Part I: Report on the study of the system of sanctions applied when Member States transpose the provisions of Directives 75/129 and 92/65 on collective redundancies

A. General

Directives 75/129 and 92/56, which deal with collective redundancy procedures, do not lay down rules on the legal consequences faced by those responsible for carrying them out — generally employers — if they disregard and/or fail to comply with them. The European Commission failed to win approval for its original intention of regulating sanctions by means of the Directive itself, and so the instrument went no further than the standard clause that is customary in European labour legislation whereby sanction mechanisms are left to the discretion of the Member States. Each Member State can therefore settle the issue on its own. In the domain of the equal-rights directives, however, the European Court of Justice has ruled that certain sanctions available under Member States' legislation are inadequate; sanctions must, for instance, be tangible for the employer, i.e. they must have a certain level of severity. It has repeatedly expressed this view, particularly with regard to Germany. Whether the sanction systems and sanctions described in the study meet these requirements is not, of course, for this report to decide. It does not therefore address that question.

With regard to the Member States' regulations on collective redundancies, it should firstly be pointed out that, given the different national regulatory systems, it is not always possible to approach the sanctions issue in the same way. This is because some Member States do not regulate collective redundancies as a substantive issue but only as an information problem relating to the employment market (e.g. Germany and Austria), whereas in most other Member States the prerequisites for collective redundancies and their possible material consequences are laid down in one and the same law. This is done in Germany and Austria by means of quite different statutory instruments. This must not be ignored when the sanctions are assessed. It should also be noted that collective redundancies are frequently, though not always, a result of company closures. We therefore need to keep these two aspects apart here.

The following Member States are not included in this report: Finland, Greece, Ireland and Sweden.

The sanctions themselves can have a wide variety of legal bases: employment law, general civil law, administrative law and criminal law. They can be found in relevant specific legislation, in separate laws on sanctions available under labour law, ordinary law, customary law and the rulings of the competent courts. Depending on the type of sanction, the national system of sanctions may derive from more than one of the above-mentioned regulatory frameworks.

B. The various systems of sanctions in the Member States of the European Union

I Belgium

1. Implementing act

Convention collective de travail no. 24 du 2 octobre 1975 concernant la procédure d'information et de consultation des représentants des travailleurs en matière de licenciements collectifs, rendue obligatoire par l'arrêté royal du 21 janvier 1976 (Collective agreement No 24 of 2 October 1975 concerning the procedure for informing and consulting employees on matters of collective redundancies, enacted by virtue of the royal decree of 21 January 1976), as subsequently amended, in particular by the *Convention collective no. 24 quater du 21 décembre 1993, rendue obligatoire par l'arrêté royal du 28 février 1994* (Collective agreement No 24c of 21 December 1993, enacted by virtue of the royal decree of 28 February 1994).

2. Legal sanctions

The parties to a collective agreement are not normally empowered to adopt provisions regulating infringements of the agreement. Collective agreements do not therefore lay down the sanctions to be applied when the obligations they contain are contravened.
Under Article 1(14) of the *Loi relative aux amendes administratives applicables en cas d'infraction à certaines lois sociales* of 30 June 1971 [Act governing administrative fines imposable in the event of infringement of certain social legislation], each case of failure to comply with a rule in a collective agreement is subject to an administrative fine (*amende administrative*) ranging from BFR 2 000 to 50 000. Criminal prosecution is also possible (Article 4). Under Article 11, this administrative fine is imposed separately for each employed worker, up to a total of BFR 800 000.

A criminal sanction (*sanction pénale*) can be imposed if the employer fails to comply with the deadlines in accordance with Article 21 of the Act of 14 February 1961.

3. Sanctions on the basis of case law

Infringement of the aforementioned regulations results neither in the dismissal *(licenciement)* being declared null and void (Antwerp Labour Court (*Arbeidshof Antwerpen*), 13 September 1995 - *Journal des tribunaux de travail 1987, 137*), nor in the worker being entitled to claim compensation (Brussels Labour Court (*Tribunal du travail Bruxelles*), 24 February 1986 - *Journal des tribunaux de travail 1987, 195*); cf. also *Arbeidshof, Brussel, 16.5.1997 - Chronique de droit social 1997, 325* in the *Renault Vilvoorde* case).

II Germany

1. Implementing act

Section 17 of the *Kündigungsschutzgesetz* [Dismissal Protection Act], as amended by Article 5 of the *Gesetz zur Anpassung arbeitsrechtlicher Bestimmungen an das EG-Recht* [Act on the Adaptation of Labour Law to EC Norms] of 27 July 1995.

2. Legal sanctions

Infringement of the employer's obligation to notify the Federal Labour Office (*Bundesanstalt für Arbeit*) is not punishable by a court sentence or administrative fine. The notification requirement as such is an obligation under public law which the employer has towards the Federal Labour Office. Nor is an employer's obligation to notify the works council subject to penal or administrative sanctions.

