COMMISSION OF THE EUROPEAN COMMUNITIES

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94/0203 (CNS)

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

(presented by the Commission)

EXPLANATORY MEMORANDUM

Introduction

1. Council 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[1] (hereinafter the "Directive" or the "transfers Directive") adopted on the basis, in particular, of Article 100 of the Treaty, was intended, according to its recitals, to provide for "the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded". For that purpose, the Directive provides that the transferor's rights and obligations arising from the contract of employment or from an employment relationship shall by reason of a transfer be transferred to the transferee. It also provides for protection of the employees concerned against dismissal by the transferor or the transferee, but does not stand in the way of"dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce". Moreover, Article 6 of the Directive requires the transferor and the transferee to inform and consult the representatives of the employees affected by the transfer. The main purpose of the Directive is therefore to ensure thatrestructuring of undertakings within the Common Market does not adversely affect the employees in the undertaking concerned.

2. On a legislative level, the effectiveness of the Directive, in terms of the social protection it guarantees, cannot be denied. The Directive has proved to be an invaluable instrument for protecting employees in cases of corporate reorganization, ensuring peaceful and consensual economic and technological restructuring and laying down minimum standards for promoting fair competition with respect to such changes. It could, however, be argued that the Directive's failure to provide for greaterflexibility in the event of transfers of insolvent businesses or of undertakings facing major economic difficulties, as well as its failure to cover explicitly the transnational dimension of corporate restructuring, may have jeopardized or at least prejudiced the very objectives it was intended to achieve.

   Any appraisal of the shortcomings and loopholes of the transfer Directive must take into account the internal market, the development of "emergencylaw" to deal with the rescue of undertakings in economic difficulties and the case law of the European Court of Justice, as well as the Commission's proposed revision of the collective redundancies Directive to which the transfer Directive is closely related.

The impact of the internal market

3. The internal market is, according to Article 8a of the EC Treaty, "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty". The dismantling of internal frontiers is already resulting in major corporate reorganizations within the Community, involving a significant increase in mergers, takeovers, transfers and joint ventures, and leading to a growing concentration of company ownership. The total

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[1] OJ No L 61/27 of 5.3.1977

number of acquisitions (majority holdingsor mergers) made by the top 1000 European industrial enterprises isgrowing constantly. A recent Commission report [2] shows that the number of such operations has doubled every three years during the 1980s, rising from 208 in 1984-85 to 492 in 1988-89.

4. Moreover, merger operations within the Community are increasingly transnational. The same Commission report notes that: "National-typeoperations (between two enterprises belonging to the same Member State) largely dominated between 1983 and 1987. Almost two-thirds of the number of acquisitions recorded involved this type of operation. Since 1987, more rapid growth has been noted in the number of acquisitions involving Community enterprises belonging to two different Member States. In 1988--1989, such operations represented 40% of the total number of acquisitions effected. International-level operations involving two enterprises - the one Community, the other non-Community - accounted for approximately 15 % of the total number of operations recorded. This figure is more or less stable for the period under review."

The detailed figures are given in the following table:
Mergers and acquisitions by nationality of the firms involved

Year	National	EC	International
1983-84	101 (65.2)	29 (18.7)	25 (16.1)
1984-85	146 (70.2)	44 (21.2)	18 (8.7)
1985-86	145 (63.7)	52 (23.0)	30 (13.3)
1986-87	211 (69.6)	75 (24.8)	17 (5.6)
1987-88	214 (55.9)	111 (29.0)	58 (17.8)
1988-89	233 (47.4)	197 (40.0)	62 (12.6)
1989-90	241 (38.7)	257 (41.3)	124 (20.0)

NB:Figures in brackets show the percentage of the total numberof operations surveyed.
Source: European Commission

[2] XXth Report on Competition Policy (Commission of the European Communities)

The completion of the single market is therefore accompanied by a widespread trend towards major corporate reorganizations. This is pursuing objectives specific to a market economy, that is, the establishment, on the most appropriate sites, of businesses capable of implementing the large-scale economic operations which a large market is likely to require.

5. In order to facilitate this process, the Community Institutions have-relying on provisions of primary law- adopted specific legislation on mergers and concentrations in the fields of competition and company law. In the field of competition, on 21 December 1989 the Council adopted Regulation (EEC) No 4064/89 on the control of concentrations between undertakings[3] setting up a system for the prior control of Community--scale concentrations. Although the 31st recital of the Regulation expressly states that it does not detract from "the collective rights of employees as recognized in the undertakings concerned", it provides no machinery for ensuring these rights.

6. In the field of company law, the Third Council Directive (78/855/EEC) of 9 October 1978 concerning mergers of public limited liability companies[4] expressly affirms in Article 12 that the protection of employees provided for in the transfers Directive applies to mergers. The Sixth Council Directive (82/891/EEC) concerning the division of public limited liability companies [5] also refers (Article 11) to the application of the transfers Directive to division operations. Council Regulation (EEC) No 2137/85 on European Economic Interest Groupings(EEIG)[6] provides European economic operators, with a view to the establishment of the internal market, with a flexible, light frameworkof association affording them a common autonomous structure for pursuing one or more cross-border projects while retaining legal and economic freedom for their own activities. The Regulation contains no rules onthe individual or collective rights of employees.

Reference should also be made to the proposal for a Tenth Council Directive on cross-border mergers of public limited companies[7] which also refers to the transfers Directive, to the proposed European Company Regulation and complementing worker involvment Directive [8] and to the proposal for a Thirteenth Council Directive on company law concerning take-over and other general bids [9].

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3 OJ No L 395, 30 December 1989

4 OJ No L 295, 20 October 1978

5 OJ No L 378, 31 December 1982

6 OJ No L 199, 31 July 1985

7 OJ No C 23, 25 January 1985

8 OJ No C 138/8 of 29 May 1991

9 COM (88) 823 Final

7. In the social field reference should be made to two Directives closely linked to the transfers Directives. Council Directive 75/129/EEC on collective redundancies [10] and Council Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer [11]. The three employment Directives all aim to ensure appropriate protection for the employee in situations associated with company restructuring and long-term economic difficulties (the interaction between the three Directives is shown in Annex 2). The proposed amendments to the transfer Directive should take account of the protection under the other employment Directives. As far as information and consultation rights are concerned, account should be taken of the revised proposal for a Council Directive on the establishment of European Works Councils[12], although its the scope and material content differs considerably from the transfer Directive.

