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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,

**First phase consultation of social partners under Article 138(2) of the EC Treaty
concerning cross-border transfers of undertakings, businesses or parts of undertakings
or businesses**

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1. INTRODUCTION

The fact that the issue of cross-border transfers is not explicitly covered by Directive 2001/23/EC¹ (hereinafter ‘the Directive’), even though it applies to transfers of undertakings ‘situated within the territorial scope of the Treaty’, might create legal uncertainty for employers and employees.

This Communication seeks to launch the first phase in the consultation of social partners provided for in Article 138(2) of the Treaty establishing the European Community on the question of whether the Directive should be modified to clarify its application to cross-border transfers of undertakings. If, as provided for by Article 138(3) of the Treaty, the Commission then considers Community action advisable, it will consult the social partners on any proposal it may make.

It goes without saying that this Communication does not in any way prejudice any interpretation by the Court of Justice of the Directive or the Convention on the Law applicable to contractual obligations² (hereinafter the ‘Rome Convention’).

2. TERRITORIAL SCOPE OF THE DIRECTIVE

According to Article 1(2), the Directive applies ‘where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty’.

Under this provision, the only relevant criterion for determining the territorial applicability of the Directive is the situation of the economic entity on the date of transfer, irrespective of whether the transferor and transferee are governed by the law of the same Member State or not. Conversely, the Directive does not apply where the economic entity to be transferred is situated outside the EU, even if the transferor or transferee or both are governed by the law of a Member State.

¹ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or part of undertakings or businesses. OJ L 82 of 22.3.2001, p. 16.

² Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980. The consolidated version of the Convention as well as the First Protocol on the interpretation of the Convention by the Court of Justice and the Second Protocol conferring on the Court of Justice powers to interpret the Convention were published in OJ C27 of 26.1.98, p. 34.

As it stands, however, the territorial applicability criterion in Article 1(2) is of no assistance when it comes to determining the applicability of the legislation of the Member States concerned.

3. DEFINITION OF CROSS-BORDER TRANSFERS

Taking into account the territorial scope of the Directive, cross-border transfers of undertakings arise where the transferor and the transferee are governed by the laws of different Member States of the EU or the EEA (Norway, Iceland, Liechtenstein), or where one is governed by the law of a Member State and the other by the law of a third (non-EU/EEA) country.

The transferor and transferee are defined in the Directive as any natural or legal person who, by reason of a transfer, ceases to be (transferor) or becomes (transferee) ‘the employer in respect of the undertaking, business or part of the undertaking or business’. (Article 2(1)(a) and (b)).

4. ISSUES ARISING FROM CROSS-BORDER TRANSFERS

The Directive leaves to national law the definition of some of the notions it uses: for instance, the notion of employee (Article 2(1)(d)) or the definition of the contract of employment or employment relationship (Article 2(2)). Moreover, several provisions of the Directive give Member States options they may use: Article 3(1), second subparagraph; Article 3(3), second subparagraph; Article 3(4)(a); Article 4(1), second subparagraph; Article 5(1), (2) and (3); Article 6(1), third subparagraph; Article 7(3) and (5). Finally, the Directive allows Member States to apply or introduce rules that are more favourable to employees or to promote collective agreements more favourable to employees (Article 8).

The Court has also referred to Member States' legislation in order to rule on certain aspects relating to transfers of undertakings. For instance, national law determines the obligations of the transferor to be maintained after the transfer, whether arising under a contract of employment, an employment relationship or a collective agreement, as well as the possibility for the transferee to modify them³. Similarly, if employees decide of their own accord not to continue with the contract of employment or employment relationship with the transferee, it is for the Member States to determine what should happen to the contract of employment or employment relationship⁴.

In these circumstances, when the transferor and the transferee are governed by the laws of different Member States, problems may arise for which the Directive does not provide a solution and which have not until now been considered by the European Court of Justice.

³ Case 209/91 *Watson Rask*.

⁴ Case C-399/96 *Europieces*.

