

Amended proposal for a Council Directive amending Directive 77/187/EEC 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 ⁽¹⁾

(97/C 124/07)

(Text with EEA relevance)

COM(97) 60 final — 94/0203(CNS)

(Submitted by the Commission pursuant to Article 189a (2) of the EC Treaty on 24 February 1997)

⁽¹⁾ OJ No C 274, 1. 10. 1994.

ORIGINAL PROPOSAL

Proposal for a Council Directive 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

AMENDED PROPOSAL

Proposal for a Council Directive amending Directive 77/187/EEC 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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Having regard to the opinion of the Committee of the Regions,

Whereas Council Directive 77/187/EEC ⁽¹⁾ concerns 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; whereas, in the interests of clarity, rather than amend the existing Directive, it would be preferable to replace it with a new text;

Deleted

⁽¹⁾ OJ Nr. L 61, 5. 3. 1977.

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Whereas the Community Charter of the Fundamental Social Rights of Workers adopted by the Heads of State or Government of eleven Member States at the Strasbourg European Council on 9 December 1989 states, at point 7, first paragraph, first sentence and second paragraph, point 17, first paragraph and point 18 (ii) that:

7. The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community.

The improvement must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundancies and those regarding bankruptcies.

17. Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States.

18. Such information, consultation and participation must be implemented in due time, particularly in the following cases:

- in connection with restructuring operations in undertakings or in cases of mergers having an impact on the employment of workers;'

Whereas Directive 77/187/EEC of 14 February 1977 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 promotes the harmonization of the relevant national laws ensuring the safeguarding of the rights of transferred employees and requiring transferees and transferees to inform and consult employees' representatives in good time;

Whereas the purpose of this proposal is to amend Directive 77/187/EEC of 14 February 1977 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 European Court of Justice, the adopted revision of the Directive on collective redundancies and the legislation already in force in most Member States;

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Whereas considerations of legal security and transparency require that the legal concept of transfer be clarified in the light of the case law of the European Court of Justice; whereas such a concept must cover any transfer of an undertaking, business or part of a business to another employer effected by means of contract, deed, administrative measure, judicial decision or operation of law, including mergers and divisions;

Whereas requirements of legal security and transparency also require that it be expressly provided that the Directive should apply to private or public undertakings carrying out economic activities, whether or not they operate for gain;

Whereas the principles of legal security demand that a clear distinction be made between transfers of undertakings, businesses or parts of businesses and the transfer of only an activity of an undertaking; whereas the transfer of an activity which does not also involve the transfer of an economic entity whose identity is affected by such transfer, an economic entity being understood to consist of several parts operating autonomously and pursuing a specific objective, even if a partial one, is not covered by the Directive;

Deleted

Whereas considerations of flexibility justify the exclusion of sea-going vessels from the scope of Section III of the Directive, but not from its other provisions;

Unchanged

Whereas a minimal harmonization of the concept of 'employee' is necessary in order that there may be a uniform application of the Directive in the different Member States;

Whereas differences still remain between the Member States' legislation concerning the joint liability of the transferor and the transferee;

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Whereas, with a view to ensuring the survival of insolvent undertakings, Member States should be expressly allowed not to apply Articles 3 and 4 of the Directive to transfers effected in the framework of liquidation proceedings, and certain derogations from the Directive's general provisions should be permitted in the case of transfers effected in the context of insolvency pre-liquidation proceedings; whereas such provisions constitute a measure of deregulation in comparison with the existing legal situation;

Whereas the circumstances in which the function and status of employee representatives are to be preserved should be clarified;

Whereas, in order to ensure equal treatment of similar situations, it is necessary to ensure that the information and consultation requirements laid down in Directive 77/187/EEC are complied with irrespective of whether the decision leading to the transfer is taken by the employer or by an undertaking controlling the employer;

Whereas the Member States' faculty not to apply the information and consultation requirements to certain undertaking on grounds of workforce size thresholds must be clarified;

Whereas it is necessary to clarify the circumstances in which employees must be informed where there are no employee representatives;

Whereas considerations of efficacy require that the Member States take appropriate measures in the event of failure to comply with this Directive;

Whereas the present Directive shall be without prejudice to the Member States' obligations concerning the deadline for transposal of Directive 77/187/EEC indicated in Annex I;

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Whereas, in order to ensure equal treatment of similar situations, it is necessary to ensure that the information and consultation requirements laid down in Directive 77/187/EEC are complied with irrespective of whether the decision leading to the transfer is taken by the employer or by another natural or legal person;

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Unchanged

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(new)

Whereas, when the Member States apply the provisions contained in this Directive, they may under no circumstances introduce discrimination on the basis of race, sex, age, handicap, sexual orientation, colour, religion or nationality,

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HAS ADOPTED THIS DIRECTIVE:

SECTION I

Scope and definitions

Article 1

1. This Directive shall apply to the transfer of an undertaking, business or part of a business to another employer effected by contract or by some other disposition or operation of law, judicial decision or administrative measure.