8. Despite the variety of Community legal instruments concerning directly or indirectly transfers and concentrations of undertakings having a transnational dimension, there is as yet no Community law dealing specifically with the social consequences of transnational transfers and mergers. The information and consultation provisions need therefore to be revised to cover all cases of transnational transfer and merger and to guarantee adherence to the information and consultation procedures where the decision leading to the transfer or merger is taken by a decision--making centre located in a State other than the Member State in which the employees concerned are employed.

The rescue of undertakings in economic difficulties and the new tendencies in bankruptcy law and employment law

9. The aim of bankruptcy law, including pre-liquidation or liquidation proceedings, is to pay creditors through the realization of the insolvent undertaking's assets. The survival of the undertaking or the total or partial liquidation of the business concerned are envisaged as a means to achieve that objective. The employees of the insolvent undertaking are in most Member States, with the exception of France and, to a certain extent, Germany, not involved in insolvency proceedings.

   On the contrary, employment law lays down, as far as insolvent undertakings are concerned, a system of protective rules aimed at preserving the employees' rights, guaranteeing their credits and ensuring their rights to be informed and consulted. The creditors' interests,other than the employees themselves, are not taken into account.

10. These two branches of law, bankruptcy law and employment law, are dissociated in the twelve Member States. They follow different but parallel paths, which do not often meet. However, the impact of the economic changes of the 70s and 80s has fostered a process of convergence between both branches of law, the objective being to rescue undertakings in economic difficulties and provide for their survival and for the maintenance of employment levels. The rights of both creditors and employees

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10 OJ No L 48/29 of 22.03.1975

11 OJ No L 283/23, 28/10/80

12 OJ N C 336/11 of 31.12.1991

have consequently been reshaped as a means of guaranteeing the survival of ailing undertakings.

11. This legislative tendency within the framework of insolvency proceedings, can be observed in France [13] (procédure de redressement), Portugal [14] (procedimento de recuperao), the United Kingdom [15] (judicialadministration), Germany [16], Spain [17], the Netherlands [18] and Belgium [19].

Within the context of parallel proceedings other than judicial insolvency proceedings, some Member States (Italy, Greece, Belgium, Portugal andSpain) have set up rescue plans providing a legal framework for undertakings in need of restructuring and reorganization. Such plans may include recourse to public aid or certain derogations from the protection of employees provided for under labour law (Italy).

12. The transfers Directive contains no provision for a specific scheme of protection for employees transferred in the context of insolvency proceedings or serious economic difficulties. The European Court of Justice [20] could not close this loophole by introducing a comprehensive set of rules to be applied to insolvency situations, although it declared that transfers effected in insolvency liquidation proceedings were excluded from the Directive. The revision of the transfer Directive should address the question if and to what extent certain solutions in force in some Member States - in particular, the need not to transfer pre-existing debts in insolvency situations, the possibility of derogating from the Directive via collective bargaining and the need to reinforce information and consultation procedures in insolvency situations - should be incorporated into the Directive.

The case law of the European Court of Justice: interpretation and clarification of the transfers Directive

13. The transfers Directive has engendered considerable litigation before the European Court of Justice. In all judgments (19) which have been handed down, most of them (15) were in the context of references for preliminary rulings (See Annex 1).

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13 Acts of 25 January 1985 and 1 March 1984

14 Decree Law of 2 July 1986

15 Insolvency Act 1986 and Cork Commission

16 1985 Report of the Commission on the reform of bankruptcy law and Actof 20 February 1985 on the social plan in the context of bankruptcyproceedings.

17 Bill on the reform of bankruptcy proceedings (1986)

18 Commission Mijnssen

19 1983 Bill on undertakings in severe economic difficulties

20 see footnote 23

The Court has clarified the notion of transfer, determined that nocontractual link is needed between transferor and transferee for the Directive to be applicable, excluded liquidation proceedings but not suspension of payments proceedings from the scope of the Directive, clarified the meaning of the term "employee" and declared that employees and their representatives cannot contract out of the rights accorded to them by the Directive as implemented by national law.

The revision of the collective redundancies Directive

14. In November 1991, the Commission adopted a proposal for a Council Directive amending Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies [21].The revision of the collective redundancies Directive, as the Commission's Action Programme relating to the implementation of the Community Charter of Fundamental Social Rights of Workers made clear, was considered necessary in the light of several years' application of this Directive, socio-economic changes, and the establishment of the Single European Market. In particular, the Action Programme spelt out the need to give the Directive a transnational dimension so as to ensure that situations in which employees are affected by redundancy decisions taken by a head office or controlling undertaking located outside the Member State where they are employed are properly covered. The amendments to the collective redundancies Directive proposed by the Commission reflect these concerns.
This proposal was adopted by the Council the 24 June 1992 (Directive 92/SC/EEC).

15. Although the Commission's Action Programme relating to the implementation of the Charter does not expressly mention the revision of the transfer Directive, the Explanatory Memorandum to the proposal for a Council Directive amending Directive75/129/EEC on collective redundancies states that "the Commission is aware that in a number of important respects the reasons for revising the collective redundancies Directive apply equally to the existing transfers Directive". These reasons concern the proposed amendments to Directive 75/129/EEC relating to :

a) the need to ensure the enforcement of its provisions when the relevant decision is being taken by an undertaking other than the employer;

b) the need to provide for appropriate remedies in the event of failure to comply with the Directive;

c) the implementation of the Directive's provisions by collective agreement;

d) The application of the Directive in the event of bankruptcies.