5. EXISTING INSTRUMENTS AT EU LEVEL

In order to determine the applicable law, the only Community-wide⁵ instrument capable of assisting in the solution of some of the problems raised is the Rome Convention. It is worth mentioning that the directive as originally proposed by the Commission in 1974⁶ stated that *'the labour laws of a Member State which are applicable to employment relationships prior to the merger or takeover shall also apply after the merger or takeover has taken place'*. This was not to apply where the place of work of an employee was transferred to another Member State or the application of another body of labour law was validly agreed. However, this proposal was dropped from later drafts, because it was believed that this issue would be dealt with in the draft Regulation on the conflict of laws in employment matters⁷. This proposal for a Regulation was abandoned and the Directive was therefore left without provisions on the conflict of laws.

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

The scope of an applicable law includes (Article 10): a) interpretation; b) performance; c) the consequences of breach of contract; d) the ways of extinguishing obligations, and prescription and limitation of actions; e) the consequences of nullity of the contract.

The central feature of the system established by the Rome Convention is the principle of freedom of choice, whereby the parties are free to choose the law applicable to their contract (Article 3).

However, as far as individual employment contracts are concerned, Article 6(1) establishes that the choice of law made by the parties must not 'have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under Article 6(2) in the absence of choice'.

Article 6(2) provides that, in the absence of choice, a contract of employment is governed:

(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or

(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;

⁵ As of 31 December 2006, the Convention on the accession of the ten new Member States to the Rome Convention (OJ C 169 of 8.7.2005, p. 1) had not yet been ratified by 9 Member States.

⁶ COM(74) 351 final/2, 21 June 1974, Article 10.

⁷ OJ 1972, C 49/26.

The rules set out in Article 6(2) are only presumptions: in the absence of choice, if it appears from the circumstances as a whole that the contract is more closely connected with another country, then the contract of employment is governed by the law of that country.

It should be mentioned that the Commission adopted on 15 December 2005 a proposal for a Regulation on the law applicable to contractual obligations⁸ which follows the same principles as the Rome Convention as far as individual contracts of employment are concerned.

The preservation of the status and function of employees' representatives and their protection (Article 6 of the Directive) as well as information and consultation rights (Article 7 of the Directive) are matters that fall outside the scope of the Rome Convention. They are therefore governed by the national conflict rules, which generally provide for the application of the law of the place where the business (the employee representation) is situated. This is also the solution adopted in Article 10 of Directive 2001/86/EC⁹.

6. CROSS-BORDER TRANSFERS OF UNDERTAKINGS WITHOUT A CHANGE IN THE PLACE OF WORK

This is the most straightforward case and can be treated as a purely domestic transfer: the national provisions implementing the Directive that applied before the transfer continue to apply after the transfer.

The law applicable to the employment contract does not change merely because the transferee is governed by a different national law. This law is determined in accordance with the Rome Convention (cf. point 5 above), with the proviso that, according to the Court of Justice, the protection conferred by the mandatory provisions of the Directive is a matter of public policy¹⁰. The Court has ruled very clearly that employees cannot waive the rights conferred upon them by the Directive and that these rights cannot be restricted, even with their consent and even if the disadvantages resulting from the waiver are offset by benefits with the result that, overall, they are not placed in a worse position¹¹. Therefore, any law chosen by the parties to the employment contract cannot result in depriving employees of the protection afforded by the law that would apply by virtue of Article 6(2) of the Rome Convention.

Similarly, the law applicable to the preservation of the status and function of employees' representatives and their protection as well as information and consultation rights does not change merely because the undertaking is transferred to a transferee governed by a different national law.

⁸ Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final.

⁹ Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294 of 10.11.2001, p. 22.

¹⁰ Case C-305/94 *Rotsart de Hertaing*, point 17; Case 324/86 *Daddy's Dance Hall*, point 14; Case C-4/01 *Serene Martin*, point 39; Case C-499/04 *Werhof*, point 26.

¹¹ Case 324/86 *Daddy's Dance Hall*.