The transfer of an activity which is accompanied by the transfer of an economic entity which retains its identity shall be deemed to be a transfer within the meaning of the Directive. The transfer of only an activity of an undertaking, business or part of a business, whether or not it was previously carried out directly, does not in itself constitute a transfer of an undertaking within the meaning of the Directive.

2. This Directive shall apply where and insofar as the undertaking, business or part of the business to be transferred is situated within the territorial scope of the Treaty.

3. This Directive shall apply to public or private undertakings engaged in economic activities whether or not they are operating for gain.

4. Member States need not apply Section III of this Directive to sea-going vessels.

5. The Member States need not apply Articles 3 (1), (2) and (3) and 4 (1) and (2) of this Directive in cases where the undertaking, business or part of a business being transferred is the subject of bankruptcy proceedings or any other analogous proceedings instituted with a view to the liquidation of the assets of a natural or legal person and under the supervision of a competent public authority.

Article 2

1. For the purposes of this Directive:

(a) 'transferor' means 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 business;

SECTION I

Scope and definitions

Article 1

Unchanged

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Unchanged

Article 2

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- (b) 'transferee' means 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 business;
- (c) 'representatives of the employees' means the representatives of the employees provided for by the laws or practice of the Member States.

2. This Directive is 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; or
- (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, aimed at encouraging improvements in the safety and health of workers with a fixed-duration employment relationship or a temporary employment relationship;
- (c) they are temporary employment relationships within the meaning of Article 1 (2) of Directive 91/383/EEC.

SECTION II

Safeguarding of employees' rights

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 within the meaning of Article 1 (1) shall, by reason of such transfer, be transferred to the transferee.

Member States shall provide that, after the date of transfer within the meaning of Article 1 (1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or employment relationship. However, in respect of obligations that fall due after the date of transfer, the transferor shall be liable only to the extent corresponding to the portion of the relevant period which expired on the date of the transfer. Member States may limit the transferor's joint liability to those obligations which arose before the date of the transfer and fall due within the first year following that date.

SECTION II

Safeguarding of employees' rights

Article 3

Unchanged

Member States shall provide that, after the date of transfer within the meaning of Article 1 (1), the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose from a contract of employment or an employment relationship and fell due before the date of transfer.

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2. Following the transfer within the meaning of Article 1 (1), 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.

3. Paragraphs 1 and 2 shall not cover 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.

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 the meaning of Article 1 (1) in respect of rights conferring on them immediate or prospective entitlement to old age benefits, including survivors' benefits under supplementary schemes referred to in the first subparagraph.

4. Notwithstanding paragraphs 1, 2 and 3 of this Article, the laws of the Member States may provide that the transferor's debts — arising from a contract of employment or an employment relationship — due before the transfer or before the opening of insolvency proceedings, shall not be transferred to the transferee in cases of transfers effected in the context of insolvency proceedings other than the proceedings mentioned in Article 1 (5), such as administration or judicial arrangements, compositions, suspension of payments, or other analogous non-liquidation proceedings, provided that such proceedings:

- (a) are conducted under the supervision of a competent public authority, which may be an insolvency practitioner authorized by a competent public authority, and;
- (b) give rise, according to the legislation of the Member State in question, to the protection laid down by its national law, ensuring a level of protection at least equivalent to that provided for by Council Directive 80/987/EEC 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.

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Unchanged

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Article 4

1. The transfer of an undertaking, business or part of a 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 organizational 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 within the meaning of Article 1 (1) 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.

3. Notwithstanding Article 3 (1), (2) and (3), the laws of the Member States may allow the employer or the person or persons exercising the employer's powers, on the one hand, and the employees' representatives, on the other hand, to change the terms and conditions of employment by an agreement concluded as a means of ensuring the survival of an undertaking, business or part of a business transferred in the context of the proceedings referred to in Article 3 (4). Such an agreement may also determine whether and to what extent dismissals may take place for economic, technical or organizational reasons entailing changes in the workforce.

4. Without prejudice to paragraph 2 of this Article, where the agreement referred to in paragraph 3 is concluded, it shall be presumed, unless proved to the contrary, that the alteration of the terms and conditions of employment is made as a means of ensuring the survival of the transferred undertaking, business or part of a business and that the dismissals concerned are effected for economic, technical and organizational reasons, entailing changes in the workforce.

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Article 4

5. Member States shall provide for the necessary measures to ban the use of fraudulent insolvency proceedings intended to deprive employees of the rights laid down in this Directive.