Proposed changes to the Directive

16. In the light of the aforementioned considerations and having regard to the implementation of the Directive by Member States, to the case law of the European Court of Justice and to cross-border corporate restructuring brought about by the

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21 OJ No L 48/29 Of 22.02.1975

completion of the Internal Market, the Commission is proposing a series of amendments to Section I (Scope and definitions), Section II (Safeguarding of employees' rights), Section III (Information and consultation) and Section IV (Final provisions) of the Directive.

a) **Scope and definitions (Article 1 (1)**

(I) **Clarification of the term "transfer" so as to include any transfer whether by way of contract or by some other disposition or by operation of law, judicial decision or administrative measure**

17. The language versions of the Directive differ considerably as to the definition of the term "transfer" laid down in Article 1(1). The English version refers to "legal transfer or merger" and is wide enough to cover transfers other than those resulting from contract The French version, however, refers to "cession conventionnelle" (contractual transfer), though the recitals merely refer to "cessions". The Dutch, German, Italian, Spanish, Portuguese and Greek versions appear to be to the same effect ("overdracht krachtens overeenkomst, vertragliche Ubertragung, cessione contrattuale, cesion contractual, cessão contratual and συμβατκή εκχώρήσή"). The Danish version ("overdragelse") apparently falls between the two, since it includes transfers by way of gift as well as by contract, but not by court order or inheritance, though it does include the purchase from the bankrupt estate ("konkursbo") following an insolvency. The central question here is whether the Directive should be limited to contractual transfers, that is a transfer by a willing transferee to a willing transferor (by sale, lease or other contract). The Commission believes that a wide interpretation of the term "transfer" is fully consistent with the purpose of the Directive and no significance should be attached to the nature of the transaction, be it a contract, a deed taking effect upon death, an administrative measure or a judicial decision as a result of which one businessman succeeds another. The present wording of the Directive has been purposely construed by the European Court of Justice so as to include any transfer of an undertaking, business or parts of a business from one employer to another [22].

Accordingly, the Commission proposes that all language versions of the Directive be revised so as to include any transfer whether by way of contract or by some other disposition or by operation of law, judicial decision or administrative measure, including mergers and divisions.

18. Taking account of certain transfers, the Directive states that it shall not apply in cases where only an activity of an undertaking is transferred but there is no transfer of an economic entity which retains its own identity. It must be emphasised that in the absence of explicit Community provisions on this specific point, the Court of Justice has continued its dynamic interpretation activities in a field which is becoming increasingly complex.

The proposed Directive distinguishes between two fundamentally different situations: the transfer of an activity as such, and the transfer of an economic entity which retains

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[22] Daddy's Dance Hall, Case 324/86, [1988] ECR 739 ; Berg, Busschers,Bessalsen, Case 144-145/87 - 87 [1989] 3 CMLR 817, etc

its identity, without however lowering the level of protection currently enjoyed by workers.

It has to be stressed, then, that the Directive will still apply where the transfer of an activity is accompanied by the transfer of an economic entity which retains its identity.

The reference to economic entities which retain their identity occurs consistently in the Court of Justice's case law (e.g. *Spijkers*, Case 24/85, and the *Raymond Stichting* judgment in C-29/91), the decisive criterion for establishing whether there is a transfer of an economic entity being whether the business in question retains its identity, taken to mean a self-contained set of elements pursuing a specified economic objective, even where the activity is an ancillary one. The mere transfer of the business's assets is not sufficient in itself. The business concerned must have been disposed of as a going concern, as would be indicated *inter alia* by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities. In order to determine whether those conditions are met, the Court held that it is necessary to consider "all the facts characterising the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings or movable property, are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended" (Case 24/85, *Spijkers*, Cases 101/87 *Bork International*).

Consequently, the proposed new paragraph introduces certain clarifying and other elements to help in interpreting and implementing the Directive, more particularly where only one business activity is transferred.

Clearly, any transfer of activity which is not covered by this proposal for a Directive must be in conformity with the relevant national legislation, including any national provisions arising from international conventions which have been ratified by the Member States concerned, e.g. ILO conventions.

(II) <u>Applying the Directive in insolvency situations</u> (Article 3, paragraph 4 and article 4, paragraph 3, 4 and 5)

19. The tranfers Directive does not expressly exclude from its scope transfers effected in the framework of insolvency proceedings. The European Court of Justice has been required on several occasions to close this significant loophole [23]. The Court has held that the Directive does not apply to the case of transfers "taking place in the context of insolvency proceedings instituted with a view to the liquidation of the assets of the transfer or under the supervision of the competent judicial authority" (Abels, Ground 23). However, the Court made it clear in Urso (Grounds 25 and 26) that the nature of that supervision was not conclusive, the only determining criterion being the objective

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[23] Abels, Case 135/83 (1985) ECR 469. Industriebond FNV, Case 179/83(1985) ECR 511. Botzen, Case 189/83 (1985) ECR 519. Mikkelsen, Case105/84 (1985) ECR 2639. D'Urso, Case 362/89 of 25 July 1991, I-4105es.

(liquidation or survival) to be attained by the insolvency proceedings.

20. he Court has also held that the Directive does apply where the business insolvency proceedings such as suspension of payments as opposed to full liquidation proceedings, since the purpose of the former (in casu, "surseance van betaling") is to allow the company to survive while giving temporary protection against creditors.

21. Member States are at liberty, the Court also found, to apply the principles of the Directive at their own initiative to all insolvency situations. That has been done by Spain, France, Germany, Denmark and theUnited Kingdom [24].

22. The underlying problem here is the conflict between the acquired rights of employees and those of other creditors upon insolvency. If the employees of the insolvent transferor undertaking and all their rights and entitlements are transferred to the new solvent transferee, the effect is to treat those employees more favourably than other creditors of the insolvent undertaking. The creditors will assert that the transferee will pay less for the transferred undertaking, as a result of having to take over all liabilities for the new employees, and hence the pool assets against which the creditors of the insolvent undertaking can claim will be reduced. The transfer of that responsibility might also dissuade a potential transferee from acquiring an undertaking on conditions acceptable to the creditors thereof, who, in such a case, would prefer to sell the undertaking separately. In that case, as the Court has held[25] a serious risk of general deterioration in working and living conditions, contrary to the social objectives of the Treaty, cannot be ruled out ...". The Court also pointed to the existence of Council Directive 80/187/EEC on insolvency protection, which is deemed to cover only liquidation, as further evidence that such proceedings were intended to be an exception to the application of the transfers Directive.

23. In the light of these considerations and taking into account the case law of the ECJ, the need to conciliate the survival of insolvent undertaking, the acquired rights of creditors and the rights of employees, notably the right to work, the Commission is proposing a new approach for the transfers as going concerns of undertakings, businesses and parts of businesses in the context of pre-liquidation and liquidation proceedings.

