequence of the transfer. Workers' commissions as well as the commissions composed by representatives of the unions and the trade unions delegates of the respective undertakings or businesses are considered to be representatives of the employees,

The limitations laid down in Articles 7.3 and 7.5 have not been applied.

These rules on continuing to observe collective agreements are applicable even if the decision has been taken by a group controlling the undertaking or business

Article 320(1) of the Labour Code provides that when there are no employee representatives in an undertaking or business, the information must be provided and the employees must be directly informed.

Slovenia

Article 74 of the ERA provides that the transferor and the transferee must at least 30 days prior to the transfer inform the trade unions at the employer about the matters contained in Directive Articles 7.1.

Article 74 para 2 provides that the transferor and the transferee must, with the intention of achieving an agreement, and at least 15 days prior to the transfer, consult with the trade unions about the legal, economic and social implications of the transfer and about the envisaged measures for workers.

Article 74 para 3 states that if there is no trade union the workers concerned by the transfer must, within the deadline, be directly informed about the circumstances of the transfer, i.e. the date or the suggested date of transfer, the reasons for the transfer, the legal, economic and social implications of the transfer for workers, and the measures envisaged in relation to workers

Slovakia

Article 29 Sec. 1 of the Labour Code provides that the transferor is obliged, no later than one month prior to the transfer, to inform the employees' representatives, and if no employees' representatives operate at the employer, the employees in writing on the date or proposed date of transfer; the reasons; labour law, economic and social implications of the transfer with respect to the employees; and projected measures affecting the employees.

With a view to achieving consensus, the transferor shall be obliged, at least one month prior to implementation of measures affecting employees, to discuss such measures with the employees' representatives

Article 29 Sec. 3 of the Labour Code places the same obligations upon the transferee.

There are no provisions in relation to Directive Articles 7.3, 7.4 or 7.5.

Finland

Section 11.3 of the ACU provides that the transferor and the transferee are obliged to notify the representatives of the employees of the time or the planned time of the transfer; the grounds for the transfer; the judicial, economic and social consequences for the employees due to the transfer and, fourthly, the planned measures affecting the employees.

The transferor must give the information to employee representatives in good time before the transfer takes place.

Section 7 of the ACU contains provisions on the co-operation procedure.
If the transfer has effects on the personnel, the normal co-operation procedure will be carried out. The obligation to negotiate has been fulfilled when the matter has been negotiated between the co-operative parties. Before the employer decides on a matter that is within the scope of the co-operative procedure, he or she needs to negotiate on the reasons, effects and alternatives of the action envisaged with the wage-earners or salaried employees, or their representatives (Section 7 of the ACU).

If the co-operation procedure has been initiated before a transfer, the negotiation period for the transferee and the receiving undertaking also includes the time they have been party to negotiations (Section 8.4 of the ACU).

There are no provisions implementing Article 7.4, although it has been argued that the ACU governs such situations.

The Act applies to undertakings normally employing at least thirty persons (on certain conditions 20 persons). Section 3 of the Act defines parties to co-operation as the employer and the staff of the undertaking.

If a staff group has no shop steward, liaison officer or contact person or if representative has been appointed on the basis of an election in which only members of a trade union were entitled to take part and the wage-earners or salaried employees not belonging to that trade union constitute the majority of the staff group concerned, such wage-earners or salaried employees are entitled to elect a person from among their own number for one year at a time to represent them for the purposes of the co-operation referred to in the ACU (Section 5.1 of the Act).

Section 14 of the ACU allows deviation from certain provisions of the Act by collective agreements. Nationwide employers' and employees' associations may conclude agreements in derogation to the provisions that, among other things, concern transfer of undertaking. Such provisions are Sections 6 a, 7, 7a and 8 of the Act. It seems that Section 14 is not fully in line with the Directive since it permits even weakening of employees' right to information and consultation through collective agreements.

Sweden

Existing general rules on information and consultation apply in situations where the employer is bound by a collective agreement, section 11 of the (1976:580) Co-determination Act. Trade unions that are bound by a collective agreement with the employer (or the federation of employers) on wages and general conditions of employment enjoy a primary right of negotiation.