If collective redundancies also constitute a substantial alteration to the establishment within the meaning of the second sentence of section 111 of the *Betriebsverfassungsgesetz* [Works Constitution Act], the employer must first inform the works council about the proposed alteration, and a compensation programme (section 112(1) of the Act) must then be agreed between the employer and the works council. If they are unable to agree, the decision is entrusted to the works arbitration committee (section 112(4)). This is an in-house form of obligatory arbitration. Even if the duty to provide information is violated, the works council can demand that a compensation programme be drawn up.

3. Sanctions on the basis of ordinary law

The obligatory notification specified in section 17 of the *Kündigungsschutzgesetz* is motivated by considerations of labour-market policy, the aim being to give the Federal Labour Office time to prepare itself for expected large-scale redundancies and introduce measures to avoid redundancies or find new jobs. Individual protection is not provided for in sections 17 et seq. of the *Kündigungsschutzgesetz*. However, a dismissed worker can invoke infringement of an obligation to notify the Federal Labour Office. This results in the individual dismissal being declared null and void.

Violation of the obligation to notify the Federal Labour Office does not entitle the workers affected by a collective redundancy to claim compensation, since the general view is that sections 17 et seq. of the *Kündigungsschutzgesetz* do not constitute a protective law within the meaning of section 823(2) of the *Bürgerliches Gesetzbuch* [Civil Code], but are merely designed as a general instrument of labour-market policy.

III Denmark

1. Implementing act

Lov om varsling af kollective afskedigelser [Collective Redundancies Notification Act], in force since 1 January 1996.

2. Legal sanctions

An employer who fails to enter into negotiations with the workers or notify the *Arbejdsmarkedsrådet* as required in the event of collective redundancies, must pay damages or compensation (*godtgørelse*) to the workers affected. This amounts to up to 30 days' pay from the time of dismissal for each worker. The wages due during the individual period of notice are to be deducted from this amount.

The compensation is increased to up to eight weeks' pay from the time of dismissal when at least 50% of the workers in an establishment employing at least 100 workers are made redundant.

The employer must pay a fine if the obligations laid down in sections 5, 6 and 7 of the Act are infringed.

IV France

1. Implementing act

Article L 122-14-4, 321-1 et seq. of the *Code du travail* [Labour Code].

2. Legal sanctions

An employer who fails to fulfil his legal obligations to notify and consult the employment service and workers' representatives (e.g. *comité d'entreprise*) in the event of collective redundancies (*licenciement collectif*) is liable to both civil and criminal sanctions.

Compensation (*indemnité*) for the individual worker affected by the *licenciement collectif* applies as a civil sanction under Article L 122-14-4(3) of the *Code du travail* when the employer has not observed the procedure set out in Article L 321-2 of the Code for notifying the employment service and, if possible, consulting the *comité d'entreprise* or the staff representatives (*délégués du personnel*). According to the latest ruling by the *Cour de cassation* (Supreme Court) in the Samaritaine case, dismissals issued under these circumstances are also null and void.

Article 321-11(1) and (2) of the *Code du travail* provide for a penal sanction in the event of violation of the notification requirement under Article L 321-3 or the consultation requirement under Article L 321-7-1 of the Code; this sanction takes the form of a fine amounting to FF 25 000 for each employee served with a redundancy notice.

Furthermore, disregarding the obligation to consult the *comité d'entreprise* or *comité d'établissement* constitutes interference with their "*fonctionnement intérieur*" and hence an unlawful curtailment of rights (*délit d'entrave*) under Article L 483-1 of the *Code du travail*, which is punishable by a prison sentence or fine.

The "*affaire Renault*" has not produced anything new regarding sanctions. The crux of the matter is not the question of sanctions for improper conduct, but whether the European Works Council can legally compel the French parent company to furnish information even though the case formally relates to the Belgian subsidiary.

V Italy

1. Implementing act

Statute No 223 of 23 July 1991, *D. Lgs.* No 151/1997.

2. Legal sanctions

The Italian regulations on collective redundancies (*licenziamento collettivo*) do not themselves lay down any sanctions at all. These can only be derived from the relevant court rulings and general labour law regulations.

3. Sanctions on the basis of general regulations and case law

In the pertinent literature and case law, violation of the employer's obligation to inform and consult the company union delegations (*rappresentanze sindacali aziendali*) is seen by some as anti-union conduct (*comportamento antisindacale*) within the meaning of Article 28 of the *Statuto dei lavoratori* [Statute of Workers' Rights] of 1970 and hence as subject to the penalty laid down therein.

The latest ruling by the *Corte di cassazione* on collective redundancy procedures under Article 4 of Statute No 223/1991, which lays down the employer's obligations to inform and consult the regional employment office and the *rappresentanze sindicali aziendali*, states that dismissals based on Article 4 are null and void if the statutory procedure has not been followed (Judgment No 6759 of 26 July 1996). However, failure to send the list of dismissed workers to the regional employment office does not render the dismissal null and void; it merely entitles the worker to claim compensation for non-enjoyment of associated benefits ("*per il mancato godimento dei benefici connessi"* - Judgment No 10187 of 20 November 1996).