24. Member States are free to apply Articles 3(1, 2 and 3) and 4(1 and 2) of the Directive in cases where the undertaking, business or part of a business being transferred is the subject of bankruptcy proceedings, proceedings related to the winding-up of insolvency companies and analogous liquidation proceedings instituted with a view to the liquidation of the assets under the supervision of a competent authority.

25. Conversely, the Directive's provisions will apply in cases of transfers of undertakings, businesses or parts of businesses in the context of non--liquidation proceedings, such as compositions, judicial arrangements, administrative receiverships, suspension of

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[24] Lyon-Caen, Grard, "L'information et la consultation desreprsentants des salaris dans les procdures de faillites" - 1988.

[25] Abels, Case 135/83 (1985), ECR 479

payments or analogous proceedings instituted with a view to ensuring that the undertaking is able to continue operating in the future.

26. Consequently, where an undertaking, a business or part of a business is transferred as a going concern in the framework of non-liquidation proceedings, the contracts of employment or the employment relationships existing on the date of the transfer shall be transferred to the transferee. This provision will not, however, prejudice the right of the transferor or the transferee to alter the terms or conditions of employment or to make dismissals for economic, technical or organizational reasons entailing changes in the workforce (Article 4(1),final sentence).

However, Member States need not apply Article3(1) with respect to the arrears of payments, damages or any other liabilities of the transfer or arising from the contract of employment or employment relationship before the date of the transfer itself in the case of transfers effected in the context of non-liquidation proceedings provided that the transferor's liabilities or part thereof which are not transferred to the transferee are subject to the protection laid down by Council Directive 80/987/EEC on the protection of employees in the event of their employers'insolvency or to equivalent protection, and that the proceedings in question are supervised by a competent authority. The Commission is firmly convinced that such limitation to the transferee's responsibility will ensure the transfer of the undertaking as a going concern and guarantee the maintenance of employment levels. This was also the view expressed in the Opinion of Advocate General Sir Gordon Glynn delivered on 8 November 1984 on Abels. The Advocate General stated "if the Directive had made a clear provision that pre-existing debts were not the liability of the transferee, it would go some, perhaps a substantial, way to suggest that the risk of a potential purchaser being deterred from buying would be reduced".

27. The proposal will also allow Member States to empower the competent judicial authorities to alter or to terminate, in the framework of non--liquidation proceedings, contracts of employment or employment relationships to the extent justified to ensure the survival of the undertaking. The proposed amendment is in line with the law and legislative proposals existing in some Member States. The Commission believes that the intervention of a judicial authority and the prescribed justification of the measure - the survival of the undertaking - will avoid possible abuses and arbitrary decisions.

28. Furthermore, in order to guarantee the survival of the undertaking or business concerned, the proposal provides the necessary flexibility by allowing Member States to permit the employees' representatives and the employer or, as the case may be, the administrative receiver, administrator, "syndic" liquidator or similar persons, to alter by agreement the terms and conditions of employment and to determine whether and to what extent dismissals may take place for economic, technical or organisational reasons entailing changes in the workforce in cases of transfers effected in the context of insolvency proceedings. Where such an agreement is concluded, it shall be presumed, unless the contrary is proved, that the alteration of the contracts of employment take place in order to guarantee the survival of the undertaking and that the incumbent dismissals are effected by economic, technical or organisational reasons. Such a provision is without prejudice to the rights conferred upon employers under Article 4(2) of the Directive.

29. There is no reason whatsoever for excluding the rights to information and consultation (Article6) and the protection of employees' representatives (Article5) in the context of insolvency. Indeed, such rights may be extremely valuable in such circumstances, giving the employees'representatives the opportunity to make proposals for avoiding insolvency to the transferor and for redeployment to the transferee. This already occurs in France, the Federal Republic of Germany, the United Kingdom, Spain and Denmark with respect to transfers in the framework of liquidation proceedings, and in all Member States as regards transfers effected in pre-liquidation proceedings.

(III) Applying the Directive to all public or private undertakings carrying on activities of an economic or commercial nature, whether or not they are intended to operate for gain (Article 1 (3))

30. The Directive itself does not include any explicit definition of the terms "undertaking, business or part of a business". However, in a series of cases, the Court has stated that in order to determine the existence of a transfer it is necessary to establish whether what has been sold is an economic entity which is still inexistence. In its judgment of 8 June 1994 in Case C-382/92 (not yet published), the Court stated explicitly that undertakings engaged in non-profit making activities fall within the scope of Directive.

Consequently, to remove any shadow of doubt, it is recommended that a provision be included in the Directive stating that it shall apply to all undertakings, private or public, whether or not they are operated forgain.

(IV) Applying the Directive to sea-going vessels (Article 1 (4))

31. The survey of the laws of the Member States implementing the Directive indicates that France, Germany, Italy, Spain, Portugal and Ireland have applied the principles of the Directive to sea-going vessels. The Commission considers that the provisions of the directive relating to the safeguarding of employees' rights (sectionII) are in no way incompatible with the special nature of the contract of employment or employment relationships of crews of sea-going vessels. Their exclusion from the protection provided by the Directive is not justifiable. The fact that the Directive is intended to safeguard employees' rights, not to increase them, and that the information and consultation procedure is not imposed upon sea-going vessels, provides the appropriate flexibility required for the maritime sector. It should be noted that Council Directive80/987/EEC relating to the protection of employees in the event of the insolvency of their employer [26] also applies to the crews of sea-going vessels unless they benefit from "the existence of other forms of guarantee offering the employee protection equivalent to that resulting from this Directive" (Article 1(2)). Only the members of fishing vessel crews, if and to the extent that they are remunerated by a share in the profits, have been expressly excluded by Greece, Ireland and the United Kingdom on the ground of the special nature of the relationship vis--vis the objective (protection of wages) of the Directive.

(V) The coverage of part-time, fixed-duration and temporary employees

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[26] OJ No L 283/23 of 20.10.1980

(Article 2 (2))

32. In Mikkelson [27], the European Court of Justice held that the Directive covers only a person who is protected by national law as an " employee" and whether or not a person is so protected is for the national courts. This decision implies that national authorities and courts may give a narrow interpretation to the words "contract of employment or employment relationship" [28]. The Commisstion report to the Council with regard to the implementation of the transfers Directive [29] shows there is a wide variation in the coverage of national laws ratione personae. As a result of relying on a national definition rather than a Community-wideone, in some Member States the area covered by the Directive is likely to shrink as the traditional "contract of employment" becomes less typical.This situation seems undesirable and consequently should be remedied. However the Commission considers, after long discussions with the social partners and national experts, that the introduction of a Community-wide definition for the sole purposes of this Directive would create rather than solve problems.