The employer is obliged to negotiate with the trade union on his or her own initiative before making decisions regarding important alterations of the business or an employee's employment conditions or relationship. A transfer of an undertaking constitutes such an important alteration of the business. Both the transferor and the transferee are obliged to negotiate (consult) in accordance with section 11. The employer is obliged to give all necessary and relevant information, such as information on the reason for the transfer and the legal, economic and social implications of the transfer for the employees. The information is to be given in good time. The Directive requires the employer to negotiate *with a view to reaching an agreement*, cf. Article 7.2.
This is not expressly stated in the Co-determination Act, but the legislative preparatory works to the Act, however, clarify that the employer is obliged to negotiate with this intention.

Section 13 of the (1976:580) Co-determination Act states that an employer who is not bound by any collective agreement is obliged to negotiate with all the trade unions concerned (having at least one member at the workplace) before a making a decision regarding a transfer of an undertaking. This obligation applies to both the transferor and the transferee.

If the employer is not bound by any collective agreement and all of his or her employees are non-union members the employer is under no obligation to inform or consult before making decisions regarding a transfer of an undertaking. According to Swedish law and practice there are, in principle, no representatives of employees in this situation.

Article 7.4 has not been explicitly implemented. In principle, the employer is obliged to apply the rules concerning information and consultation in the Co-determination Act regardless of whether or not the decision has been made by the employer or an undertaking controlling the employer.

Existing rules concerning information and consultation in the Co-determination Act apply to all employers, regardless of the number of his or her employees. The

Directive Article 7.5 has not been adopted.

United Kingdom

Regulation 13 is concerned with the duty to inform and consult representatives. The appropriate representatives of employees can be selected from a hierarchy of categories. Firstly, if there is a an independent trade union recognised by the employer as the representative of the affected employees, then the representatives of that trade union are the appropriate representatives. If there are no trade union representatives then the employer may invite employees to elect representatives.

The obligation in the Transfer Regulations is to begin the process 'long enough before a relevant transfer' to enable consultation to take place Regulation 13(2). The transferee must provide information with regard to measures to be taken in time to enable the transferor to carry out his/her duties to inform the employees. Regulation 13(2) contains all the categories in Article 7.1.

The issue of an arbitration board are not relevant to the United Kingdom.

Regulation 13(12) provides that the duties imposed upon the employer apply irrespective of whether the decision resulting in the transfer is taken by the employer 'or a person controlling the employer'.

Article 7.5 is not applicable to the United Kingdom.

Regulation 13(11) provides that where an employer has invited affected employees to elect representatives and they fail to do so within a reasonable time, then he or she shall give to any affected employees the information set out in Regulation 13(2).

4. Conclusions

The Member States have produced measures at the national level to broadly implement Directive 98/50/EC amending Directive 77/187/EEC and consolidated by Directive 2001/23/EC. The 10 Member States that joined in May 2004 all implemented measures in preparation for joining. The remaining 15 Member States already had measures and most introduced new measures as a result of the 1998 amendments.

It is clear that decisions of the European Court of Justice has been influential in the judicial application of the Directive in Member States. Member States do not always transposed Directive Article 1.1(b) providing the meaning of a transfer, but generally the national courts have followed the Court of Justice in this matter.

There are a number of issues that are of concern and justify further attention:

1. Scope and definitions

In some Member States who have used the French (and Dutch) language versions of the Directive have incorporated the requirement for an *agreed* transfer. This might suggest that there needs to be some sort of contractual link between the transferor and the transferee with consequent effects on outsourcing transfers. This occurs in Belgium and the national author cites a case from the Labour Court in Liege which was affected because the transfer had not been agreed. It is also noted here for Denmark. On the other hand, there is a similar provision in Denmark, but there the laws on transfers clearly apply to outsourcing.

The level of public sector involvement in the coverage of the Directive is variable. In Belgium there is an exclusion for public sector companies, with some named exceptions; in France there is a division between public and private law which may affect transfers between the sectors; in Italy this leads to the exclusion of a number of categories of public employees including university professors and researchers; in Austria employment relationships with provincial and local authorities are excluded,

In most Member States a re-organisation of public administrative authorities or the transfer of administrative functions between such authorities are not regarded as transfers.

Some Member States have a minimum number of employees in an undertaking or business before it is affected by the Directive. There is the possibility of this problem in Belgium.