VI Luxembourg

1. Implementing act

Loi du 23 juillet 1993 portant diverses mesures en faveur de l'emploi: Licenciement collectif [Act of 23 July 1993 establishing various measures to promote employment: collective redundancies]

2. Legal sanctions

The law as expressed in Articles 7(8) and 13 of the Act of 23 July 1993 merely provides for the individual dismissal to be declared null and void and for further civil sanctions in favour of the individual worker, e.g. by granting compensation for wrongful dismissal (*dommages-intérêts pour rupture abusive du contrat*) in the event of failure to comply with the procedure.

Current Luxembourg law does not provide for any other civil or criminal sanctions.

VII Netherlands

1. Implementing act

Wet van 24 maart 1976 houdende regelen inzake melding van collectief ontslag [Act of 24 March 1976 governing the notification of collective redundancies], as amended on version of 7 July 1993.

2. Legal sanctions

Article 7 lays down the action to be taken by the authorities if the notification requirement is not fulfilled. If the workers' representatives have not been informed, for instance, then the authorities will not process the employer's application further (Article 7(1)).
The law does not lay down civil or criminal sanctions. I am not aware of any case law on sanctions.

VIII Austria

1. Implementing act

Section 45a of the *Arbeitsmarktförderungsgesetz (AMFG)* [Labour Market Promotion Act].

2. Legal sanctions

Under section 45a(5) of the AMFG, redundancy notices issued to employees as part of collective redundancies within the meaning of section 45a(1) of the AMFG are null and void if they take place before the employment service has been notified or without the authorisation of the regional employment office.

The AMFG does not lay down any further sanctions.

IX Portugal

The only piece of Portuguese legislation to date on collective redundancies is the statute of 22 February 1989 regulating protection against dismissal. Harmonisation with EU directives has not yet taken place but is in the pipeline. The government submitted a legislative bill to that end in the latter part of 1997. It has not yet been passed.

X Spain

1. Implementing act

Articles 51, 93 and 95(7) of the *Art. 51, 93, 95 No 7 Estatuto de los trabajadores (ET)* [Statute of Workers' Rights].

2. Legal sanctions

Article 51(1) of the ET stipulates that certain dismissals not complying with the procedural requirements laid down in Article 51 are null and void.
Moreover, sanctions relating to the employer's information and consultation obligations fall under criminal law (Articles 93 and 95(7) of the ET).
Unlike the laws of other EU Member States, Spanish legislation requires the authorisation of the employment authority for collective redundancies. If this has not been obtained, then they are null and void.

XI United Kingdom

1. Implementing act

Sections 188-198 of the Trade Unions and Labour Relations (Consolidation) Act 1992, as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995.

2. Legal sanctions

The consequences for employers disregarding the obligation to consult trade union representatives which is laid down in Section 188 of the 1992 Act are regulated in sections 189, 190 and 192 of the Act.
The key element here is the affected worker's right of complaint (Article 189 of the 1992 Act), which entitles him in particular to claim unpaid wages.
The sanctions for employers who ignore their obligation to notify the Secretary of State for Employment (Section 193 of the 1992 Act), which is an offence, are laid down in Section 194 of the Act.

XII Sweden

1. Implementing act

Directives 75/129 and 92/56 were transposed in Sweden by means of amendments to the following prior legislation: the *Lag om vissa anställningsfrämjande atgärder* [Employment Promotion Act] of 1974 (sections 1-6, 17 and 25), the *Lag om medberstämmende i arbetslivet* [Codetermination Act] of 1976 (sections 11, 13(3) and 15(2)) and section 29 of the *Lag om anställningsskydd* [Employment Protection Act] of 1982.

2. Legal sanctions

The right of employers to restrict their operations by means of collective redundancies is not challenged, but under section 17(1) of the 1974 Act they are required to pay a levy to the government if they restrict their operations without due notice.

Moreover, if employers fail to negotiate in accordance with section 11 and 13(2) of the Codetermination Act, section 54 of the same Act requires them to pay compensation. The assessment of whether and to what extent a person has sustained a loss must also take account of that person's interest in the employer's compliance with the statutory provisions and of other factors which are not of purely economic significance (section 55).

XIII Greece

1. Implementing act

Directive 75/129 was transposed in Greece by means of Statute No 1387/1983.

2. Legal sanctions

Under Article 6(1) of the Statute, unlawful collective redundancies are null and void.

XIV Finland

1. Implementing act

Directives 75/129 and 92/56 were transposed in Finland by the Employment Contracts Act and the Cooperation within Enterprises Act (sections 2(2) and 6(36)).