Unchanged

3. Notwithstanding Article 3 (1) and (2), the laws of the Member States may allow the employer or the person or persons exercising the employer's powers, on the one hand, and the employees' representatives, on the other hand, in so far as they enjoy sufficient independence to carry out the functions assigned to them, to change the terms and conditions of employment by an agreement concluded as a means of ensuring the survival of an undertaking, business or part of a business transferred in the context of the proceedings referred to in Article 3 (4). Such an agreement may also determine whether and to what extent dismissals may take place for economic, technical or organizational reasons entailing changes in the workforce.

4. Without prejudice to paragraph 2 of this Article, where the agreement referred to in paragraph 3 is concluded, it shall be presumed, unless proved to the contrary, that the alteration of the terms and conditions of employment referred to in the agreement is made as a means of ensuring the survival of the transferred undertaking, business or part of a business and that the dismissals referred to in the agreement are effected for economic, technical and organizational reasons, entailing changes in the workforce.

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5. The Member States may confer on the competent judicial authorities the power to alter or terminate contracts of employment or employment relationships existing on the date of a transfer effected in the framework of insolvency proceedings referred to in Article 3 (4) to ensure the survival of the undertaking, business or part of a business.

Article 5

1. If the business preserves its autonomy, the status and function of the representatives or of the representation of the employees affected by a transfer within the meaning of Article 1 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 employees' 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.

If the business does not preserve its autonomy and provided that the conditions necessary for the constitution of the representation of the employees are fulfilled, 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 prior to the reconstitution or reappointment of the representation of employees.

2. If the term of office of the representatives of the employees affected by a transfer within the meaning of Article 1 (1) 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.

SECTION III

Information and consultation*Article 6*

1. The transferor and the transferee shall be required to inform the representatives of employees affected by a transfer within the meaning of Article 1 (1) of the following:

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Deleted

Article 5

Unchanged

SECTION III

Information and consultation*Article 6*

1. When the transferor and transferee envisage a transfer within the meaning of Article 1 (1), they shall be required to inform the representatives of their respective employees affected by the transfer of the following:

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- 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.

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. If 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 leading the transfer is taken by the employer or by an undertaking controlling the employer. In considering alleged breaches of the information and consultation requirements laid down by this Directive, the argument that such breach occurred because the information has not been provided by the undertaking which took the decision leading to the transfer shall not be accepted as an excuse.

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Unchanged

When 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.

Unchanged

4. The obligations laid down in this Article shall apply irrespective of whether the decision resulting in the transfer is taken by a natural person or a legal person other than the employer. In considering alleged breaches of the information and consultation requirements laid down by this Directive, the argument that such breach occurred because the information has not been provided by the natural or legal person who/which took the decision leading to the transfer shall not be accepted as an excuse.

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5. The Member States may limit the obligations laid down in paragraphs 1, 2 and 3 to undertakings or businesses which normally employ 50 or more employees or which, if employing less than 50 employees, fulfil the workforce size thresholds 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, the employees concerned must be informed in advance when a transfer within the meaning of Article 1 (1) is about to take place.

SECTION IV

Final provisions

Article 7

This Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees.

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5. The 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.

Unchanged

Article 6A

For the purposes of the information and consultation requirements laid down in this Directive, the Member States shall provide for employee representatives who enjoy the necessary independence to carry out the functions assigned to them.

SECTION IV

Final provisions

Article 7

Unchanged

Article 7A

Member States shall provide for sanctions in the event of failure to comply with the national provisions adopted under this Directive and shall take the necessary measures to ensure that these sanctions are enforced. These sanctions shall be effective, proportionate and dissuasive.

Article 7B

When the Member States apply the provisions contained in this Directive, they may under no circumstances introduce discrimination on the basis of race, sex, age, handicap, sexual orientation, colour, religion or nationality.

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Article 8

Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities.

This Article shall also apply to employees' representatives in respect of their rights under Articles 4 (3) (4) and (5), 5 and 6.

Article 9

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within 18 months at the latest from the date of its adoption or shall ensure, that, at that date at the latest, the employers' and employees' representatives have introduced the required provisions by means of agreement, the Member States being obliged to take the necessary steps enabling them at all times to guarantee the results imposed by this Directive.

2. When Member States adopt the measures referred to in paragraph 1, such measures shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

Member States shall inform the Commission immediately of the measures they take to implement this Directive.

Article 10

Directive 77/187/EEC is repealed with effect from the date of transposal of the present Directive, without prejudice to the Member States' obligations with regard to the deadline for transposal of Directive 77/187/EEC, indicated in Annex I.

Any references made to the repealed Directive are understood as being made to the present Directive within the meaning of Article 9 (1), and are to be interpreted on the basis of the Comparative Table in Annex II.

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Article 8

Unchanged

This Article shall also apply to employees' representatives in respect of their rights under Article 4 (3) and (4), 5 and 6.

Article 9

Unchanged

Article 10

Deleted

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*Article 11**Article 11*

This Directive is addressed to the Member States.

Unchanged

This Directive shall enter into force 20 days after its publication in the *Official Journal of the European Communities*.