In Lithuania the definitions in national law of the scope of the Directive may be more limited than those expressed in Directive Article 1.2.

Not all Member States have specific definitions of the terms in Directive Article 2.1, although these exist in terms of practical application.

No Member State, except Hungary, excludes any of the categories in Directive Article 2.2. In Hungary, fixed-term workers seem not to be protected by national law from ordinary dismissal and are therefore excluded from the protection of Directive Article 4.1.

2. Safeguarding of employees' rights

All Member States have provided for the transfer of rights and obligations relating to terms and conditions of employment when a transfer of an undertaking takes place, within the scope of application.

Exclusions from this requirement may be Belgium where Works Rules are differentiated from the contract of employment and may not transfer and Hungary where the Labour Code only applies to the private sector and transfers involving the public sector may lead to the termination of contracts of employment rather than their transfer to the new employer. In Lithuania there are no provisions in respect of Directive Articles 3.4(a) or 3.4(b).

In terms of joint liability, some 16 Member States have provision for this, with another two, Cyprus and Lithuania making it possible on a voluntary basis. The Czech Republic, Denmark, Ireland, Latvia, Malta, Slovakia and the United Kingdom have no provision for joint liability. There are a number of issues associated with this:

i). in some cases there may be a problem concerning the limiting of the liabilities of the transferee. In Estonia there appears to be uncertainty because section $6^2(1)$ of the Employment Contracts Act provides that obligations due at the time of the transfer remain the responsibility of the transferor; in Greece there is the possibility that the liability of the transferee will be limited to the value of the transferred items; this may also have been the position in Austria.
ii). in France joint liability only applies when there are contractual relations between the parties. In other cases the parties remain responsible for their own obligations. This is a particular concern in outsourcing situations when there may not be contractual relations between successive contractors.
iii). there are occasions when the transferor may reach an agreement with the employees to be excluded from joint liability, such as in Italy. In Portugal, the transferor may put up a notice in the workplace informing the employees that they must submit claims within three months or the liability will not be transferred.
iv). in Luxembourg there is an obligation on the transferor to reimburse the transferee for any claims.

All Member States have provisions for the transfer of collective bargaining agreements, although in those Member States where there are excluded categories of employees, such a provision does not apply to those excluded categories. In Denmark the employer may give notice to the relevant trade union of not wishing to confirm a transferred collective agreement. In Ireland and the United Kingdom, recognition is voluntary, although there may be an issue in the United Kingdom with regard to those trade unions who have gained legal recognition as there is uncertainty about whether this recognition transfers.

In all Member States the principle contained in Article 4.1, that a transfer of an undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal, has been adopted. In most member States this is done by a positive statement to this effect. In some, such as the Czech Republic, Portugal, Slovenia and Slovakia, it is achieved by not making it a reason to justify a dismissal.

In some Member States, such as France and Austria, there are no specific regulations corresponding to Article 4.1, but the Courts have interpreted the Labour Code or law in a way that is in compliance with the Directive.

All Member States permit economic, technical or organisational reasons to be a justifiable reason for dismissal, although not always by using the precise term. Where it is used, it is not usually defined, but left to judicial interpretation.

Apart from the position of fixed-term workers in Hungary, there are no groups of employees who are excepted for the purposes of this Directive Article, but, as elsewhere, there are exclusions for the public sector, as in Hungary.

Directive Article 4.2 has been incorporated into the law of many Member States, but there are a number of exceptions. These include Denmark, where employees of the transferor who have expressed their objection to the transfer are excluded; Germany, where the employee's right to object to the transfer may be a factor; Spain where there are difficulties for employees in taking action; France and Sweden, where there are no specific provisions, but the practice is in accord with the Directive; Latvia and Slovakia where there are no provisions implementing; Hungary, where the concept of constructive dismissal is entirely absent from national law;

Most Member States have special rules dealing with situations where the potential transferor is bankrupt. This usually involves exempting the transferee from liability for at least some of the pre-transfer claims of employees. This will mean that the Guarantee Fund of the Member States will compensate employees in line with Directive 80/987/EEC.

If the operation is continued during the insolvency process then the normal rules on transfers may apply.