2. Legal sanctions

Where an employer wilfully or negligently decides on collective redundancies without considering the provisions of Cooperation within Enterprises Act and an employee is consequently dismissed, the latter may claim compensation of up to 20 months' pay. Payment of compensation by the employer, however, does not absolve him from failure to observe the negotiating rules; where such failure constitutes an infringement of the law, the employee may file an additional claim for actual damage.[1]

[1] Soviranta, *Labour Law and Industrial Relations in Finland*. 2nd edit., 1997, No 324.

XV Ireland

1. Implementing act

Directive 75/129 was transposed in Ireland by the Employment Protection Act 1977 and Statutory Instrument No 140/1977.

2. Legal sanctions

The Employment Protection Act 1977 prescribes sanctions for quite a number of breaches of obligation. Under section 11, an employer is liable to a fine not exceeding £500 for failing to engage in the consultations prescribed in section 9 or for failing to provide the required information relating to collective redundancies. Similarly, an employer who fails to notify the Ministry of Enterprise and Employment as laid down by section 13 commits a punishable offence. Under section 14(2), an employer may be fined up to £3000 for implementing collective redundancies before the end of the 30-day statutory period of notice. Any employer infringing the registration requirement enshrined in section 18(1) or (2) is liable to a fine of up to £500.

Part II: Report on the study of the system of sanctions applied when Member States transpose the provisions of Directives 75/129 on transfers of undertakings, businesses or parts of businesses

C. General

Directive 77/187 essentially establishes five obligations and legal consequences arising from a transfer of ownership. These are:

(1) When a company changes hands, the new owner assumes responsibility for the employees' terms of employment as they stand at the time of transfer of the business or part thereof (Article 3(1)).
(2) The terms and conditions laid down in the relevant collective agreement must be observed for at least one year after the change of ownership (Article 3(2)).
(3) The transfer of the undertaking, business or part of a business does not in itself constitute grounds for dismissal by the transferor or transferee (Article 4(1)).
(4) The transferor and the transferee are required to provide the representatives of their respective employees with certain details of the proposed transfer and to consult the employees' representatives on planned measures affecting the employees (Article 6(1) and (2)).
(5) The status and function of the employees' representatives must not be affected by the transfer of the entire business (Article 5(1)).

The sanctions to which transferors or transferees of the undertaking, business or part of a business are liable for non-fulfilment of these obligations is governed by the national law of each Member State. Directive 77/187 contains no sanctions of its own.

The following section provides an outline of the legal consequences established by legislation and case law for failure to fulfil the obligations of a transferor or transferee in the various legal systems of the Member States. These will obviously display very wide disparities in severity and scope.

D. The various systems of sanctions in the Member States of the European Union

I Belgium

1. Implementing act

By virtue of *Convention collective de travail no. 32* of 28 February 1978, Directive 77/187 was transposed into Belgian law. This was later superseded by *Convention collective de travail no 32 bis* of 7 June 1985, which was declared to be generally binding and is still in force. This collective agreement, however, only governs the passage of the employment relationship from the old to the new owner (Article 7) and the prohibition of dismissal on grounds of a change of company ownership (Article 9). The continuing validity of collective agreements concluded before the transfer derives from Article 20 of the Act of 5 December 1968. The obligation to inform and consult the competent employees' representative body (*conseil d'entreprise* or *ondernemingsraad*) is founded on Article 11 of *Convention collective du travail no. 9* of 12 September 1972.

The stipulation that changes of business ownership in general must not affect the existence of the current employees' representative body is enshrined in Article 21(10) of the Act of 20 December 1948 establishing works councils, Article 1a(10) of the Act of 10 June 1952 establishing health and safety committees and Article 20a of *Convention collective de travail no 5* establishing workplace branches of trade unions.

2. Legal sanctions

The collective agreements and laws referred to above, it must be said, do not provide for any specific sanctions for breaches of the aforementioned obligations, such as irregular dismissal. As far as infringement of the ban on dismissals is concerned, opinions differ as to the possible legal consequences.[2] Some assume that dismissals on grounds of transfer of ownership are not subject to any prohibition at all, while others advocate the application of Article 63 of the *Loi sur les contrats de travail* [Employment Contracts Act] of 3 July 1978 and the general rules on contractual liability.[3] If Article 63 of the 1978 Act is to be applied, as seems to be the prevailing view, this means that redundancies on transfer of ownership are tantamount to wrongful dismissal. Accordingly, the employer would have to pay compensation amounting to six months' pay.

The relevant collective agreement does not provide for any sanctions in the event of an employer defaulting on his obligation to inform and consult the *conseil d'entreprise*.[4]

---

[2] Cf. Van Hoogenbemt, *Bedrijfsoverdracht naar Europees en Belgisch sociaalrecht*, 1983, pp. 101 et seq.; Bertrand, *Transfert des contrats de travail et cession d'entreprise*, 1988, p. 134; Bertrand, *Jurisprudence récarte en matière de transferts d'entreprises*, in *Journal des tribunaux du travail 1990*, 33 (36).