In the light of the foregoing considerations it is proposed that the Directive is without prejudice to national laws as regards the definition of contract of employment or employment relationship. However Member States are not allowed to exclude part-time employees and fixed-duration and temporary employees, within the meaning of Council Directive91/383/ECC [30] on the sole grounds of the number of hours performed or the special nature of such relationships.

(VI) Definition of representatives of employees (Article 2, paragraph 1, c)

33. The definition of "representatives of the employees" in the current version of the Directive is that provided for by the laws or practice of the Member States, but with the proviso that employee representatives or company administrative, governing or supervisory bodies are not included. This proviso does not apply to the similar definition contained in the collective redundancies Directive. When the Commission consulted the social partners and national experts from Member States governments about bringing the two definitions into line, the preference was for omitting the proviso in the transfers Directive rather than adding it to the definition in the collective redundancies Directive (e.g. members of a Works Council who might also sit on a company board representing the employees).

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27 Case 105/84, Judgement of 11 July 1985 (1985

28 Wendelboe, Case 19/83 of 7 February 1985 (1985 ECR 457)

29 SEC (92) 857 final of 2 June 1992

30 Council Directive of 25 June 1991 supplementing the measures toencourage improvements in the safety and health at work of workerswith a fixed-duration employment relationship or a temporaryemployment relationship

b) **Safeguarding of employees' rights**

(I) **Joint liability of transferor or transferee (Article 3 (1))**

34. The second subparagraph of Article 3(1) of the current text gives Member States the option of providing for the joint liability of transferor and transferee in respect of the rights and obligations. A survey of the laws of the Member States (Synthesis Report, January 1990) indicates that seven Member States (Spain, France, Greece, Italy, the Netherlands,Portugal and Germany) have adopted some form or other of co-liability rule so that the transferor continues to be liable for pre-transfer debts, together with the transferee. The remaining five Member States (Belgium, Denmark, Ireland, Luxembourg and the United Kingdom) have not adopted such a rule so only the transferee is liable. Those States which provide for co-liability adopt different periods during which the transferor may remain jointly liable. In Spain, it is three years, and in the Netherlands and Germany one year from the date of transfer. In France and Greece there appears to be no time limit. In Portugal and Italy there are some limitations on the transferee's liability which appear to be incompatible with the first subparagraph of Article 3(1) of the Directive. In Portugal the transferee is liable for pre-transfer debts which arose within a six-month period before the transfer. In Italy the transferee is jointly liable only if he knew at the time of the transfer of the existence of the pre-transfer debts or if they are registered in the books of account or in the register of employment ("libretto di lavoro") of the transferor.

These wide variations in national law and practice expose one of the weaknesses of the Directive as a measure of harmonisation.

35 The Commission considers that the aims to be attained by the Directive and, in particular, the protection of employees and the need to promote fair competition between Community undertakings, require a flexible approximation of the joint liability provisions already in force in most Member States.The proposed Article 3.1. (paragraph 2) therefore makes the rule of joint liability for transferor and transferee obligatory in respect of obligations arising from a contract of employment or employment relationship, but allows the Member States to limit the transferor's obligations to those which arose before the date of the transfer and fall due within the first year following that date.

(II) **The preservation of the status and functions of the employees' representatives (Article 5)**

36. Article 5 of the transfer Directive prescribes a legal duty to preserve the status and functions of employees' representatives or of employer representation "as laid down by the laws, regulations or administrative provisions of Member States". Article 5(1) is rephrased to emphasise the abovementioned legal duty, to extend it to situations where the employee representation is laid down by agreement and to limit such an obligation to cases where the conditions necessary for the existence of employees' representatives or of employee representation are fulfilled.

37. The rule of Article 5(1) of the existing Directive applies only if the business preserves its "autonomy" by remaining an entity likely to operate independently and it is not

absorbed into a wider and more complex operational entity. The Commission considers that a new paragraph should be introduced so as to guarantee the representation of employees transferred when the business does not preserve its autonomy and the national conditions requiring the existence of employee representatives are fulfilled.

c) **Information and consultation (Section III)**

(I) **Ensuring the enforcement of the Directive where the decision leading to the transfer is taken by an undertaking other than the employer (Article 6 (4))**

38. The transfers Directive applies where the transferred undertaking is situated within the territorial scope of the Treaty, even where the transferor or the transferee is a controlled undertaking or is part of a multi-establishment undertaking and the decision leading to the transfer is taken by the controlling undertaking or, as the case may be, by the central administration of the multi-establishment undertaking.

39. The changes proposed here aim to ensure that the transfers Directive is enforced in cases involving transnational undertakings and associated undertakings. Thus, the information and consultation requirements laid down by the directive apply irrespective of whether the decisions leading to the transfers are taken by the employer himself, by a controlling undertaking or by the central administration of a multi-establishment undertaking. In order to reinforce this key obligation an employer's failure to comply with the directive's requirements cannot be condoned on the grounds that the undertaking taking the decision leading to the transfer failed to inform the employer in due time.

40. It should be emphasized that the revised text does not directly impose any obligation on controlling undertakings as such. Problems of extra territoriality are therefore avoided. It should also be noted that the Commission is not proposing a mechanism (as envisaged under the original draft of the 'Vredeling' directive) whereby employees would have the right to seek consultation with the undertaking's central administration or with the management of a controlling undertaking (the so-called 'by-pass' system).