Member States who take advantage of the option in Directive Article 5.2(b) include Greece, Spain, France, Luxembourg, Portugal and the United Kingdom.

In a number of Member States, including the Czech Republic and Ireland it appears to be possible to put an organisation into liquidation and then to continue trading under a different name. A number mention also that there have been no provisions implementing Directive Article 5.4, including Estonia, Malta, Italy, Austria, Slovakia and Sweden.

Particular issues are

i). France, where there appears to be a problem with the Law on Safeguarding Enterprises of 2005. In certain situations the claims of the employees prior to the insolvency may not be transferred and are not compensated for by the national guarantee institution.
ii). Austria, where the rules on transfers are excluded when a transfer takes place prior to but with a view to an imminent bankruptcy allowing scope for avoidance of the transfer rules. According to the national author there are also concerns about the scope of the national law.

Most Member States provide for the continuation of representation in the event of a transfer of an undertaking or business. This has limited effect in Ireland and the United Kingdom where recognition of trade unions is, for the most part, voluntary in nature. Exceptions are:

i). In the Czech Republic there have been problems with the implementation of Directive Article 6.1 which are addressed by the new Labour Code. There are no specific provisions with regard to Directive Article 6.1 paras 2 and 3.

ii). In Latvia there are no provisions for the implementation of paras 3 and 4 of Directive Article 6.1.
iii). In Lithuania, the provisions of Article 6 appear not to have been implemented. In Estonia there is a lack of specific provision.
iv). In the Netherlands the WOR, according to the national author, does not provide rules to ensure that the transferor's works council should continue to exist on the same terms and conditions after the transfer, if autonomy is retained. Nor does it provide rules that ensure, in situations where autonomy is not preserved, that transferred workers should continue to be represented after the transfer. Finally, there are no solutions for situations where there is no works council in the transferee's undertaking.
v). In Sweden there has been criticism that representatives of employees in situations where all employees are members of a trade union which is not bound by a collective agreement with the employer (or the federation of employers) or non-union member are not protected.

Italian law has not adopted measures to deal with Directive Articles 6.2; nor does the law of the Netherlands.

There are particular problems concerning when the undertaking or business does not retain its autonomy. This issue is not considered in the Czech Republic, Estonia, Latvia, Hungary and Slovenia.

i). in France there is some doubt as to whether the conditions necessary for the appointment of the representatives of the employees or the constitution of the representation of the employees will be fulfilled in this situation;
ii). (ii) in Germany the interim rules concerning a situation where an establishment is divided up do not apply to those employees affected by the SprAug or the staff representation Acts;
iii). (iii) Cyprus leaves the transferor and transferee to make arrangements for employee representations and so there are no national rules specifying what these measures should be; nor are there any enforcement mechanisms;
iv). (iv) in Poland, the company trade union may lose its status;
v). (v) there are no specific measures implementing Article 6.1 para 4 in Denmark, Italy, Lithuania, Malta and the Netherlands.

3. Information and consultation

All Member States, except Lithuania, have provisions for information and consultation either with works councils or trade union representatives in respect of the Directive. Most also have arrangements for information and consultation when no such formal organisation exists. In Spain there is an issue when an entity fails to retain its autonomy and the transferee has no employee representation. In such a situation employee representation is lost. Lithuania has no specific provisions implementing this Article. The Cypriot Law appears to give employers the choice between informing and consulting employee representatives or employees directly. In Austria there is some doubt as to whether there is an obligation to inform about the date of the transfer. In Finland there is the possibility of collective agreements deviating from the requirements of the Directive and the national legislation.

In Greece there is a different formulation concerning the subject matter between the articles that implement Directive Articles 7.1 and 7.2.

In Belgium one of the collective bargaining agreements regulating this matter has not been declared binding by Royal Decree, thus resulting in a situation where an employer with a trade union delegation, but no works council, has no legal requirement to inform and consult.

The option in Article 7.3 is taken up in Germany, but there are exceptions to the scope highlighted by the national author.

A number of Member States have not specifically transposed Article 7.4 into national law. These include the Czech Republic, Denmark, Estonia, France, the Netherlands, Slovakia, Finland and Sweden.

The Czech Republic has introduced a minimum number of 10 employees for information and consultation rights.

Article 7.6 has not been transposed in France, Italy and Malta.