[3] Cf. Bertrand, *Journal des tribunaux du travail 1990*, 36.

[4] Van Hoogenbemt, op. cit., p. 139.

II Denmark

1. Implementing act

In Denmark, Directive 77/187 was transposed into national law by virtue of the *Lov om Lønmodtageres retsstilling ved virksomshedsoverdragelse* [Employees' Legal Status Transfer Act] of 31 March 1979.

2. Legal sanctions

Under section 7(1) of the Act of 31 March 1979, failure to observe the information, negotiation and consultation requirements laid down in sections 5 and 6 entails payment of a fine.[5] The Act itself does not refer to any specific amount of fine.

The legal consequences of dismissal in breach of the Act are not dealt with in the Act itself; section 3(1) merely prohibits dismissal based solely on a transfer of business ownership. Section 4(3) of a collective agreement concluded between the Danish employers' association and the trade union federation recognises the right of employees to lump-sum compensation of up to 52 weeks' pay, while section 2b of the Salaried Employees Act entitles redundant white-collar workers to up to six months' pay, depending on length of service.[6]

[5] Cf. Andersen, *Lov om Lønmodtageres retsstilling ved virksomhedsoverdragelse*, 3rd edit., 1996, p. 230.

[6] Cf. Andersen, op. cit., pp. 198-199.

III Germany

1. Implementing act

Directive 77/187 was transposed into German law by virtue of section 613a(1), (2) and (4) of the *Bürgerliches Gesetzbuch* [Civil Code]. The first sentence of paragraph 1 deals with the transfer of the employment relationship to the transferee; the second sentence of paragraph 1 provides for the continuing validity of terms and conditions prescribed by a national collective agreement or a works agreement; the prohibition of dismissal on grounds of a change of ownership is contained in paragraph 4.

The employer's duty to inform and consult the *Betriebsrat* (works council) about a change of ownership, in so far as it constitutes an alteration to the establishment, is prescribed by the first sentence of section 111 of the *Betriebsverfassungsgesetz* [Works Constitution Act], while the continued existence of the Works Council after a change of business ownership derives from the jurisprudence of the *Bundesarbeitsgericht* (Federal Labour Court).

2. Legal sanctions

The first sentence of section 613a(4) of the Civil Code lays down that dismissal by an employer in breach of the dismissal prohibition is null and void; the employment relationship therefore continues and is not dissolved by wrongful dismissal. This means that the employer remains bound to go on paying the employee in question.

The employer's obligation to inform and consult the works council is guaranteed in the framework of criminal law by section 121(1) of the Works Constitution Act. It applies to businesses with more than 20 employees who are entitled to vote in works council elections and to alterations to a business which may be considerably detrimental to the workforce or significant parts of the workforce. Any employer who breaches this obligation may be liable to a fine of up to DM 20 000.

The works council is also entitled to demand a compensation programme, in which arrangements must be made to indemnify employees for economic disadvantages resulting from the planned alteration of the establishment or to alleviate any distress it may cause. If no agreement is reached between the employer and the works council, the works arbitration committee must decide, and its decision is binding (Works Constitution Act, section 112(4)).

IV France

1. Implementing act

Directive 77/187 was transposed into French law by virtue of the following articles of the *Code du travail* [Labour Code]: Articles L 122-12(2) (employment contracts), 132-8(7) (collective agreements), 412-16(4) (shop stewards), 423-16(3) and (4) (workforce delegates) and 431-1(3) (works councils). The prohibition of dismissal on grounds of a transfer of business ownership derives from case law.[7]

2. Legal sanctions

Article L 122(2) of the Labour Code makes no provision for specific sanctions. This ensues from the fact that the paragraph in question does not actually prohibit dismissal; the relevant precept derives from the jurisprudence of the *Cour de cassation* (Supreme Court), according to which an employer may even terminate an employment contract in the absence of genuine and serious grounds ("*cause réelle et sérieuse*"), as in the case of a transfer of ownership. The dismissed employee is merely entitled to compensation for dismissal without genuine and serious cause ("*indemnité pour licenciement sans cause réelle et sérieuse*")[8] and may also be entitled to compensation in lieu of notice ("*indemnité de préavis*").

The failure of an employer to inform and consult the *comité d'entreprise* (works council) in accordance with Article L 432-1(3) of the Labour Code does not carry a specific sanction, but it may amount to an unlawful curtailment of rights (*délit d'entrave*) in that it constitutes interference with the functioning (*entrave au fonctionnement*) of a representative body within the meaning of Article L 483-1(1) of the Code, in which case it is punishable by imprisonment of two months to one year or by a fine of between FF 2000 and FF 20 000 or by both; if the offence is repeated, the maximum term of imprisonment is increased to two years and the maximum fine to FF 40 000 (Article L 483-1(2) of the Code).[9]

Non-fulfilment of the information and consultation requirement does not have any further legal consequences at the present time under statute or case law.