7. CROSS-BORDER TRANSFERS OF UNDERTAKINGS WITH A CHANGE IN THE PLACE OF WORK

The starting point is that cross-border transfers do not entail in themselves a change in the place of work. The transfer of an undertaking does not change the content of the employment relationship. However, the place of work can change before or after the transfer or even simultaneously with the transfer, possibly leading to a change in the applicable national law. The treatment of such cases therefore needs to be differentiated. Similarly, a distinction must be made depending on whether the new place of work is within the EU (or the EEA) or not.

7.1. New place of work within the EU (or the EEA)

7.1.1. *Change of the place of work preceding or following the transfer of an undertaking*

Rights and obligations arising from the employment contract are transferred automatically on the date of transfer by virtue of the national measures implementing the Directive. The law applicable to the employment relationship is that at the time of the transfer.

If the employer decides to change the place of work, the national provisions governing such relocations, possibly outside the Member State in question, are applicable. The questions raised by a change before or after the transfer of a business must be answered by national law, practice and the content of the individual employment contract: does the contractual place of work include the place of business of the transferee?; may the place of work be changed under the terms of the contract?; and finally, does the relevant national law or practice allow a change of the contractually agreed place of work?

Accordingly, whether the change in the place of work takes place before or after the transfer does not appear to raise major problems as far as individual rights are concerned, since the Rome Convention can provide an answer.

Information and consultation obligations, which are outside the scope of the Rome Convention, should be met in advance of the transfer in accordance with the relevant national law, i.e. the law of the place where the business (the employee representation) is situated.

The continued observance by the transferee of the ‘terms and conditions agreed in any collective agreement on the same terms applicable to the transferor’ (Article 3(3) of the Directive) and the preservation of the status and function of employees’ representatives as well as their protection (Article 6 of the Directive) raise problems for which the Directive does not provide an answer when the place of work is changed. The Rome convention does not cover these cases either.

In any case, a change in the place of work also raises the problem of the cross-border mobility of workers and the rights such workers have, a problem that is much more general and outside the scope of the present communication.

7.1.2. *Change of the place of work simultaneously with the transfer of an undertaking*

This situation can arise when the transfer of an undertaking is conditional on the change of the place of work of the employees involved.

The first question in this case is the maintenance of the identity of the economic entity, which is one of the prerequisites for a transfer to take place within the meaning of the Directive. In other words, does the economic entity retain its identity despite changing its legal, economic and social environment? At least for relocations from one Member State to another, it can be assumed that, other things being equal, the advanced stage of the internal market would allow the transferred economic entity to maintain its identity.

While the relocation from one country to another is thus not in itself an obstacle to the transfer of an undertaking within the meaning of the Directive, the other questions raised in this case do not have an answer in either the Directive or the Rome Convention. In any case, as pointed out above, the Rome Convention is of assistance only as far as the individual employment contract is concerned, but not in matters relating to collective rights.

7.2. **New place of work outside the EU (or the EEA)**

The Directive's aim of ensuring that employees' rights are safeguarded in the event of a change of employer would be defeated if, as a result of a change in the place of work, the law applicable to the employment contract was the law of a country not bound by the Directive.

However, given that the differences in the legal, economic and social environment are likely to be substantial, it could be argued that a transfer outside the EU or the EEA would not maintain the identity of the economic entity¹². In this case, therefore, there would be no transfer within the meaning of the Directive.

This issue thus remains highly problematic.

8. **JURISDICTION**

Under Article 9 of the Directive, Member States are required to 'introduce into their national legal systems such measures as are necessary to enable all employees and representatives of employees who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claim by judicial process after possible recourse to other competent authorities'.

In all Member States, international jurisdiction must be determined with reference to Regulation No 44/2001 on jurisdiction and the recognition and enforcement of

¹² According to the Court of Justice (case C-175/1999, *Didier Mayeur v APIM*, point 53) 'it cannot be ruled out that, in certain circumstances, factors such as organisation, operation, financing, management and the applicable legal rules identify an economic entity in such a way that any alteration of those factors resulting from transfer of that entity would lead to a change in its identity'.

judgments in civil and commercial matters ('the Jurisdiction Regulation')¹³, which came into force on 1 March 2002. The Jurisdiction Regulation applies in civil and commercial matters whatever the nature of the court or tribunal, except in the cases mentioned in Article 1(2)¹⁴.