(II) **Designation of employees' representatives for information and consultation purposes (Article 6 (5))**

41. The transfers Directive imposes on Member States a general obligation to provide for employees' representatives for the purposes of the information and consultation procedures referred to therein, but leaves the definition of employees' representatives to "national law and practice". However, Article 6 (4) of the transfers Directive limits the obligation to inform and consult the employees' representatives provided for by national law or practice "to undertakings or businesses which, in respect of the number of employees, fulfil the conditions for the election or designation of a collegiate body representing the employees".This exception allows some Member States to exclude from the information and consultation procedures undertakings or businesses employing less than 150 employees (Luxembourg); 100 employees (Belgium); 50 employees (Greece, Spain, France); 35 employees (Netherlands and Denmark); 20 employees (Federal Republic of Germany); 15 employees (Italy); in Portugal, no

threshold is foreseen (see Annex III). Other Member States, however, such as Ireland and the United Kingdom where there are no statutory collegiate bodies representing the employees, were not allowed to derogate from Article 6 (1), (2) and (3). This position was upheld by the Court of Justice in its recent judgment in Case C-382/92 (not yet published).

Consequently, small undertakings in the UK and Ireland were obliged to inform and consult the employees' representatives on the legal, economic and social implications of the transfer, whereas in the other Member States the obligation to inform and consult could be limited to undertakings having collegiate bodies representing employees.

In the light of these considerations and in order to allow for the harmonisation of working conditions while their improvement is maintained, to alleviate the legal constraints imposed upon small undertakings and to reduce differences which still exist in the Member States and are bound to have a direct effect on the functioning of the internal market, the proposed revision amends Article 6 (4) and (5). The aim of the revision is to limit the faculty of Member States not to apply paragraphs 1, 2 and 3 of Article 6 to undertakings having less than 50 employees or if employing less than 50 employees having no Works Council. Furthermore, the proposed revision obliges the employer to inform the employees in advance where there are no employees' representatives.

d) Final provisions

(I) More favourable provisions (Article 7)

42. The original text is supplemented by the proviso "or to promote or allow collective agreements or agreements between social partners more favourable to employees" to take into account the establishment of more favourable conditions via collective bargaining.

(II) Failure to comply (Article 8)

43. The Directive does not lay down any particular procedures or sanctions for non-compliance with the requirements, in particular those to inform and consult. The Directive is, of course, subject to the general principles of Community law including the principles of effectiveness and non-discrimination. It is proposed, in the interest of clarifying the obligations of the Member States, that the Directive should contain an express provision along the lines of Article 8(1) of Council Directive 91/533/EEC of 19 October 1991 concerning the employer's obligation to inform the worker on the conditions applicable to the contract of employment or employment relationship. This position was endorsed by the Court of Justice in its recent judgment in Case C-382/92 (not yet published).

(III) Implementation by collective agreement (Article 9)

44. It is proposed to introduce an explicit provision allowing for the implementation of the directive by collective agreement, in line with other recent proposals for labour

law Directives.

(IV) Repeal of Directive 77/187/EEC

45. Finally, the Commission feels that, in the interests of clarity, rather than amend the existing Directive, it would be preferable to replace it with a new text.

Legal basis

46. Member States' legislation on transfers of undertakings has been harmonised by Council Directive 77/187/EEC on transfers of undertakings, businesses or parts of businesses. Consequently, any amendments to the Directive's provisions aimed at allowing for greater flexibility in the case of transfers effected in the framework of insolvency proceedings, clarifying the existing Directive's scope and definitions, providing expressively for the application of the Directive's requirements to transnational transfer decisions and to groups of undertakings and, in general, approximating the laws of the Member States affecting the functioning of the Common Market, have to be made through Community legislation.

47. Article 100 of the EC Treaty provides the legal basis for the existing directive. The same legal basis will also apply to the proposed text, as the derogation provided for by Article100a is not applicable here.

JUSTIFICATION WITH REGARD TO THE PRINCIPLE OF SUBSIDIARITY

(a) What are the objectives of the proposed measure, and how do they relate to the Community's obligations?

Harmonisation of the legislation of the Member States is covered by Council Directive 77/187/EEC, which means that this area is part of the *acquis communautaire*. Consequently, any amendments to the provisions of the existing Directive (other than those under Article 7 thereof), must be effected through Community legislation.

The objective of this proposal is to revise Council 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.

(b) Is the measure in an area where the Community has sole jurisdiction?

No. Article 100 of the EC Treaty.

(c) What is the scale of the problem?

In order to fill a number of gaps in the existing Directive, it is necessary to update various points by:

- clarifying application of the Directive's requirements to transnational transfer decisions and to groups of undertakings;

- allowing for greater flexibility in cases of transfers effected in the context of insolvency proceedings;

- reformulating and clarifying the existing Directive's scope and definitions;

- clarifying legislation where only an activity of an undertaking is transferred.

(d) What would be the most effective solution among those available to the Community and the Member States?

In view of the establishing of the internal market, national legislation has to be harmonised in order to protect workers in the event of a change in the head of an undertaking, particularly with a view to safeguarding their rights.

(e) What practical gains does the proposed measure offer and what would be the cost of failure to take action?

The proposal for a Directive provides clarity and transparency, as well as legal certainty in a relatively complex area concerned with the essential interests and rights of workers.
It would seem unacceptable for the Community not to take action. It should also take steps with a view to providing an equal level of protection for all workers in the European Union.

(f)(g) – What options are available to the Community?
- Are uniform rules needed, or is the adoption of a directive setting out the general objectives and leaving implementation to the Member States sufficient?

A directive is the appropriate way to achieve the objective of harmonisation of national legislation.

ANNEX I

European Court of Justice's Judgments on the transfers of undertaking Directive

Wendelboe, Case 19/83 of 7 February 1985, (1985) ECR 457

Abels, Case 135/83 of 7 February 1985, (1985) ECR 479

Industriebond FNV, Case 179/83 of 8 November 1984,
(1985) ECR 512 and 513

Botzen, Case 186/83 of 8 November 1984, (1985) ECR 520 and 523

A/S Danmols Inventar, Case 105/84 of 11 July 1985,
(1985) ECR 2639 and 2654

Republique italienne, Case 235/84 of 10 July 1986,
(1986) ECR 2291 and 2304

Royaume de Belgique, Case 237/84 of 14 April 1986,
(1986) ECR 1247 and 1257

Spijkers, Case 24/85 of 18 March 1986, (1986) ECR 1119 and 1130

Zaera, Case 126/86 of 11 June 1987, (1987) ECR 3697

NY Moelle KRO, Case 287/86 of 17 December 1987, (1987) ECR 5465

Daddy's Dance Hall, Case 324/86 of 10 February 1988,
(1988) ECR 739

Bork, Case 101/87 of 15 June 1988, (1988) ECR 3057

Berg & Busschers, Case 144 and 145/87 of 5 May 1988, (1988) ECR 2559

Antonissen, Case 292/89 of 8 Novembre 1990, (1991) ECR 0

Ercole Marelli, Case 362/89 of 25 July 1991, CoJEC 91, I-4105 es.