---

[7] *Lyon-Caen/Péllisler/Supiet* in *Droit du travail*, 6th edit., 1996, No 335.

[8] Cf. Couturier, *Les relations individuelles de travail*, 3rd edit., 1996, No 235 (p. 418).

[9] See, for instance, Cohen, *Le droit des comités d'entreprises*, 3rd edit., 1997, p. 471.

V United Kingdom

1. Implementing act

By enacting the Transfer of Undertakings (Protection of Employment) Regulations 1981, the United Kingdom transposed Directive 77/187 into national law.

2. Legal sanctions

Regulation 8(1) contains a provision on the consequences of dismissal by an employer on grounds of a transfer of business ownership. Such an action is treated as unfair dismissal and accordingly puts the employer under obligation to the dismissed employee. Although the dismissal as such remains valid, the employer is bound to pay the statutory compensation for unfair dismissal. This obligation depends, however, on a complaint having been lodged with the Industrial Tribunal (Employment Rights Act 1996, section 111).

The dismissed employee is entitled to compensation under sections 118 to 125 unless his reinstatement (section 114) or reengagement (section 115) is ordered. The amount of compensation depends, of course, on circumstances. There is a ceiling on compensatory payments (section 124), the actual amount of the award being determined by the Industrial Tribunal (section 117). It comprises a “basic award” (sections 119-122 of the Act), to which a “compensatory award” (section 123) is added (section 118(1)). According to section 123(1) of the Act, the compensatory award “shall be such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal”.

The consequences of non-fulfilment of the employer’s obligation to inform and consult his staff (Regulation 10) are dealt with in detail by Regulation 11 and are closely aligned with the rules governing collective redundancies. In the first instance it is up to the competent representatives of the workforce to take the employer to the industrial tribunal for non-fulfilment of the relevant obligation and to apply for recognition of the obligation and for compensation. If the employer does not pay, a dismissed employee may apply to the tribunal for a payment order.

If the application is well founded, the Industrial Tribunal must deliver a declaratory judgment (Regulation 11(4)) and order payment of compensation to the employees of the defendant employer. The amount of compensation depends on what the Industrial Tribunal considers to be just and equitable.

If the employer does not pay the awarded amount, the employees themselves have to file a complaint with the Industrial Tribunal (Regulation 11(5)). The complaint leads to a payment order being served by the Industrial Tribunal.

VI Ireland

1. Implementing act

In Ireland, Directive 77/187 was transposed by virtue of the European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations 1980 (Statutory Instrument No 306 of 1980).[10]

2. Legal sanctions

The first sentence of Regulation 5(1) lays down that dismissal on grounds of transfer of business ownership is inadmissible. For employees covered by the Unfair Dismissal Act 1977, this means that they are deemed to have suffered unfair dismissal. The dismissed employee is therefore entitled to reinstatement, reengagement or compensation under the terms of the said Act.

Employees to whom the Unfair Dismissal Act 1977 does not apply may be entitled to damages for breach of statutory duty pursuant to Regulation 5(1).[11]

Besides the sanctions under civil law, there is also Regulation 9, which states that anyone who infringes a provision of the Regulations is guilty of a criminal offence and is liable to a fine of up to £500 (Regulation 9(1)(a)). By virtue of that regulation, an employer who fails in his duty to inform and consult the representatives of the company or works staff, as prescribed in Regulation 7(1) and (2), is also liable to criminal prosecution. It is up to the Minister of Enterprise and Employment to prosecute (Regulation 9(2)), and proceedings must be instituted no later than 12 months after the alleged offence.

[10] On the transposition of Directive 77/187, see Kerr, *Implementation of Directive 77/187 into Irish Law and Case Law of the Court of Justice*, in *Acquired Rights of Employees*, 1988, pp. 1 et seq.

[11] Cf. Forde, *Employment Law*, 1992, p. 230.

VII Italy

1. Implementing act

Directive 77/187 was implemented in Italy by virtue of Article 47 of Statute No 428 of 29 December 1990; the said Article amended the first three paragraphs of Article 2112 of the *Codice civile*.

2. Legal sanctions

Under Article 47(4) of Statute No 428 of 29 December 1990, dismissal on the sole grounds of a transfer of business ownership is not admissible. Such a dismissal, however, does not have any specific legal consequences, which is why the rules governing protection against dismissal come into play at this point. Nevertheless, it should be noted that the European Court of Justice has ruled that the legal consequence of an infringement of the mandatory provision contained in Article 4(1) of Directive 77/187 is the invalidation of the dismissal.[12] This aspect of the judgment, however, has not yet been heeded.

In the rules governing the general Italian right of termination, three groups of employees are distinguishable: (1) employees with no protection against dismissal, (2) employees with relative protection against dismissal (based on tort), and (3) employees with full protection against dismissal. This means that dismissal of an employee in the first group is automatically admissible, the employer's only obligation being to make a severance payment (*trattamento di fine rapporto*); with regard to the second group, the employer could choose between compensation and reinstatement; only with the third group would the employment relationship continue. It is plain to see that this legal position is inconsistent with the aforementioned ruling by the European Court of Justice.