In principle, a defendant domiciled in a Member State may be sued only in the courts of that Member State (Article 2(1)). However, Sections 2 to 7 of the Regulation set out various instances where a defendant can be sued (additionally or exclusively) in another Member State (Article 3). If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each individual Member State is determined by the law of that Member State (Article 4(1)).

As far as individual contracts of employment are concerned, Article 18(1) of the Regulation specifies that jurisdiction is determined by Articles 18 and 19 though without prejudice to Article 4 and point 5 of Article 5¹⁵. Article 18(2) facilitates court action by employees against employers not domiciled in a Member State by providing that when these employers have a branch, agency or other establishment in one of the Member States, they are deemed to be domiciled in that Member State in disputes arising out of the operations of that branch, agency or establishment.

Article 19 provides that an employer domiciled in a Member State may be sued:

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

As for disputes concerning the preservation of the status and function of the employees' representatives and their protection, the applicability of the Jurisdiction Regulation depends, in the first instance, on whether they are to be considered civil or commercial matters, and there is no uniform approach in the Member States on this subject. If they are not considered to be civil or commercial matters, the decision on jurisdiction in the case of cross-border transfers is left to national laws, with the ensuing risk of conflicting solutions. The same goes for disputes concerning information and consultation.

¹³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12 of 16.1.2001, p. 1). An agreement has been concluded between the Community and Denmark concerning the extension to Denmark of the Regulation (OJ L 120 of 5.5.2006, p. 22)

¹⁴ The only relevant exception in this context seems to be insolvency proceedings.

¹⁵ A party domiciled in a Member State may be sued in another Member State in connection with a dispute arising out of the operations of a branch, agency or other establishment situated in that other Member State.

9. CONCLUSION

The applicability of Directive 2001/23/EC to cross-border transfers with a change in the place of work raises a few important questions that cannot be answered by either the Directive or the existing instruments of private international law. Although only a few cases have been dealt with by national courts, cases of cross-border transfers have been reported to the Commission. According to data from the European Restructuring Monitor of the European Foundation for the Improvement of Living and Working Conditions¹⁶, the number of outsourcing or delocalisation operations (restructuring operations where the activity is relocated or outsourced outside the country's borders) increased steadily from 10 at the beginning of data collection in 2001 to 109 in 2005. Although most of these transactions do not involve the transfer of an undertaking within the meaning of the Directive, it is clear that production factors can be expected to become increasingly mobile in an economic environment influenced by globalisation, the enlargement of the EU and the consolidation of the internal market. Moreover, cross-border activities will be facilitated by the Regulations on the statute for a European company¹⁷ and on the European cooperative company¹⁸ and by the Directive on cross-border mergers¹⁹.

In these circumstances, the Commission considers that it is worth exploring the possibility of amending the Directive in this field to ensure legal certainty. The content of the amendment could differ depending on whether individual or collective employment aspects are covered.

The social partners are requested to give their response to the following questions:

- a) Do the social partners agree with the above analysis on the issue of cross-border transfers?
- b) Is it necessary or advisable to amend Directive 2001/23/EC in order to deal with the issue of cross-border transfers with a change in the place of work?
- c) Is any other type of Community action in this field necessary or advisable?
- d) Should the collective aspects and the individual aspects of the employment relationship be treated separately?
- e) Should cross-border transfers with a change in the place of work outside the EEA be subject to specific treatment?

This communication constitutes the first phase of consultation provided for in Article 138(2) of the Treaty. If, as provided for by Article 138(3) of the Treaty, the

¹⁶ <http://www.emcc.eurofound.eu.int/erm/index.php?template=searchfactsheets>.

¹⁷ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ L 294, 10.11.2001, p. 1).

¹⁸ Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (OJ L 207, 18.8.2003, p. 1).

¹⁹ Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ L 310, 25.11.2005, p.1).

Commission then considers Community action advisable, it will consult the social partners on any proposal it may make.