Redmont Stichting, Case 29/91 of 19 May 1992, CoJCE 92, I-3189 es.

Anne Watson, Case C209/91 of 12 Nov. 1992, CoJCE 92, I-5755 es.

Schmidt, Case C392/92 of 14 April 1994. Not yet published.

Commission v United Kingdom C 382/92 of 8 June 1994. Not yet published.

ANNEX II

Comparison of Directives 75/129, 77/187 and 80/987

Situation (concept criteria	Definition of employees	Numbers of employers	Acquired rights (employment relationship	Respect of acquired rights	Information and consultation of employees' representatives	Authorities involved	Law applicable
Collective redundancy	no definition	+ 1 only	no provision	no provision	provided for	Government	1980 agreement
Transfer	no definition	2	all rights	provisions	provided for	none	1980 agreement
Insolvency	no definition	+ 1 only	all rights	provisions	not provided	Guaranteed institution	agreement to be reached on bankruptcy + 1980 agreement

ANNEX III

Workforce Size Thresholds

Numbers of Works Councillors in Member States with obligatory Works Councils

Country	Workforce Size Thresholds	Number of Works Councils		Source
		Minimum	Maximum	
BELGIUM	100	6	25	legislation
DENMARK	30	-	-	legislation
GERMANY	5	1	-	legislation
FRANCE	50	3	15	legislation
GREECE	50	3	7	legislation
ITALY	15	-	-	legislation
LUXEMBURG	150	1	-	legislation
NETHERLANDS	35	3	25	legislation
PORTUGAL	No threshold	3	11	legislation
SPAIN	50	5	75	legislation

ANNEX IV

The establishment of Works Councils

Country	Mandatory	Triggered by workforce
BELGIUM	*	
DENMARK		*
GERMANY		*
FRANCE	*	
GREECE		*
ITALY		*
LUXEMBURG	*	
NETHERLANDS	*	
PORTUGAL		*
SPAIN		*

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

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[1]

Having regard to the opinion of the European Parliament[2]

Having regard to the opinion of the Economic and Social Committee[3]

Whereas Council Directive 77/187/EEC 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[4]; whereas, in the interests of clarity, rather than amend the existing Directive, it would be preferable to replace it with a new text;

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:

1

2

3

4 OJ No L 61 of 5.3.77, p. 26

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

Whereas Council Directive 77/187/EEC of 17 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 harmonisation of the relevant national laws ensuring the safeguarding of the right of transferred employees and requiring transferors and transferees to inform and consult employees' representatives in good time;

Whereas the purpose of this proposal is to amend Council 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;

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 Court of Justice of the European Communities; 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 the considerations of legal security and transparency also require that it be expressly provided, in the light of the case law of the Court of Justice of the European Communities, that the Directive should apply to private and public undertakings carrying out economic activities, whether or not they operate for gain;

Whereas the considerations of legal security and transparency also demand, in the light of the case law of the Court of Justice of the European Communities, 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 cases where the transfer of only an activity is not accompanied by the transfer of an economic entity which retains its identity after the said transfer should be excluded from the scope of the Directive;

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;

Whereas a minimal harmonisation 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;

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 Council 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 undertakings 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 Directive77/187/EEC indicated in Annex I;

HAS ADOPTED THIS DIRECTIVE:

SECTION 1

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 this 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 within the meaning of the Directive.

2. This Directive shall apply where an 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 operated 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 analagous 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;

   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 [5] ,

   (c) they are temporary employment relationships within the meaning of Article 1(2) of Council 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

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[5] OJ No L 206 of 29.7.91, p. 19

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.

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 inter--company 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 authorised 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[6] .

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[6] OJ No L 283 of 28.10.80, p. 23-.

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 pace for economic, technical or organisational reasons entailing changes in the workforce. Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection agains 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 organisational 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 organisational reasons, entailing changes in the work force.

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 there presentatives 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 ofthe employees' representation are fulfilled. The first subparagraph shall not apply if, under the laws, regulations, adminstrative 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:
   - the reasons for the transfer,
   - the legal, economic and social implications of the transfer for the employees,
   - any measures envisaged in relation to the employees.

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

2. If the transferor or the tranferee 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 borad 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 goodtime 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.

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, fulfill 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 Article1(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.

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 by 31 December 1996 at the latest 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 thisDirective.

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.

Article 11

This directive is addressed to the Member States.

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

Done at Brussels,

For the Council,
The President

ANNEX 1

DEADLINE FOR TRANSPOSAL

DIRECTIVE	DEADLINE FOR TRANSPOSAL
DIRECTIVE 77/187/EEC OJ L 61 OF 5.3.1977, P. 26	16.11.1979

ANNEX II

COMPARATIVE TABLE

PRESENT DIRECTIVE	DIRECTIVE 77/187/EEC
Article 1 - paragraph 1	Article 1 paragraph 1
Article 1 - paragraph 1 - 2nd indent	
Article 1 - paragraph 2	Article 1 paragraph 2
Article 1 - paragraph 3	
Article 1 - paragraph 4	Article 1 paragraph 3
Article 1 - paragraph 5	
Article 2 - paragraph 1-a)	Article 2 - paragraph 1-a)
Article 2 - paragraph 1-b)	Article 2 - paragraph 1-b)
Article 2 - paragraph 1-c)	Article 2 - paragraph 1-c)
Article 2 - paragraph 2-a), b) and c)	
Article 3 - paragraph 1	Article 3 - paragraph 1
Article 3 - paragraph 2	Article 3 - paragraph 2
Article 3 - paragraph 3	Article 3 - paragraph 3
Article 3 - paragraph 4	
Article 4 - paragraphs 1 and 2	Article 4 - paragraphs 1 and 2
Article 4 - paragraphs 3, 4 and 5	
Article 5 - paragraph 1, 1st and 2nd indents	Article 5 - paragraph 1, 1st and 2nd indents
Article 5 - paragraph 1, 3rd indent	
Article 5 - paragraph 2	Article 5 - paragraph 2
Article 6 - paragraphs 1, 2 and 3	Article 6 - paragraphs 1, 2 and 3
Article 6 - paragraph 4	
Article 6 - paragraph 5	Article 6 - paragraph 4
Article 6 - paragraph 6	Article 6 - paragraph 5
Article 7	Article 7
Article 8	
Article 9 - paragraphs 1 and 2, 1st indent	Article 8 - paragraphs 1 and 2
Article 9 - paragraph 2, 2nd indent	
Deleted	Article 9
Article 10	
Article 11 1st indent	Article 10
Article 11 2nd indent	