A breach of the employer's duty to inform the workforce as prescribed in the first sentence of Article 47(1), unlike his failure to consult the workforce in accordance with the second sentence of Article 47(2), is not explicitly punishable as "*condotta antisindicale*" (anti-union conduct) under Article 28 of Statute No 300 of 20 May 1970. Nevertheless, in company with the majority of Italian legal commentators, we must assume that this sanction also covers the information requirement.[13] This means that, once the court has established anti-union behaviour (*comportamento antisindicale*), it orders an end to the unlawful conduct and the elimination of its effects.[14] This may include sentencing the employer to pay damages to the employee.

---

[12] ECR 1988, p. 3057, point 18 (Bork case), and ECR 1998, p. I-1061, point 41 (Case No C-319/94, Dethier v Dassy and Sovam).

[13] Cf. Nicolini, *Manuale di diritto del lavoro*, 2nd edit., 1996, p. 705.

[14] For details, see Nicolini, op. cit., pp. 706 et seq.

VIII Luxembourg

1. Implementation act

Directive 77/187 has been transposed into Luxembourg law; Article 36 of the *Loi sur le contrat de travail* [Employment Contracts Act] of 24 May 1989 is now the relevant legal base. Article 36(2) prohibits dismissal on grounds of a transfer of ownership, Article 36(3) governs the continuing validity of the terms and conditions set out in collective agreements, and Article 36(4) lays down the obligation to inform the contracting unions if the enterprise is bound by a collective agreement. The transferee assumes responsibility for informing the staff representatives about the transfer of the business. If the transferor or transferee are considering measures that would affect their employees, both are obliged to consult and negotiate on these measures with the representatives of the workforce and the relevant trade unions.

2. Legal sanctions

Luxembourg law does not lay down any particular sanctions at all for non-compliance with the dismissal prohibition or for failure to fulfil the obligation to inform, consult and negotiate with the staff representatives.

Failure to observe the ban on dismissals contained in Article 36(2) of the Act of 24 May 1989 may be covered by the general rules on wrongful dismissal (*licenciement abusif*), but neither legal literature[15] nor case law[16] offer an opinion on the matter.

[15] Cf. Schintgen, *Droit du travail*, 1996, pp. 110 et seq.

[16] Cf. Feyereisen, *Droit du travail au Grand Duché de Luxembourg*, 1995, pp. 121-125.

IX Netherlands

1. Implementing act

In the Netherlands, the provisions transposing Directive 77/187 are contained in Article 662-66 of the *Burgerlijk Wetboek* (Code of Civil Law) and in Article 25(1)(a) of the *Wet op de ondernemingsraad* (Works Councils Act).

2. Legal sanctions

The statute law of the Netherlands makes no provision for sanctions in relation to the prohibition of dismissal on grounds of a change of ownership contained in Article 4(1) of the Directive. However, the *Hoge Raad* (High Court), in its decision of 29 December 1995,[17] followed the Bork judgment of the European Court of Justice by declaring dismissal on grounds of a transfer of business ownership to be null and void. The High Court's interpretation, which is consistent with the Directive, has introduced into Netherlands law the prohibition of dismissal on grounds of a business transfer.

Non-fulfilment of the consultation requirement laid down in Article 25(1)(a) of the Works Councils Act is not specifically penalised by the Act itself. If, however, the works council has expressed an opinion which the employer has disregarded, Article 26(1) of the Act authorises it to challenge the employer's decision before the *Ondernemingskamer* (Commercial Chamber). The Chamber may, for example, enjoin the employer to refrain from implementing his proposed decision (Article 26(5)(b)). The employer may not violate such an injunction (Article 26(6)).

[17] RvdW 1996, No 22/JAR 1996, 29

X Austria

1. Implementing act

The Austrian provisions implementing Directive 77/187 are contained in section 3(1) of the *Arbeitsvertragsrechts-Anpassungsgesetz (AVRAG)* [Employment Contracts Law Adjustment Act] and in the *Arbeitsverfassungsgesetz (ArbVG)* [Constitution of Workplaces Act].

2. Legal sanctions

Section 3 of the AVRAG does not contain any explicit provisions prohibiting dismissal and therefore applies no sanctions for wrongful dismissal. The *Oberster Gerichtshof* (Supreme Court of Justice) based its decision of 29 February 1996[18] on the view that a dismissal ban is essential if the aim of Directive 77/187 is to be achieved. It was not enough, the Court ruled, merely to award damages; only the invalidation principle afforded adequate protection.
The ArbVG does not deal explicitly with non-fulfilment of an employer's duty to inform and consult the works council.

XI Portugal

1. Implementing act

An explicit implementation of Directive 77/187 has yet to occur in Portugal. Portugal does, however, have legal rules that address some of the issues covered by Directive 77/187. These are contained in Article 37 of the *lei do contrato de trabalero* [Employment Contracts Act]. There is no prohibition of dismissal as contained in Article 4(1) of the Directive, nor is there any obligation to inform and consult the representatives of the workforce. Under Article 9 of *Decreto-lei* [Order-in-Council] No 519-C 1/79 of 29 December 1979, when a business changes hands, the terms and conditions of the collective agreement that was valid on the date of transfer must be observed by the transferee for at least 12 months from that date.

2. Legal sanctions

Provision is made for one specific sanction, namely a fine, by Article 44 of *Decreto-lei* No 519-C 1/97 in the event of a breach of the provisions of a collective agreement; the fine ranges from 500 to 3000 escudos for each unfairly treated employee.

No other statutes or case law prescribe sanctions for offences against Article 37 of the Employment Contracts Act.

---

[18] *Das Recht der Arbeit 1996*, p. 313

XII Sweden

1. Implementation act

Sweden transposed Directive 77/187 in 1995 by inserting appropriate new provisions into the *Lag om anställningsskydd* [Employment Protection Act] (sections 6b and 7(3)) and into the *Lag om medbestämmande I arbetslivet* [Codetermination Act] (section 28).

2. Legal sanctions

Although the first sentence of section 7(3) of the Employment Protection Act contains a dismissal ban, there is no provision laying down the legal consequences of a dismissal in breach of section 7(3). In 1995, however, the Swedish Labour Court decided that such a dismissal is unfair.[19] This means that the sanctions for unfair dismissal available under the Act may be applied. At the employee's request, the court can, for example, declare the dismissal invalid, thereby reinstating the employment relationship (section 34); acceptance of the dismissal entitles the employee to claim damages under section 38. The employee thus has the right to choose between the two sanctions. Section 13(2) expressly states that the negotiating obligation laid down in section 11 of the Codetermination Act extends to the transfer of a business. It includes the duty to provide appropriate information (sections 18 to 22). In the event of non-fulfilment of the negotiating requirement, the applicable provision is section 54, which lays down that an employer violating the Codetermination Act is bound to make good the loss that is thereby sustained; under section 55, the assessment of whether and to what extent a person has sustained a loss must also take account of that person's interest in the employer's compliance with the statutory provisions and of other factors which are not of purely economic significance.

[19] Decisions of the Swedish Labour Court 1995, No 60; cf. Sigeman, *Arbetsrätten — En översikt av svensk rätt med europarätt*, 1997, p. 134.

XIII Spain

1. Implementing act

No specific instrument has yet been adopted in Spain for the implementation of Directive 77/187. Article 44 of the *Estatuto de los trabajadores* [Statute of Workers' Rights], however, regulates some questions relating to business transfers (*la sucesión de empresa*), especially the question of the assumption by the transferee of responsibility for the employment contract (first sentence of Article 44(1)) and the duty of the transferor — or alternatively the transferee — to inform the statutory representatives of the employees.

2. Legal sanctions

Since there is no prohibition of dismissal on grounds of a business transfer, there is also no sanction for such a dismissal.

As far as the information requirement under Article 64(1)(5) of the *Estatuto de los trabajadores* is concerned, Article 95(7) of the *Estatuto* categorises non-fulfilment of that requirement as a serious offence. The applicable sanction for such an offence is governed by Article 3(3) of the *Ley abril 1988 No 8/1988*; depending on the degree of gravity, a fine ranging from a minimum of 50 001 pesetas to a maximum of 500 000 pesetas may be imposed.

XIV Finland

1. Implementing act

Directive 77/187 was transposed into Finnish law by means of amendments to the Employment Contracts Act of 30 April 1970 (section 7(2) and (3) and section 40) and to the Cooperation within Enterprises Act of 22 September 1978 (section 11).

2. Legal sanctions

Section 40 of the Employment Contracts Act deals with the dismissal of employees on grounds of a change of business ownership, but it does not explicitly prohibit the employer from dismissing employees on those grounds and therefore prescribes no sanctions for such action.

The obligation to inform staff representatives, contained in section 11(3) of the Cooperation within Enterprises Act, is enforceable by virtue of section 16 of the Act, which defines non-fulfilment as a breach of the employer's duty to cooperate and empowers the courts to impose a fine; all other details are governed by the Penal Code.

XV Greece

1. Implementing act

Directive 77/187 was transposed into Greek law by virtue of Statute No 1338/83 and its implementing regulation 1/6-12-88 (A 269). Article 4(1) prohibits dismissal on grounds of a business transfer, while Article 6(1) and (2) lays down the employer's obligation to inform and consult the staff representatives.

2. Legal sanctions

The Regulation does not provide for any specific sanction for violation of the dismissal ban.
Article 7(1) of the Regulation prescribes payment of a fine of 50 000 to 500 000 drachmas by any transferor, transferee or staff representative body found to have violated Article 6, including its information and consultation clauses.