IMPACT ASSESSMENT FORM

The impact of the proposal on undertakings with special reference to small and medium-sized undertakings (SMUs)

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 part of businesses, derogating from Directive 77/187/EEC

THE PROPOSAL

1. Taking into account the principle of subsidiarity, why is Community legislation necessary in this area and what are the main aims?

   The Member States' legislation on transfers of undertakings was harmonised by Council Directive 77/187/EEC and, accordingly, the competence to deal with the issues covered by the Directive has been transferred to the EC. Consequently, any amendment to the Directive's provisions other than those permitted by Article 7 of the existing Directive has to be made through Community legislation.

   The purpose of this Proposal is to revise Council Directive 77/187/EEC of 14th February 1977 in the light of the impact of the internal market, the Member States' current laws and proposed legislation on the rescue of undertakings in economic difficulties, the case law of the European Court of Justice, the adopted revision of the collective redundancies Directive and the legislation already in force in most Member States.

The key changes proposed are:

- to clarify the application of the Directive's requirements to transnational transfer decisions and to groups of undertakings;
- to allow for greater flexibility in cases of transfers effected in the framework of insolvency proceedings;
- to reshape and clarify the existing Directive's scope and definitions.
- to clarify the legislation in cases where only an activity of an undertaking is transferred;

Furthermore, in the interests of clarity, it is felt that rather than amend the existing Directive it would be preferable to replace it with a new text.

THE IMPACT ON UNDERTAKINGS

2. Who will be affected by the proposal?

The scope of the proposal coincides with that of the existing Directive, but substantial changes are introduced.

Firstly, the new Directive provides that it is not applicable in cases where only an activity of an undertaking is transferred, provided that there is not at the same time a transfer of an economic entity which retains its identity.

The new Directive also provides expressly that it applies only to undertakings - private or public - carrying out economic activities, whether or not they operate for gain.

In addition, the Directive will apply, as does the existing Directive, to transfers effected in the framework of pre-bankruptcy proceedings. However, the proposed text allows for important derogations from the Directive's main requirements in the event of pre-bankruptcy proceedings.

Furthermore, the Directive's information and consultation requirements apply to pre-bankruptcy proceedings.

The proposed Directive provides expressly that it covers part-time, fixed-duration and temporary employees without prejudice to the laws of the Member States concerning the protection of employees in the case of dismissals.

Finally, the proposal will apply to sea-going vessels, but Member States are allowed not to apply section III of the Directive to the crews of sea-going vessels.

3. What will businesses have to do to comply with the proposal?

Greater flexibility is provided by Article 3(4) and 4(3, 4 and 5) which derogate from Article 3(1, 2 and 3) in the case of transfers effected in the framework of non-liquidation insolvency proceedings. They may also implement the Directive through collective agreements. However, they are required to comply with Article 3(1) (inter alia) concerning joint liability and observe the Directive's provisions where the decision leading to the transfer has been taken by an undertaking controlling the employer.

4. What economic effects is the proposal likely to have?

- on employment

By taking into account the need to reconcile the survival of insolvent undertakings, the acquired rights of creditors and the rights of employees - notably the right to work - the Proposal aims to ensure the survival of certain undertakings in economic difficulties, by allowing for derogations from the Directive's main requirements whenever an insolvent undertaking is transferred.

- on investment and the creation of new businesses

Any legislative proposal providing for increased flexibility in the framework of transfers effected by contract or by some other disposition or operation of law, or by judicial decision or administrative measure, is bound to have a positive impact on investment and on the creation or the continuation of businesses.

- on the competitive position of businesses.

The proposal strengthens the competitive position of EC businesses in two ways: at international level, because it allows for changes permitting more flexibility in transfer operations; at Community level by harmonising the transfer rules which are already in force in the majority of Member States.

5. Does the proposal contain measures to take into account the specific situation of small and medium-sized firms (less stringent or different requirements, etc.)?

The proposal allows for less stringent requirements on information and consultation in the case of undertakings or establishments having fewer than fifty employees or, if employing fewer than fifty employees, having no Works Councils.

6. Consultation

The consultations with the social partners UNICE, CEEP and ETUC took place on 22nd April and 7th July 1992, and were based on a Commission document containing the main guidelines for the revision and the provisional text. Both UNICE and ETUC agreed on the need to revise the Directive in the light of the completion of the single market, the case law of the European Court of Justice and the need to introduce greater flexibility in the event of transfers effected within the framework of insolvency proceedings. Although both organisations supported the Commission's general approach, certain disagreements were voiced as to the Proposal's scope and level of protection.

During the discussion of the text, the question of the Directive's application to "contracting out of services" was raised. The Commission decided to set up a group of experts to analyse how, and to what extent, the national provisions for transposing the Directive applied to contracting out of services in all the Member States of the European Union.
The Commission drew up a supplementary text based on the expert group's conclusions, to be put to the social partners for examination.

Consultations on this text took place on 14 March 1994 with UNICE, CEEP and ETUC. There was also written consultation with other social partners, to obtain the broadest possible range of views. The Commission had proposed a provision to the effect that the Directive should not apply in cases where the transfer concerns only an activity and there is no transfer of an economic activity which retains its identity.

The proposed text on the contracting-out of services was viewed favourably by the social partners, although it was felt that it should be made still clearer, given the complexity of this issue.The fact that Article 1.3 was so much more up-to-date than the text examined in 1992 (applicability to both public and private undertakings) was also very much appreciated. However, ETUC expressed their concern at the number of derogations in cases of bankruptcy, and UNICE felt that the new paragraphs 3, 4 and 5 of Article 4 resulted in less rather than more flexibility.

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